Case Number: 2300388/2020

EMPLOYMENT TRIBUNALS

Claimant. **Mr Howard Waters**

Respondent. **The Mote Cricket Club (an unincorporated members association).**

Heard at: **Croydon Remotely via CVP** **On: 11 September 2020.**

Before: **Employment Judge Hargrove .**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Barr, Committee member.**

RESERVED JUDGMENT AND REASONS.
(Clerical errors corrected under Rule 69 2 November.)

1. **The judgement of the employment tribunal is that the claimant was neither an employee nor a worker as defined in section 230 of the Employment Rights Act. In these circumstances the claims for holiday pay and notice pay are not well founded and the application to add a claim of unfair dismissal does not succeed.**

Reasons.

1. This hearing was listed to consider whether the claimant was an employee, a worker, or genuinely self-employed when he performed work for the respondent in the period from the 1st of December 2017 to the 31st of January 2020.
2. Section 230 of the Employment Rights Act provides as follows: –

"(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.
(2) in this Act 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.
(3) 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 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."

3. **History**.

3.1.TMCC is an unincorporated members club run by a committee. It has two cricket pitches on grounds at Maidstone Kent which also include rugby pitches controlled by another club, MRFC.

3.2.From about 2000 a groundsman, Tony Saunders (TS) was employed by the committee to upkeep the grounds of the cricket club and in particular to upkeep to cricket squares in which a number of pitches were prepared for matches.

There is no doubt that TS was an employee of the respondent, at least up to 2016 when he retired/resigned. His contract of employment is at exhibit two of the Claimant's bundle. It incorporates the license to occupy as a licensee accommodation on the ground, Moteside , for the purpose of the better performance of his duties; and a disciplinary and grievance procedure .

3.3. The house had been built as accommodation for a groundsman subject to that condition of use in 1963.

3.4. The claimant had been a member of the club and, latterly, a member of the committee, as well as a player, from about 2000. He had from time to time worked as a volunteer and/or casual worker assisting the groundsman.

3.5. In 2011 He started his own business, Green Hand Gardens (GHG) to provide garden services and maintenance which included that of another cricket pitch at Torry Hill. At that time he lived two streets away from TMCC.

3.6. When TS left in 2016, he vacated Moteside. The claimant submitted proposals for a replacement to the committee. On 9 February 2016 a vacancy for the Mote head groundsman was circulated to interested parties. See C4A page 20. A list of applicants is at exhibit C4B. These included Chris Dale (CD) and the claimant. They were both interviewed and comments on the merits of both candidates was summarised at C4B page 26. It is to be noted that the comments with regard to the claimant were to the effect that he was to be a full-time employee over 12 months with a package the same as TS including the house, whereas CD was to be engaged on a contract basis based on eight months per annum invoiced evenly over eight months with no house. There was a cost comparison, page C27, and CD was appointed. On 14th March 2016 CD was offered a contract to undertake the task at a rate of £18,000 per annum invoiced over eight months April to November 2016, with termination on three months notice. See C5C page 30. One of the financial advantages of this arrangement from the respondent's point of view was that CD did not require the accommodation at Moteside, as he lived some distance away and would travel to work. The respondent envisaged letting out Moteside to provide additional income for the Club. CD also ran a business as a cricket coach at the Club and elsewhere.

3.7. On the 1st of July 2016 the claimant signed an assured short hold tenancy agreement for Moteside at a initial rental of £700 per month, subsequently, after six months, increased to £900 per month. It appears that this may have been a breach of planning controls, and that no steps were taken thereafter to regularise the position with the planning authority. Another effect was that the claimant's existing business, GHG, now became based there and he continued to operate it. In addition, the claimant was subsequently allowed to

store his tools and equipment in an existing shed and a shipping container which he was permitted to place in the grounds. This arrangement must have been approved by the Committee.

3.8. There was subsequently a falling out between the club and CD. The claimant's exhibits 5C and 6 record discussions taking place in the committee. Amongst them was a note that CD was a contractor and " we should aim to treat him the same way as Tony and to direct his work…". This is a reference to TS's previous employment status. One of the matters of concern was that CD was not working enough hours on the contract, and that he should be required to record the number of hours weekly. At the end of the 2017 season CD was removed from the contract. He circulated a letter of complaint. Exhibit C7.

