Case Nos. 2601798/2019
2601841/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr S Chalimoniuk

Respondents: (1) Transkol Limited
(2) FN Transport Limited

FINAL HEARING

Heard at: Nottingham (in public) **On:** 24 February 2020

Before: Employment Judge Camp

Appearances
For the claimant: Mr S Donovan, lay representative
For the respondent: Mr M Wiencek, lay representative

RESERVED JUDGMENT

The claim fails and is dismissed.

REASONS

1. This is a claim for unauthorised deductions from wages under the Employment Rights Act 1996 and unpaid holiday pay under the Working Time Regulations 1998.

2. Directly or indirectly, the claimant did some work for both respondents between October/November 2017 and March/April 2019. The work was driving the respondents' lorries delivering goods on behalf of the respondents' third-party clients. The lorries were HGVs for which one needs a class one licence, which the claimant had.

3. Theoretically, there were a number of issues in this case, but the main – and, in practice, only – real issue was employment status: was the claimant the worker of either or both respondents at all relevant times in accordance with the definition in section 230(3) of the Employment Rights Act 1996? Under that section, a "*worker*" is: "*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".

4. First and foremost, to be a worker the individual must have a contract with the alleged employer. My decision in a nutshell is that the claimant did not, at least not at any relevant time, have a contract of any kind with either respondent. His claim therefore fails.

5. Because his claim fails for that reason, I shall not deal with any of the other issues that might have arisen had I decided that there was a contract between him and either or both of the respondents. I do, however, note that even if I had decided that there was a contract between him and the respondents, it is by no means clear that I would have found that it was a worker's contract.

6. The evidence before me consisted of live witness evidence from the claimant himself and, for the respondent, from: Mr L Kolanowski, the sole shareholder and director of the first respondent, Transkol Ltd; Mrs A Kolanowska, the sole shareholder and director of the second respondent, FN Transport Limited and Mr Kolanowski's wife; Mrs K Bujna, who was formerly in a romantic relationship with the claimant. There was also a file or 'bundle' of documents running to some 260-odd pages. There were also some documents attached to the claimant's witness statement, most or all of which were in the bundle too.

7. In addition, I allowed to be admitted in evidence, at the respondents' application (opposed by the claimant), a recording the claimant had made of a telephone conversation between him and someone from his accountants that had been obtained by the respondents. I decided to admit it in evidence for reasons that were given orally at the time. Written reasons for that decision will not be given unless they are asked for by any party presenting a written request for them within 14 days of the sending of this written record of the decision. However, I note that one of the main reasons why I decided that it should be admitted in evidence was that I thought it should anyway have been disclosed by the claimant.

8. Although all of the witnesses, including the claimant, spoke English to a lesser or greater extent, none of them was fluent in English and all gave their evidence assisted by an interpreter. We had the benefit of two interpreters, and the respondents' representative is also a native Polish speaker, and at no stage did anyone suggest that there were significant translation errors by either of the official court interpreters. The recording which I admitted in evidence was in Polish and it was transcribed in open Tribunal, with the interpreters' assistance, phrase by phrase.

9. These were hard-fought proceedings and it seemed there was little love lost between the parties. By the end of the evidence, however, it appeared to me that, at least in terms of what happened that is relevant to the employment status issue, very little was materially in dispute.

10. I should, though, highlight one thing at the outset. The claimant's case, as presented by his representative on his behalf, is to the effect that the claimant is a naive immigrant worker, ruthlessly exploited by the respondents, who have sought to take advantage of the claimant's lack of knowledge as to his employment rights, which he

was wholly ignorant of until receiving expert legal advice at the end of his engagement with the respondent. I reject that almost entirely.

11. As I shall explain, the respondents' businesses were deliberately run in such a way as to minimise the number of employees they had on their books. But that was done in a way that is lawful and may well be as advantageous to those, like the claimant, who did work for the respondents as for the respondents themselves. The claimant went into the arrangement with the respondents with his eyes open. Insofar as he did not understand what he was letting himself in for beforehand (and I think he did understand), he chose, in the full understanding of what he was doing, to enter into written contracts with the respondent, through his own company, that made it crystal clear he was not their worker, in September 2018, having taken legal and accountancy advice. He then continued working for the respondents under that arrangement for a further five months or so. He did that, I think, because he wanted to and because he considered it to be to his advantage to do so. I am certainly not satisfied that he was reluctantly, of necessity, just going along with what the respondents wanted him to do, because of a power imbalance between him and the respondents, or anything along those lines.

