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EMPLOYMENT TRIBUNALS

Claimant

Mr H Minhas

Respondents

Cmm2 Transfers Ltd

AND

Heard at: London Central

On: 8 October 2019

Before: Employment Judge Walker

Representation

For the Claimant: In person

For the Respondent: Mr M Wint, Director

JUDGMENT

The Claimant's claims are dismissed as the Tribunal has no jurisdiction to consider them.

REASONS

1. The Claimant is a private hire vehicle driver. The Respondent operates a small business offering travel services primarily for tour operators. The Claimant has claimed unpaid wages and holiday pay.

Issues

2. The issues in the case primarily revolve around the Claimant's status.

2.1 Was he an employee or worker as defined in s.230 of the Employment Rights Act 1996 so that this Tribunal has jurisdiction to consider the claim for arrears

2.2 Additionally, was he a worker pursuant to the definition in regulation 2 of the Working Time Regulations 1998?

3. If the Claimant was a worker or an employee how much was he owed if any for either unpaid wages or holiday pay?

Evidence

4. The evidence provided to the Tribunal was primarily provided by the Respondent. The Tribunal had issued standard directions on accepting the claim but the Claimant had not complied with those directions in that he had not provided a schedule of loss, although his ET1 did contain a breakdown of the wages act claim. The Claimant had not disclosed documents nor had he prepared a witness statement.

5. The Respondent had prepared a witness statement and a bundle albeit appeared that had only been provided to the Claimant either immediately before the hearing or the day before.

6. In the light of this neither party had prepared properly for the hearing but both parties agreed to go ahead. Accordingly, we took some time during the case going through the Claimant's oral evidence in order that he could explain his claim in some detail. We took rather less time hearing from the Respondent who had already provided a witness statement.

7. Despite the lack of preparation, both parties were content to proceed, rather than postpone to another occasion.

Facts

8. The Respondent is a small company. It provides services, mainly to tour operators, by arranging a car and driver for those tour operators to collect their clients and drive them to various destinations. The passengers have no direct contract with either the Claimant or Respondent but rather with the tour operator.

9. When the Respondent engaged a new driver, they would be offered a choice of working as a salaried employee or self-employed. Depending of their choice they are given a pack of information at the start. There are different documents depending on whether the individual elects to be self-employed or an employee. In addition to that pack of information, they are provided with a tie and also boards or placards for the various tour operators that the Respondent works with.

10. The Respondent admits that it failed to ensure the Claimant signed any documents at the outset. The Claimant says he did not receive those documents and did not know his status.

11. A factor of this case was that there was frequently a clash of oral evidence between the evidence provided by Mr Wint as Director of the company and by the Claimant himself. Overall, I had to consider whose evidence I preferred in relation to that clash of evidence as there was little documentation to assist. I will explain my decision as I deal with the matters.

12. The Claimant admits he had worked as a driver previously and had always been self-employed. He said he had been employed when he acted as a Controller i.e. when he was allocating jobs, but not otherwise. The Claimant had not filed a tax return since working with the Respondent which he said was due to personal problems and a change of address. He said he was now waiting for this Judgment to determine how to deal with that.

13. Having heard the Claimant's evidence I have no doubt that having been self-employed in the past the Claimant elected to be self-employed as Mr Wint said. He expected to be self-employed. He says he questioned his status several times and pursued the matter with Mr Wint but I do not accept that he did and I do not find it credible, particularly in the light of evidence that showed that Mr Wint was prepared to put employees on his payroll and to deal with them as such and had no difficulty with that possibility.

14. Additionally, the Claimant said that he was fobbed off by Mr Wint when he raised questions about his pay and status. He said he was told things such as the payroll system was down. I reject that as not being credible, since he told me that other people were on payroll and there was no suggestion that they did not get their payslips.