3.9. In paragraph 8 of his witness statement the claimant describes that he was approached and offered the role as a contractor. He says that he had "…no desire to do the role as a contractor as he always maintained the job was better suited to a service occupier as had previously been the case as the hours in work were demanding. This time a full-time role with accommodation was not on offer. I really wanted to do the job and had no choice but to agree to terms as a contractor myself and Chris Dale had discussions about the role with the cricket club. The cricket club offered me a contract which I signed."

3.10. The copy of that contract is produced by the claimant at C8. It was also produced by the respondent. I was shown a signed copy. It was signed by "Howard Waters (on behalf of Green Hand Gardens)", and "Chris Back (on behalf of the Mote CC)." It is dated November 2017, and the claimant started on 1 December . In summary: 1. It contains detailed provisions as to"Cricket playing and practice surface preparation", with seven bullet points dealing with the preparation of the 2 squares and wickets for matches on them, for the care and maintenance of the outfields, the maintenance of artificial nets, and work to be done on match days. There were also provisions for the maintenance of surrounding areas with a schedule setting out the frequency when tasks were to be done; and for maintenance of machinery. 2. There was also a list of tasks which were not to be included in the contract. 3, under the heading of "expected work time and compensation – timing –" there was a specific provision " The above services would mainly be carried out during the summer months, and would include Saturday match days as required. Work is expected to be a minimum of 60 hours per week during the summer months, of which at least 40 should be carried out in person by Howard Waters (as the skilled groundsman). Summer months is March to October inclusive. During the winter months (November to February inclusive), it is expected that the cricket pitches continue to have some basic maintenance and oversight. This should take four hours a week". 4. Under "Machinery", "Machinery owned by the Mote CC or borrowed from Maidstone RFC should be used in the first instance. Use of machinery owned by GHG or any other entity should be approved by the head of ground and will not give rise to additional remuneration". 5. Under "compensation", – "£22,000 per annum for the summer work (16 hours per week, of which 40 by Howard Waters in person); additional £1200 for winter work (4 hours per week). This remuneration allows for an increase in the use of the squares in the 2018 season. – £22,000 Invoiced evenly over eight months (March to October 2018); £1200 invoiced evenly over four months (November 2017 – February

2018). Invoice on first day of month. Payment to be made by 15th of month.Invoice addressed to TMCC and delivered by email to the treasurer".
6."Tenancy clarification – this contract is absolutely independent and separate from any other contractual arrangement between TMCC and Howard Waters, including the existing private tenancy agreement on Moteside." 7. The contract was determinable on notice of 3 months on either side.

3.11. The claimant performed the work from the 1st of December 2017 until he was given notice to end on the 31st of January 2020. It is clear that from 2018 the claimant was unhappy with the terms of the agreement and made attempts in correspondence and meetings with members of the committee to negotiate different terms in the form of increased remuneration, or reduced work or, at the end, a removal of the commitment personally to work 40 hours per week during the summer months. It is clear that the claimant was seeking changes Including the recognition that he should be recognised as a full-time employee. There was an increase in his remuneration in 2019, and some other minor variations, but essentially the claimant's status remained the same and he declined to sign any other agreement of a similar nature with the respondent the respondent expressly declined to grant the claimant employment status and to recognise that he was an employee.

4. **Tribunal self-direction on the Law.**

I start with the multiple test set out in the judgement in **Ready Mixed Concrete Southeast Ltd v Ministry of Pensions and National insurance 1968 1 All England** Reports at page 437. This recognises the following three questions: –

- Did the worker agreed to provide his or her own work and skill in return for remuneration?
- Did the work agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of Master and servant?
- Were the other provisions of the contract consistent with its being a contract of service?

As was stated in the judgement of Sir John Donaldson in **O'Kelly v Trusthouse Forte**: " The tribunal must consider all aspects of the relationship, no single factor being in itself decisive and each of which which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account".

As to the test of control, I note the decision of the EAT in the **Commissioners of Inland Revenue** v **Post office Ltd 2003 ICR page 546:** – the obligations on sub postmaster is to keep accounts in a particular way, to notify the post office of various matters, including sickness, to comply with the post office's requirements in the selection of staff and to meet certain quality standards, were all consistent with a contract for services (not of service). These applications were not sufficient to satisfy the control test, meaning that the postmasters were not employees.

