EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr C Scully **Digital Communication Systems Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON REMISSION FROM THE EMPLOYMENT APPEAL TRIBUNAL

Heard at: Bristol (remotely) **On** **10 July 2020**

Before: Employment Judge Goraj

Appearances
For the Claimant: Mr P Sayers, solicitor
For the Respondent: Mr R Johns, counsel

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS THAT: -

The Claimant was a worker of the respondent pursuant to the Section 230 (3) (b) of the Employment Rights Act 1996 for the purposes of his complaints of unlawful deductions from wages and outstanding holiday pay.

Nature of This Hearing

This has been a remote hearing to which the parties have consented/ not objected. The form of remote hearing was a video conference hearing by Cloud Video Platform. A face to face hearing was not held because of the Covid pandemic and because it is in the interests of justice and in accordance with the overriding objective to minimise expenditure on time and costs.

The Tribunal was provided with – (a) an agreed bundle of documents ("the bundle") (b) an agreed bundle of authorities ("the bundle of authorities") and (c) written legal submissions from the parties and (c) a witness statement from Mr Mulvenna (which was subsequently withdrawn).

REASONS

1. This case was remitted for rehearing before a differently constituted Tribunal to determine the issues identified below pursuant to an Order of the Employment Appeal Tribunal dated 5 December 2019 (which was sealed on 19 December 2019) ("the Order of the EAT")

BACKGROUND

The Claims

2. By a claim form presented on15 March 2018 the claimant brought claims for (a) unfair dismissal (b) breach of contract in respect of notice (c) unlawful deductions from wages and (d) for accrued but unpaid holiday pay. The claims were resisted by the respondent including on the basis that the claimant was a self-employed consultant and did not therefore have the necessary status, as an employee or worker, to bring such claims.

The Preliminary Judgment

3. The matter was listed for a preliminary hearing on 11 December 2018 to determine the claimant's employment status. A copy of the subsequent reserved Judgment dated 12 December 2018 ("the Preliminary Judgment") is at pages 3- 8 of the bundle.

4. The Preliminary Judgment records that the Tribunal heard oral evidence from (a) the claimant and from (b) Mr Brendan Mulvenna and Mr David Lawler on behalf of the respondent. The Tribunal also had regard to the available documentary evidence and legal submissions of the parties.

5. The key findings of fact are at paragraphs 4 – 14 of the Preliminary Judgment (pages 4- 5 of the bundle). The Preliminary Judgment also records that the claimant accepted during that hearing that he was genuinely self-employed and no longer asserted that he was an employee of the respondent (paragraphs 25 and 26 of the Preliminary Judgment – page 7 of the bundle).

6. Having considered the matters recorded in the Preliminary Judgment, the Tribunal held that the claimant was a worker (for the purposes of section 230 (3) (b) of the Employment Rights Act 1996 ("the Act") but not an employee of the respondent (for the purposes of section 230 (3) (a) of the Act. The Tribunal accordingly dismissed the claimant's claims for unfair dismissal and breach of contract but allowed the claims for unlawful deductions from wages and for accrued but unpaid holiday pay proceed to hearing.

The Hearing on 8 May 2019

7. Following a subsequent hearing on 8 May 2019 to determine the claimant's entitlement to the alleged unlawful deductions from wages and accrued holiday pay the Tribunal held in a reserved Judgment of that date ("the Judgment dated 8 May 2019") that: - (a) the claimant succeeded in his claims for (a) accrued but unpaid holiday in the sum of £1,726.05 and (b) unlawful deductions from wages in the sum of £1,265.77. There has been no appeal against the Judgment dated 8 May 2019. Further, the parties confirmed at this hearing that they both accepted that if this Tribunal finds that the claimant was a worker for the purposes of section 230 (3) (b) of the Act he will be entitled to the monies referred to above.

The Appeal to the Employment Appeal Tribunal

8. The respondent appealed to the Employment Appeal Tribunal ("the EAT") against the finding that the claimant was a worker for the purposes of section 230(3) (b) of the Act. The respondent's notice of appeal dated 7 February 2019 is at pages 11- 13 of the bundle. The claimant's Answer is at pages 14- 16 of the bundle. There was no appeal by the claimant in respect of the finding in the Preliminary Judgment that the claimant was not an employee for the purposes of section 230 (1) of the Act.

