EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Grundstein	v	**Bobtrade Ltd**

PRELIMINARY HEARING

Heard at: **Watford** **On: 1 November 2019**

Before: Employment Judge Jack

Appearances:

For the Claimant: **In person**
For the Respondents: **Maryan Obeid, Trainee Solicitor**
Schneor Crombie, chief executive officer

JUDGMENT

1. On the preliminary issue it is declared that the claimant was an employee.

2. The respondent shall pay the claimant £8,086.99.

REASONS

1. By an ET1 presented on 7 May 2018 the claimant claimed unfair dismissal and monies owed to him comprising wages from 1 January 2018 to 9 February 2018 at £5,000 per month, a total of £6,607 of arrears plus £118.99 for a return flight to Israel and £1,360, the balance of his accommodation expenses. The total amounts to £8,086.99. The claimant appeared in person. Ms Obeid, a trainee solicitor appeared for the respondent. No cases were cited but I read passages from the case of Autoclenz Ltd v Belcher [2011] UKSC 41 2011 IRLR 820 to the parties so they understood the legal issues.

2. The tribunal refused to accept the claim of unfair dismissal on the basis that the claimant was not asserting that he had been employed for two years or more. As a result, that was not proceeded with. Only the claims to monies is before me.

Common ground

3. The following is common ground. Both the claimant and Mr Crombie, the chief executive officer of the respondent, are Israelis. The respondent was developing a software platform, a little like Amazon, for construction companies. The respondent had made some progress with the software but did not yet have a marketable product. In November 2017 there was an oral agreement between the claimant and the respondent made between the claimant and Mr Crombie for the claimant to come to London to work on the development of the software. The respondent was to pay the claimant £5,000 a month. The respondent accepts that it paid the claimant's travel and accommodation expenses in the United Kingdom up to the end of December 2018 but its case is that it was not legally obliged to pay the travel and accommodation expenses. The claimant's case is that they were obliged to.

4. It is also common ground that the claimant was not working in Israel as a consultant. He had no business of his own there and was not self-employed in Israel.

The issue

5. By order of 18 May 2019 Employment Judge Manley directed that there be a preliminary hearing to determine the following issue, namely whether the claimant was an employee or a worker under s.230 of the Employment Rights Act 1996. It is that preliminary issue which I have heard today. In fact, no separate issue arose as to whether the claimant was an employee or a worker. It is simply a question whether he was an employee or whether he was self-employed.

The law

6. In Autoclenz the Supreme Court approved the judgment of Mr Justice McKenna in Readymix Concrete South East Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 at page 515C where he said:

> "A contract of service exists if these 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. Freedom to do a job either by one's own hand or by another's is inconsistent with a contract of service though a limited or occasional power of delegation may not be."

7. The Supreme Court also approved three further propositions:

   7.1 As Lord Justice Stephenson put it in Nethermere St Neots Ltd v Gardner [1984] IRLR 240 at 245, there must… "be an irreducible minimum of obligation on each side to create a contract of services".

7.2 "If a genuine right of substitution exists, this negates an obligation to perform the work personally and is inconsistent with employee status".

7.3 I do not need to read the third proposition.

8. The Supreme Court in that case also emphasised that when construing contracts (and I read from the head note):

> "The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. The circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. Organisations which offer work or require services to be provided by individuals are frequently in a position to dictate the written terms which the other party has to accept. In practise in employment cases it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly-wise when it does so."

9. Pausing there in the current case there is no written contract governing the services but I bear well in mind the remarks of the Supreme Court as to the relative bargaining power of the parties and its impact on the interpretation of what was truly agreed between the parties.

10. S.13 of the Employment Rights Act provides that, save in certain circumstances which do not arise in the current case, an employee may not make a deduction from wages of a worker employed by him. The parties are in dispute as to whether the work which the claimant carried out was in fact of any use to the respondent. The respondent says the claimant, far from improving the software, in fact substantially ruined it. That is not an issue before me and by reason of s.13 it is not a matter over which the tribunal has any jurisdiction, given that the respondent has not made any counterclaim. Accordingly, I had to stop the parties giving evidence about this aspect of the case.

The facts

11. The initial terms are in my judgment much more consistent with an employment relationship than with a consultancy. A consultant would generally charge by the day or for a concrete piece of work. Charging by the month is unusual for consultants. I do not accept Mr Crombie's evidence that the terms of payment of flight and accommodation were not legally binding. That is highly unlikely in my judgment.

12. So far as invoicing is concerned the claimant raised an invoice in shekels on 10 January 2018 for the equivalent of £900 sterling. That was part payment for the monies due in December. He subsequently raised an invoice for the balance of the December monies which was paid. This form of invoicing was, the claimant says, forced upon him by Mr Crombie. The claimant was desperate because he had worked for 56 days in this country without payment. The respondent was only prepared to pay him if he opened a Paypal account and raised these invoices, the wording of which, the claimant said, was dictated by Mr Crombie. I accept that evidence. If the claimant was a genuine freelance consultant he would not have

waited until mid-January to issue an invoice, nor an invoice for only a fraction of the amount owed at that stage. Generally, I prefer the claimant's evidence to that of Mr Crombie. I find that Mr Crombie did insist on the claimant working in the respondent's offices and that Mr Crombie did keep a very close eye on what the claimant was doing. I regard the suggestion made by Ms Obeid that there was a right of substitution as absurd. It was clear in my judgment that the claimant had to provide the services himself. Further, there was mutuality of obligation. The claimant had to work and the respondent had to give him work. In my judgment the Readymix Concrete test is satisfied on the facts of this case so that the claimant is an employee.

13. I should add that in his evidence Mr Crombie suggested that the claimant's immigration status would have precluded his working in this country. That point was not raised in the professionally prepared ET3. Nor was it put to the claimant when he gave evidence. In the circumstances I disregard this point.

Consequential judgment

14. Following the giving of that judgment, Ms Obeid accepted that in the light of S.13 the respondent had no defence to the claimant's case. Accordingly, I gave judgment in favour of the claimant for £8,086.99.

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Employment Judge Jack

Date: 7 November 2019

Sent to the parties on:

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For the Tribunal:

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