Mutuality of obligation is generally regarded as a necessary element of a contract of employment, i.e. an obligation on the part of the employer to provide work, and a corresponding obligation on the employee to accept and perform the work offered. Personal performance is also a necessary component and if there is an unfettered discretion on the part of the worker to provide a substitute, that points away from a contract of employment or service. The intention of the parties as to the status of the relationship may be relevant factor, but the tribunal must always look to the substance of the matter, even if the parties agree the label. See **Young and Woods v West 1980 IRLR 201 CA.** In that connection I was referred by Mr Waters to the case of **Autoclenz**

v Belcher 2011 ICR 1157. Supreme Court. It is permissible to look behind the terms of the written contract, to see if the identification of the workers' status (in that case car valets) as self- employed was a sham.

5.**Tribunal's conclusions**

I conclude that Mr Waters was not an employee of TMCC for the following reasons: –

5.1.there was clearly a contract between the parties. The key issue is as to its status and as to how the contract was to be performed. I find that although the work to be done under the agreement was closely prescribed – much more closely than CD's contract, which was one of the respondent's reasons for dissatisfaction with CD's performance, the claimant was not under any control or supervision as to how and when he performed the work. He had no fixed start or finish times. He was not required to report to anyone. There were no provisions for his work to be measured or assessed or for him to be subject to any Disciplinary process.

5.2. He was also expected in practice from time to time to provide his own tools or machinery which he also used for his own business, in addition to the use of the club's equipment. He refers in one email to use of his own specialist ladders and trailers. In his evidence to the tribunal he referred to a "Verticutter" a sophisticated form of scarifier used on cricket pitches and, I presume, on golf greens.

5.3. It is not in dispute that the claimant was already running a business of a similar kind and the work which he engaged to perform for the club could be incorporated within that business without difficulty. By contrast the claimant was not incorporated into the supposed employer's organisation. There is no evidence of any supervision of him or his work. Nor is there any evidence that there were any other employees of the club.

5.4. There was some evidence of mutuality of obligation but no more than one would expect between an owner of a business and a customer or client who had entered into a contract for the provision of the services by the business in exchange for payment.

5.5. The Claimant's business was a pre-existing business. It was the means by which T MCC chose to purchase the claimant's services in the same way as they had earlier purchased services from CD, who was also not an employee of the club. The agreement was not a sham. It was not something which it did not purport to be in practice . I note that the claimant also charged the club for extra work on the grounds outside the terms of the agreement, which were done by the business.

5.6. There were no provisions in the agreement with the claimant for the club to pay holiday pay or sick pay, or for the deduction of tax and national insurance. The claimant accepts that he was responsible for the submission of tax returns to HMRC for his business, in which he included the amounts received from the club. He did not produce to the Tribunal any copies of his tax returns for this period, but accepts that his turnover for the business as a whole was in the region of £40,000 per annum, which included the £22,000 from the club.

5.7.In the cited paragraphs from the claimant's witness statement – see paragraph 3.9 above – the claimant recognised that he was not being offered employment with accommodation included, as he would have preferred, but as a contractor. I find that he chose that option in a hope that he would be able to obtain a foot in the door and in the expectation that the club would offer him employment in the future. However the club refused to change his status.

5.8.A factor which causes me concern as to the worker issue was that the contract, drafted by the respondent, required the claimant to work personally 40 hours per week in the summer months. There was to that extent a requirement of personal service, but the fact that the claimant was expected to provide 60 hours of work in total indicate that he was expected to provide someone else to perform the additional work. The evidence

was that the claimant actually engaged and paid someone else in 2018; and his partner who was also employed in his business did engage in extra work in 2018 and 2019. I find that the respondent inserted that clause because of concerns that CD had not been working the requisite number of hours. In addition the respondent relied upon the claimant's expertise, but that is no different from a requirement that an independent contractor in a specialist field should not delegate to a non-expert. It is noteworthy that there is no evidence that the respondent actually checked the number of hours which the claimant actually worked.

5.9. Clearly the claimant was in a position to be able to carry on his own business performing work for customers other than the club. I accept that the 40 hours requirement may have limited, but not altogether prevented him from doing work personally for other customers during summer months. It certainly did not prevent him from employing others to perform external work as he did In 2018. It was for this reason that the claimant sought in vain to remove the 40 hour requirement. He was anxious to maintain the benefits of his business arrangement with the club, but also to improve his chances of pursuing other customer contacts.

6. In summary, I found that the claimant was not an employee and was not at a worker thereby entitled to holiday pay, because the respondent was genuinely a customer or client of the claimant's business, albeit a very significant one.

Employment Judge Hargrove

13 September 2020.

Corrected under Rule 69 2November 2020.

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