15. For these reasons, I prefer Mr Wint's evidence on the matter. I also note that the documents show emails from the Claimant which only threaten legal action because the relationship between the parties broke down over charges made by the Respondent for repair work and penalty charge notices incurred on the vehicle used by the Claimant. Those emails do not mention self-employed or employee status. In the circumstances I believe that the question of status only arose because the Claimant wishes to use this Tribunal to address the dispute he has with the Respondent.

16. The arrangements between the parties were that the Claimant would rent a vehicle from the Respondent, albeit there was no actual charge for the rental. The Claimant was free to work when he wanted, although the Respondent asked for availability in advance so that it could plan sufficient cover for expected work.

17. The Claimant told the Respondent his preferred choices in terms of the time when he wanted to work. The Claimant usually chose to work early in the morning, given the fact that he lived in Milton Keynes and it was easier to travel at that time.

18. There was no app which distributed the work. The parties communicated by phone and text. Mr Wint said the Claimant would turn his phone off if he did not want to work anymore and then could not be contacted even if he had previously indicated that he was available for work at that time. I accept that that was correct. Mr Wint said he requested that the Claimant wore a tie which his company provided and also asked him to wear a white shirt and dark suit or coat but I was not told of any process under which he could monitor whether the Claimant did that.

19. The Claimant was shown how to deal with customers but only so that he understood the level of professionalism expected by the customers. The Claimant was free to choose his own driving routes and there was no restriction which prevented him from substituting another driver for his trips, although I was not told of any occasion when that happened.

20. The Claimant could have worked for other companies if he wanted to. There was no express restriction on him doing so. When I asked him what he had done in periods of time when he was without work due to not having certain documents he required, it seemed that the only reason he did not work was that he did not have his own vehicle to use.

21. In short, the level of control exercised by the Respondent over the Claimant was minimal. It did operate according to its documentation as a booking service for jobs, monitoring the jobs and relaying the jobs. In practice that seems all that it did apart from liaising with garages and authorities over vehicle repairs and charges which was sent to it as the owner of the vehicle.

22. The Respondent's request for the Claimant to use placards from the various tour operators to identify guests due for pick up and to wear a white shirt were consistent with helping the drivers provide the level of service the tour operators' clients would expect but no more.

23. I am satisfied that the Claimant's explanation of the trouble he might expect if he did not accept jobs was a description of his past experience, indeed he said it was based on his knowledge of what to expect. There was no suggestion it was based on any practical experience of any sort with the Respondent. Mr Wint displayed some degree of despair when explaining how difficult it was as he had no method at all of asking or persuading drivers to meet his time scale and if they

chose not to work when he had expected them to there was simply nothing he could do about it.

24. When the Claimant was unable to work, which happened on two lengthy occasions because he did not have the necessary private hire licence or on another occasion a driving licence, he says the Respondent left the vehicle with him. I am not sure that happened on both occasions, but certainly on one. He says he could not use it for other work, presumably due to the insurance restrictions, however it was not taken away from him. I doubt that would have carried on forever and I accept this happened in the quieter period as the Respondent's work was seasonal and reduced in volume during the winter period. Nevertheless, it supports the position that the Claimant was not obliged to carry out any specific work for the Respondent.

25. The Claimant accepted some risk. He was responsible for penalty charges and for damage to the vehicle and did not dispute that, but expected to be able to challenge the penalty charges if he wished and also expected that the repair work would be reasonably priced.

26. The Respondent freely admitted that if drivers did too little work it became uneconomic but the Respondent did not impose sanctions or penalise or make any specific demands as to the amount if required and it had no process at all to deal with the matter if a driver did not work when it wanted. Indeed, Mr Wint said that the Claimant also disappeared for several days and would not work and chose his days as he wanted and I accept that.

27. I reject the Claimant's suggestion that he was always available and I prefer the Respondent's explanation that he chose exactly when he would work and would leave them with gaps of several days.