9. The respondent was given leave to proceed to a full hearing on the grounds that the Tribunal's conclusion that the claimant was a worker for the purposes of section 230 (3) of the Act was arguable wrong as :- (a) the Tribunal had concluded at paragraph 11 of the Preliminary Judgment that the contract had included a right of substitution and (b) that the conclusions at paragraphs 26 and 28 of the Preliminary Judgement were inconsistent on the question of whether the claimant had any obligation of personal service (page 51 of the bundle).

The outcome of the appeal to the EAT

10. At the full hearing of the appeal on 5 December 2019 his Honour Judge Shanks upheld the appeal in brief summary, on the grounds that there was a contradiction between the findings at paragraphs 26 and 28 of the Preliminary Judgment on the question of personal service making the decision flawed on its face (paragraph G at page 1 of the transcript of Judgment of the EAT). The EAT considered that it would be inappropriate for the EAT to determine the issue and held that :- (a) the matter should be remitted to a different Tribunal and (b) that the Tribunal should proceed on the basis of the primary facts found by the Employment Judge at the preliminary hearing as set out at paragraphs 4 to 14 of the Preliminary judgement and (c) that the appropriate

inferences to be drawn from those facts, appropriate findings about the contractual relationship between the parties and the final issue as to whether the claimant was a worker for the purposes of section 230 (3)(b) of the Act were matters on which the parties would be allowed to make submissions at the remitted hearing (paragraphs A – C at page 2 of the transcript of the Judgment of the EAT).

This Hearing

11. This Tribunal has had the benefit of the documents referred to above. The Tribunal has also had the assistance of the brief oral closing submissions of the parties.

12. The respondent proposed to rely on additional oral evidence from Mr Mulvenna (who had given oral evidence at the Preliminary Hearing) and served and produced a witness statement for the purposes of this Hearing. The respondent however confirmed at the commencement of this Hearing that it no longer sought to rely upon any additional oral evidence and accordingly formally withdrew the witness statement of Mr Mulvenna. The only findings of fact before this Tribunal are therefore those contained at paragraphs 4-14 of the Preliminary Judgment.

The Claimant's submissions

13. In summary, the claimant relied upon the following legal authorities in support of its contention that the claimant satisfied the test for a worker pursuant to section 230 (3) (b) of the Act. The claimant contended as follows:-

(1) The EAT decision in **James v Redcats (Brands) Limited [2007] ICR 1006** approved a line of authority requiring the Tribunal to determine whether personal service was a dominant purpose/dominant feature of the arrangement. This approach had received further judicial endorsement in the Supreme Court including in **Pimlico plumbers Ltd and Mullins v Smith [2018] UKSC 29.**

(2) Further the Court of Appeal had previously considered in **Pimlico Plumbers Limited v Smith [2017] EWCA Civ 51** how the obligation of personal service should be analysed in terms of whether the individual could provide a substitute to perform the work and gave guidance at paragraph 84 including that :- (a) although an unfettered right to provide a substitute was inconsistent with an obligation to perform service personally (b) a conditional right to provide a substitute may or may not be consistent with personal service-this would depend upon the precise contractual terms and the degree to which the right was limited or occasional including that the ability send a substitute subject to obtaining the consent of another person who had an

absolute and unqualified discretion to withhold consent was consistent with personal performance.

(3) The claimant relies on the EAT authority of **Byrne Brothers (Formwork) Limited v Baird and others [2002] IRLR 96** in support of his assertion that the respondent's status was not simply that of a customer of the claimant's own business including that (a) the purpose of section 230 (3) (b) of the Act was to create an intermediate class between employees and the genuinely self-employed and (b) that the test for determining whether someone was carrying on a business undertaking/the respondent is a customer is similar to the test of whether a contract is a contract of service or a contract for services including the degree of integration into the business.