12. The respondents are, literally, husband and wife companies. Essentially, they do the same thing, from the same premises, alongside each other. They are, however, separate legal entities, with separate assets. The reason for there being two companies is that that was the arrangement made in a pre-nuptial agreement between Mr Kolanowski and Ms Kolanowska – it is no more or less complicated than that.

13. As I mentioned above, the way the respondents are set up, is, plainly, designed to reduce costs. The respondents are transport companies. They cannot operate without drivers. But if you want to drive for the respondents, you have yourself to set up a company and then get that company to supply your services as a driver to the respondents. In his evidence, Mr Kolanowski was keen to emphasise the advantages of this to the drivers. He explained that he himself had been a lorry driver, before he set up his own transport company, and had used just such an arrangement. He told me that drivers actively want to enter into this kind of arrangement, because not to be directly employed but self-employed – or operating through a company – has very significant financial advantages for the worker.

14. I do not doubt it is true that many, perhaps most, of the respondents' drivers prefer the arrangements the respondents insist upon for just these kinds of financial reasons. I am equally sure that the principal reason why the respondents like to operate with these arrangements is that it dramatically reduces their staff costs. Amongst other things, they do not have to worry about employers' National Insurance contributions, pensions, holiday pay, and sick pay. No doubt it is, for the most part, a mutually beneficial arrangement. Whatever concerns one might have about evasion of employment rights, and of tax and National Insurance, there is nothing preventing companies operating like this. Even if an individual in the claimant's position would actually prefer to be an employee, if they choose to go to work for a company like the respondents, they have chosen to work under an arrangement which they know involves them not being an employee or worker.

15. The claimant has lived and worked in the UK for a number of years. In or around August/September 2017 he was looking for a job. He already had a job several days a week and was looking for another job to fill up his time and earn extra income. He saw a Facebook post from Mr Kolanowski offering work for HGV drivers. He made contact and Transkol Ltd agreed to try him out. As I understand it, the trial consisted of the claimant driving alongside one of the respondents' existing drivers for a few days. The trial was successful. At some stage before the start of the engagement, the claimant was made aware, either by Mr Kolanowski or by other drivers, that in order to become a driver for the respondents he would have to form a company, so that he could provide his services through that company. The claimant did so. The claimant found his own accountant to help him with this, evidently somebody who could speak to him in Polish. His accountants were and are called Primus Accounting Limited.

16. The claimant started driving for the respondents before his own company was incorporated. (In practice, it seems that if a driver starts working for the first respondent, it starts working for the second respondent too). However, when he started it was on the understanding and condition that he was in the process of setting up his own company, as indeed he was. The company was incorporated on 23 November 2017. It is called Sylwek Transport Ltd. The nature of its business, as shown in Companies House records, is "*47910 – Retail sale via mail order houses or via Internet*" and "*49410 – Freight transport by road*". Its sole director and shareholder is shown as being the claimant. Part of the evidence before me was a copy of its accounts for the period ending 30 November 2018. These show, amongst other things, that the company paid £2,630.00 in UK corporation tax during that period.

17. It is inconceivable to me that the claimant could set up a company like this, expressly for the purpose of working through it for the respondents, and do so using his own accountant, and have accounts and pay corporation tax and be registered as a director at Companies House and not, in the course of doing all this, have sufficient advice from his accountant to understand at least the gist of what he was doing.

18. Part of the arrangements between the respondents and their drivers is that the drivers' company must submit invoices to the respondents which the respondents then pay. Drivers can chose to have the respondents prepare these invoices on their behalf, in which case the respondents make a charge for providing this service, or the driver's company can chose to do it for themselves. The claimant chose to have the respondents prepare invoices on his behalf. The fact that the claimant started working for the respondents on the understanding and basis that he was in the process of setting up a company – something that is not seemingly in dispute anyway – is evidenced by the fact that the first invoices date from just after the claimant's company was incorporated, albeit they relate to work carried out before the incorporation of the company. There is nothing legally or conceptually wrong with that. All that happened, in legal terms, was that the claimant gave his company the benefit of a debt the respondents would otherwise have owed him for the work he had done before incorporation.

19. From then onwards, invoices were prepared and paid. They were paid to the claimant's company. The claimant then paid himself as he saw fit out of his company's monies. As mentioned already, the company appears to have paid corporation tax. It must therefore have declared income to HMRC.