The Law

28. The law is set out in s.230 of the Employment Rights Act which provides:

- 28.1 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.
- 28.2 A "contract of employment" means a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing.
- 28.3 A "worker" means an individual who was 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 professional business undertaking carried on by the individual.

29. Regulation 2 of the Working Time Regulations is similar, providing that “worker” means an individual who was 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 professional business undertaking carried on by the individual.

30. There has been a great deal of examination in case law recently of the status of staff, in particular in the gig economy. The Respondent referred me to one case which was a previous case involving the Respondent, and the Claimant referred to the case of *Uber v Aslam* [2018] EWCA Civ 2748. I myself have considered various cases in particular the case of *Addison Lee Limited v Lange and others* UK EAT/003718/BA and the cases that it refers to.

Submissions

31. The Claimant submitted that he was an employee and that he was due his money.

32. The Claimant submitted that no contract was ever presented to him. The fact that he chose some days did not mean he was not self-employed. Uber drivers could log off when they wanted to. They were held to be workers.

33. He questioned the vehicle damage and considered it was unreasonable particularly given that the previous charge had been £1,800.

31. The Respondent submitted that the Claimant was not employed and was not eligible to pursue his claim in this tribunal. The Respondent accepts that the documentation was not in such an ideal state but referred to the fact that the Claimant was in control of when he worked, he wasn't given a uniform other than a tie, his work conditions were controlled by himself and the route he took was

his own. The only requirements made were how he met passengers and how he kept the vehicle which was reasonable for representatives of other firms such as the tour companies he did business with.

32. The Claimant never put in writing any request for any payslips nor sought advice about his status. The Respondent suggested that it was not correct that he had ever questioned his employment status.

Conclusions

34. I am satisfied that the Claimant was never an employee. I do not think that the Claimant ever considered himself to be an employee, but even if he did not, that is not determinative of the question. The Respondent did not exercise control over the Claimant in the manner in which he performed the duties under their agreement. There was no mutuality of obligation. The Claimant worked when he wanted and did not have to work any minimum amount of time. The Claimant undertook some risk associated with the use of the equipment, i.e. the car. When the Claimant was unable to, or chose not to work, the Respondent did nothing and the Claimant retained the car. As such, the irreducible minimum requirements for a contract of employment were not present.

35. The next issue was whether the Claimant was a worker. I have spent some time considering this question, which is called limb (b) in case law. If he was a worker, the Claimant can bring his claims in the Employment Tribunal.

36. In order to determine that question I focussed on two questions. Did the Claimant do his work personally?. If he did, was the Respondent his client or customer in a business he undertook. If not, he is a worker.

37. The Claimant did largely carry out the work personally and it seems both parties expected that he would do so, even though there was no clear requirement that he did. I was not told of any process for him substituting a replacement. That leaves the question of whether the Respondent's status was that of a client or customer of any professional business carried on by the Claimant.

38. There was no evidence that the Claimant marketed his services to others. He was however a professional driver and had been for some time before working with the Respondent. The majority of pickups he undertook were arranged for tour companies who themselves had subcontracted the work to the Respondent, which in turn subcontracted to the Claimant. If the Claimant had a vehicle of his own he could have used his time to work for other companies as and when he chose. This was not like the Uber case where there was a sham contract between the parties and where the Courts have held that the

arrangements were, in practice, contracted between the passenger and Uber. There was no uniform as such and the terms of operation were very much looser. The Claimant hired out his skills as a self-employed driver and worked as and when he wanted and chose his own methods of operation. The instructions to him were limited to some behaviours consistent with the tour operator's expectations.

39. On balance therefore, I conclude that the Claimant was a professional driver and that he was not a worker, but rather self-employed. In practice the Respondent was a customer (effectively a client of his) to whom he provided his service very much as a self-employed driver. Accordingly, this Tribunal cannot determine the claims which must therefore be dismissed.

Employment Judge Walker

Dated: 29 October 2019

Judgment and Reasons sent to the parties on:

29 October 2019

For the Tribunal Office