(4) The claimant also relies on the EAT authority of **Cotswold Developments Construction Ltd v Williams UK EAT [2005] UKEAT0457/05** the purposes of assessing whether a person is a worker or self-employed contractor including whether:- (a) the worker actively marketed their services to the world in general-which might infer independent contractor status or (b) they have been recruited by a principal to work as an integral part of the principal's operation-which would tend to infer worker status.

(5) The claimant further relies on the Supreme Court Judgment in the **Pimlico Plumbers** case in relation to its decision that the dominant feature test was applicable to both the overarching requirement of personal service and whether the individual was carrying out a business undertaking of their own.

14. The Tribunal has also had regard to the claimant's submissions regarding the application of the law to the facts at paragraphs 14 – 18 of the claimant's skeleton argument.

The respondent's submissions

15. In summary, the respondent relied upon the following written submissions: -

    (1) the Order of the EAT limited the rehearing of the matter to an assessment of the application of section 230 (3) (b) of the Act on the basis of the facts set out at paragraphs 4-14 of the Preliminary Judgment.

    (2) the Tribunal found at paragraph 11 of the Preliminary Judgment that there was a right of substitution.

(3) At paragraphs 10 and 11 the Tribunal found that the claimant was not (the skeleton argument says was under but this is clearly a typographical error) the day-to-day control of the respondent and that he could take holiday when he wished to do so.

(4) Section 230 (3) (b) of the Act requires: –(a) an obligation that the person performs the work personally and (b) that the person for whom the work is done must not be a client or customer of the business been run by the individual.

(5) The finding that there was a right of substitution is a significant indicator - the respondent asserts that the claimant was not obliged to perform the work personally. Further it is not a requirement, in the light of the Judgment in **Express and Echo Publications Ltd v Tanton [1999] IRLR 367** that the use of the substitution is ever used to establish its existence. The claimant therefore fails at that hurdle.

(6) The claimant had a right to substitute himself and was not obliged to perform any work. The claimant could have taken time away from work when he wanted, he operated a consultancy company and wish to be treated and was treated as self-employed.

(7) Further, it is erroneous to consider whether the claimant had other clients-his own evidence was that he could have had other clients and he did run a consultancy business. The respondent was therefore clearly a client of his business based on the findings of the Tribunal.

(8) Taking the facts found by the Tribunal in the Preliminary Judgment in the round, the claimant was self-employed and did not satisfy the worker test for the purposes of section 230 (3) (b) of the Act.

THE LAW

16. The Tribunal has had regard to the provisions of section 230 (3) (b) of the Act (which is set out below) and to the authorities contained in the authorities bundles provided by the parties (which are referred to above).

17. Section 230 (3) of the Act states as follows: -

"In this Act '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 other 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".

18. The Tribunal has also had regard to the guidance of the EAT as set out at paragraph 10 above.

19. The Tribunal is required to answer, by applying the statutory provisions/authorities referred to above to the findings of fact at paragraphs 4-14 of the Preliminary Judgment, the following questions: --

(1) Was there a contract between the claimant and the respondent for the claimant to perform work or services.

(2) Was there was an obligation on the claimant to perform that work/ services personally and,

(3) Were the services performed by the claimant provided to the respondent in the course of running a business of which the respondent was a client or customer (and in which case the claimant would not be considered as a worker for the purposes of section 230 (3) (b) of the Act).

THE CONCLUSIONS OF THE TRIBUNAL

Was there a contract between the claimant and the respondent for the claimant to perform work or services

20. There is limited documentation evidencing the contractual relationship between the claimant and the respondent. The Tribunal is however satisfied having regard to the findings of fact contained at paragraphs 4 – 14 of the Preliminary Judgment that there was a contract between the parties for the claimant to perform work or services as evidenced as follows:-

(1) The letter from Mr Mulvenna of the respondent to the claimant dated 23 February 2013 as set out at paragraph 5 of the Preliminary Judgment.

(2) The Non – Disclosure Agreement referred to at paragraph 6 of the Preliminary Judgement.

(3) The arrangements for monthly billing in the agreed sum of £3,500 per month and associated arrangements as set out at paragraph 7 of the Preliminary Judgment.