20. I asked the claimant about how he dealt with his own tax affairs. He appeared not to understand what I was talking about. The impression I got from his evidence was that he had himself paid no tax and national insurance whatsoever, nor prepared personal accounts, nor declared any income to HMRC. The way he organised his own personal tax affairs – or, rather, apparently did not do so – is curious given that he had an accountant for his company and given the contents of the conversation with his accountant that he recorded that was part of the evidence before me, referred to above, and which I shall describe in more detail below.

21. The claimant's evidence about his own tax affairs was oral evidence, given in answer to questions from me [the Employment Judge]. I am not entirely sure what the claimant's case is. If it is his case that he was unaware of the need to declare his income to HMRC, I do not accept this. If his case is that there was a misunderstanding between me and him when I was asking him questions and that he has in fact declared his income to HMRC, and paid tax and national insurance as appropriate as a self-employed person, or in some other way, then he has failed properly to disclose highly relevant documents detailing his personal interactions with HMRC in breach of his disclosure obligations. Either way, it causes me to doubt his credibility.

22. I shall return to the claimant's tax affairs and the advice he had in relation to them in a moment. Before that I shall briefly address how the claimant worked in practice. Until January 2018, the claimant had another job which he did along-side his work for the respondent company. His other job consisted of working four days on and four days off. There was at least one occasion during those few months when the respondents wanted him to do some work and he was not able to do it because of his other job. The respondents don't seem to have had a problem with that.

23. The way it worked was that the respondents decided between themselves which of them was going to use the claimant's services at a particular time and he would be told a few days in advance when they wanted him to drive. There was no occasion when the claimant was asked to do some work on a day that he did not want to do when he was made to work. Equally, after January 2018 at least, there was no occasion when he was asked to work when he said no and the respondents assumed he would be available for work whenever they wanted him to, except on the few occasions when he had told them in advance he was not going to be available, something he did not do very often. He said in evidence that every time he wanted a day off he asked for one and every time he asked for one the respondents said yes.

24. As best one can tell, the claimant did not particularly care which of the respondents he was doing work for. His work schedule was in practice arranged entirely by the respondents for their own convenience. However, there was nothing preventing the claimant from telling the respondents that he did not want to work on a particular day – he simply chose not to do this. Similarly, the claimant told me that he felt that he was free to do what he liked on days when he was not working for the respondents and that he could have, had he wanted to, gone to work for someone else on those days. He did do this outside of the initial period when he was doing four days on and four days off, but only on one occasion that is identified in the evidence: in late November 2018 when he did some driving work for Sports Direct through an agency. In his oral evidence, he said he did this work through his company.

25. The claimant also told me that he was not saying there was anything stopping him from getting someone else to do the driving for him. Mr Kolanowski said much the same thing in his evidence. However, I am quite sure that in practice the respondents would not have been happy with a substitute driver who they did not know at all, although I think they would have been perfectly happy for the claimant to substitute another driver for himself they were acquainted with, such as someone who had previously done some driving work for them.

26. In or around early 2018, the respondents decided that they needed to formalise their arrangements with their drivers. They sought legal advice and got contracts drawn up. There seem to have been considerable difficulties getting contracts that they were happy with drawn up and it took until late summer/early autumn 2018 to do so. The claimant was presented with two contracts, one for each of the respondents. The contracts are in identical terms. They are headed "*Independent Contractor Agreement*" and on the face of them they are between one of the respondents, which is referred to in the contracts as "*the client*", and Sylwek Transport Ltd which is labelled "*the contractor*". In the contracts, Sylwek Transport Ltd is engaged by the respondent in question to provide its services, consisting of, "*delivering of goods to recipients*". The claimant is not named.

27. Within the agreements, Sylwek Transport Ltd warrants, amongst other things, that it is "*a self-employed independent contractor in business on* [its] *own account*". That is one of a number of terms of the contract that would make more sense if it were a contract between the respondents and an individual rather than a company, another example being a warranty that, "*you have the right to reside and work in the United Kingdom and have all necessary visas, licences and permits allowing you to do so*" and "*you hold, and will continue to hold, a clean drivers licence which permits you to drive category C and E vehicles in the UK*". Nevertheless, they are clearly agreements between one company and another company and they are entirely consistent with the arrangement that had operated in relation to the claimant's work for the respondents since late 2017.

28. The claimant signed both agreements on or about 27 September 2018. Before signing them, the claimant took advice both from his accountant and from Mr Donovan, the man representing the claimant in these proceedings. I am not sure what Mr Donovan's legal qualifications are, but he describes himself on his website as a "*highly successful legal professional offering 25 years of legal service experience*" and as having been, at some stage, Chairman of Mansfield Area Law Association. (I do not mention this to demean him – quite the reverse).

29. The recording referred to earlier was a recording of a telephone call the claimant made to his accountants partly in connection with these agreements. The call starts with the claimant stating that he had a short question about regulation IR35. He stated (in translation), "*I want to ask what it is all about, because my situation is that I work for one company at a time. I have been working for the same company for a year now*".

30. Pausing there, I permitted a small amount of evidence in chief from the claimant in relation to the recording. In that evidence in chief, the claimant stated that he knew nothing about IR35 and that he was phoning his accountant to ask what it was about.

I do not think that is true. It is fairly obvious to me from the conversation that the claimant was aware, at least in general terms, of what IR35 was. IR35 is, of course, legislation aimed at preventing avoidance of payment of income tax and National Insurance contributions by the use of service companies. His concern and a large part of his reason for phoning was that it might apply to him, which would of course mean that he would have to pay more tax – or some tax.

31. The gist of the accountant's advice to the claimant was that he might or might not be covered by IR35, depending on the terms of the agreement that he had with the respondents. The claimant mentioned that he had been given written contracts to sign and, towards the end of the conversation, he agreed with the accountant that he would send the contracts to the accountant for the accountant to look at, by implication with a view to the accountant deciding whether, in light of them, the claimant was covered by IR35.

32. The claimant confirmed in oral evidence that he did indeed send the contracts to the accountant and received advice from the accountant. From the fact that the claimant signed them and continued to work with the respondents in exactly the same way as he had done for the previous ten or eleven months or so, I assume that the accountant's advice was that IR35 did not apply and that the claimant was genuinely self-employed, or, at least, that it was sufficiently arguable that he was genuinely self-employed for him to continue operating as he had done previously. For the same reasons, I assume Mr Donovan's advice was similar.

33. There is no evidence that the claimant ever, at any relevant time, raised a concern with the respondents that he was not genuinely self-employed and that the arrangement between Sylwek Transport Limited might be subject to challenge by HMRC, nor is there any suggestion that the claimant wanted to raise such an issue but was in some way intimidated from doing so. Even if he were suggesting that, it would not be a credible suggestion in light of the fact that he had assistance both from his accountant and from Mr Donovan from at least September 2018, and the arrangement with the respondents continued into March/April 2019. I also know of no evidence of any challenge by HMRC to the arrangements between the respondents and their drivers' service companies, such as Sylwek Transport Limited.

34. Where all of that takes me to is this:

    34.1 for the first month or so, but only for the first month or so, there was a contract between the claimant himself and the respondent companies;

    34.2 one of the terms of that contract was that the claimant was in the process of setting up a company of his own and that once that company was set up the contract would transfer to being a contract between his own company and the respondent companies;

    34.3 the behaviour of the respondent companies and Sylwek Transport Limited was entirely consistent with there being a contract between them for the provision of services by the latter to the former, rather than the true agreement continuing to be between the claimant and the respondents;

    34.4 before entering into this arrangement, the claimant must have had some advice from his accountant;

34.5 in September 2018, having taken advice both from his accountant and his quasi legal adviser, the claimant signed contracts on behalf of his company which confirmed what the arrangement was;

34.6 the contracts he signed were, again, entirely consistent with the arrangement being that the claimant's services were supplied to the respondents through his company and with what happened in practice;

34.7 from the date of incorporation of Sylwek Transport Limited (23 November 2017) there was no contract of any kind directly between the claimant and the respondents. The only relevant contracts from then onwards were between the respondents and Sylwek Transport Limited;

34.8 there is no room whatsoever for implying a contract directly between the claimant and the respondent companies. Not only is there no need to do so, there is almost nothing even suggesting there might be such an implied contract, or, more generally, that the true position was other than the apparent position;

34.9 I can easily envisage HMRC deciding that IR35 did apply to the arrangements between the claimant and the respondents and Sylwek Transport Limited. However, even if that is so, it does not alter the fact that there was, in law, no contract at all between the claimant and the respondents at any relevant time;

34.10 at the very least, when the claimant signed the contracts in September 2018, having taken advice and therefore signing them with his eyes open, as it were, the claimant replaced any pre-existing contracts directly between him and the respondents with the contracts between his company and the respondents.

35. In conclusion, at no relevant time was there a contract between the claimant and the respondents or either of them. Accordingly the claimant was not the respondents' worker at any relevant time and his claim therefore fails.

EMPLOYMENT JUDGE CAMP

02 April 2020

Sent to the parties on:

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For the Tribunal:

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