(4) The exchange of emails between the claimant and the respondent's company secretary on 3 August 2016 as set out at paragraph 8 of the Preliminary Judgement.

Was there an obligation on the claimant to provide such work/services personally

21. This issue is at the heart of this case and the Tribunal has given careful consideration to the competing submissions of the parties.

22. After giving the matter careful consideration, the Tribunal is satisfied that the claimant met the requirement to undertake "to do or perform personally any work or services for another party" for the purposes of section 230 (3) (b) of the Act for the following reasons:-

(1) The terms of the respondent's letter dated 22 February 2013, which formed the basis upon which the claimant was engaged by the respondent (after 2/ 3 months of discussions), is consistent with personal service. The Tribunal has noted in particular, that the respondent stated in that letter that "we would like to offer you a position within our company as follows: I propose that we employ your services for a minimum period of six months, with a rolling three-month termination period thereafter for £3,500 per calendar month excluding VAT… I would like to wish you a long and successful future with the company" (paragraph 5 of the Preliminary Hearing).

(2) The claimant thereafter received a fixed monthly fee of £3,500 throughout his period of engagement with the respondent pursuant to the terms of such agreement (paragraph 7 of the Preliminary Judgment).

(3) The claimant did not undertake any services for any other party during his period of engagement with the respondent (paragraph 13 of the Preliminary Judgment).

(4) There was no agreement between the parties permitting the clamant to provide a substitute. Although the Tribunal accepted the evidence of the respondent that the claimant could have appointed a substitute to carry out some of his services provided that the respondent was notified, there is no finding of any actual agreement to that effect. Moreover, the Tribunal made findings

of fact that:- (a) the claimant did not any stage suggest that he wanted to appoint a substitute and (b) "there is no evidence that this prospect was ever actually raised or discussed" (paragraph 11 of the Preliminary Judgment").

(5) This Tribunal therefore rejects the submissions of the respondent at paragraph 15 above regarding substitution and lack of personal service.

Were the services performed by the claimant provided to the respondent in the course of running a business of which the respondent was a client or customer.

23. Again, the Tribunal has given careful consideration to the legal submissions of the parties.

24. The Tribunal has also given careful consideration to the helpful guidance contained in paragraph 15 of the EAT Judgment in **Byrne** (pages 18 – 19 of the authorities bundle) and in particular:- (a) the factors identified at paragraph (5) of that judgment and (b) the recognition that " The basic effect of limb (b) is so to speak, to lower the pass – mark so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as worker".

25. When reaching its conclusions on this matter the Tribunal has balanced the competing contentions of the parties in the light of the findings of fact contained in the Preliminary Judgment.

26. The Tribunal has taken into account the matters which support the case that the claimant was providing services to the respondent as a client or customer of his business undertaking including :- (a) that the claimant represented himself in the NDA as Charles Scully Consultancy (paragraph 6 of the Preliminary Judgment) (b) the claimant's tax and related arrangements in which he was treated as self-employed (paragraph 6- 8 of the Preliminary Judgment) and (c) the findings in the Preliminary Judgment regarding the high degree of autonomy which was afforded to the claimant (paragraphs 10 -12 of the Preliminary Judgment).

27. The Tribunal has however balanced against such matters :- (a) the findings which it has already made above regarding the personal nature of the relationship (b) the duration and nature of the relationship including that the claimant's income was limited to the agreed monthly payments of £3,500 which did not vary at any time/ depend on the level of work done and (c) the claimant did not provide services to any

other person and did not receive remuneration from any other business.

28. Having given the matter very careful consideration the Tribunal is satisfied that in accordance with **Bryne** that the claimant has reached the necessary pass mark to qualify for protection as a worker for the purposes of section 230 (3) (b) of the Act in circumstances where he has failed to achieve protection as an employee.

29. In all the circumstances, the Tribunal finds that the claimant was at all relevant times a worker for the purposes of section 230 (3) (b) of the Act.

Employment Judge Goraj

Date: 6 August 2020

Judgment sent to parties: 12 August 2020

FOR THE OFFICE OF THE TRIBUNALS

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