EMPLOYMENT TRIBUNALS

Claimant: Mr B Sturges

Respondent: Clarkes Solutions Ltd

Heard at: Birmingham **On:** 19th October 2020

Before: Employment Judge V Jones (sitting alone)

Appearances
For the Claimant: in person
For the Respondent: Mr Z Malik, solicitor

Reasons on an Open Preliminary Hearing

Background

1. These reasons are provided at the request of the respondent.

2. By his ET1 claim form presented on 2 August 2019 the claimant claimed damages for breach of contract (pay in lieu of notice); unpaid holiday pay and compensation for discrimination contrary to the Equality Act 2010.

Issues

3. This was a preliminary hearing to determine whether the claimant was:

   (i) an 'employee' under s230(1) Employment Rights Act 1996, for the purposes of his claim for pay in lieu of notice;

   (ii) a 'worker' under s230(3) ERA and regulation 2(1) Working Time Regulations 1998 (WTR) for the purposes of his claim for "holiday pay";

   (iii) employed 'under a contract personally to do work' under s83(2)(a) Equality Act 2010 (EqA) for the purposes of his complaint of discrimination contrary to that Act.

4. The claimant appeared in person. The respondent was represented by Mr Malik. For the claimant I heard oral evidence from the claimant. For the respondent I read a written witness statement and heard evidence from Mr Marcin Farris,

operations manager. There was an agreed bundle of documents (pp1-68) and references, in these reasons, to page numbers are to pages in the agreed bundle.

Findings of fact

5. From the evidence I received and heard I made the following findings of fact:

5.1 Prior to the events leading up to this claim, the claimant had been employed by the respondent as a welder for a number of years ending with his dismissal for absenteeism and lateness in November 2017. He was issued with a written contract of employment during the last year of that employment.

5.2 On 19 December 2018, the claimant returned to work for the respondent. The parties' evidence differed as to the terms on which that work was offered, and performed, between 19 December 2018 and 14 June 2019 when his contract was terminated by the respondent without notice. The claimant says Mr Richard Clarke, one of the respondent's managers, whom he met through attending the same church, made the offer of work during December 2018. He says there was no discussion about terms and he understood that he would return on the same terms as before. That belief was reinforced by the fact that he was paid the same rate of pay as previously (£60 per day) and he did the same work. The Respondent's evidence was that Mr Clarke had told the claimant that he would be returning as a self-employed contractor and that Mr Farris also had a discussion with the claimant before he returned in which he told the claimant that he would be self-employed for an "initial period".

5.3 The claimant's evidence was that he was employed as a welder/fabricator but was expected to do other work if required, for example painting. He said he had to be a "master of all trades". There were three other welders, all of whom were "on the books" and who were similarly required to do other work as needed. Mr Farris's evidence was that the claimant only did welding/fabricating, but in cross-examination he said he was not always out on the yard and could not say confidently that the claimant did not do painting or other work. I therefore accept the claimant's evidence that he did other work, including painting. The claimant's unchallenged evidence was that he wore the company uniform which consisted of trousers, a T-shirt with the company name on it, and boots. He also used the company's tools. While Mr Farris accepted this was the case, he said the company only provided the claimant with tools because he had no transport of his own.

5.4 The claimant's manager picked him up for work each morning shortly before 8am, though the messages at pp 36-42 show that occasionally he did not get a lift. The claimant and the other welders worked until 5pm each day. He said he could not start late or leave early without a reason.

5.5 The claimant attended meetings with managers alongside his fellow workmates every two to four weeks to discuss work issues, moving forward with contracts, projects, wages, grievances etc. He was treated no differently from other employees in relation to the level of control management had over his work. There was no direct supervision of his work, or theirs. All fabricator/welders were required to work from 8am to 5pm, five days a week. The claimant understood that the respondent would pay his tax and national insurance contributions as they had done before, though he

was given no written information to confirm this had been done. In fact the respondent did not pay the contributions on his behalf.

5.6 Where the claimant accepted his position differed from those who, in his words, were "on the books" was in the fact that the respondent was not under a duty to provide him with work. It was common ground that there were two occasions in the six month period from December to June when he was told there was no work available. It was also common ground that the claimant did not have to accept work when offered. He had told Mr Clarke when they discussed him going back that he may have to refuse certain work due to a pre-existing back condition. Over the 6-month period from 19 December to 14 June there were 18-19 occasions when he declined work. This generally occurred because of the claimant's back condition (pp 36-42) and so might otherwise have been classified as "sickness absence". But sometimes the claimant refused work because he needed to sort out personal matters, such as dealing with benefit claims or job interviews, and on other occasions he refused work without giving any reason at all. On the occasions where he refused work, the respondent sometimes told him not to come in for the rest of that week. A record of WhatsApp messages in the Respondent's bundle (pp36-42) showed there were regular conversations between the claimant and respondent about whether or not he would be coming into work on any particular day. One of the early messages from the claimant stated: *"I'm glad I have freedom what days I come in..."* (p36, column 2).

5.7 The respondent's unchallenged evidence was that employees who took time off were required to provide sick notes and to attend a "return to work" interview when they came back to work. The claimant was not required to do either of these things, though his evidence was that he never took a long enough period off sick to require a sick note. But the claimant's absences did not result in the respondent holding meetings with him under its absence policy, as would have been the case for his colleagues who were treated as employees. The absence policy provided that three occasions of absence in a 6-month period or seven absences over a 12 month period would lead to an investigatory meeting. The claimant was not required to give the respondent notice of his intention to take annual leave two weeks in advance as employees "on the books" were required to do. He said that after being denied holiday pay the first time he took time off, he did not apply for paid holiday again.

5.8 In his witness statement Mr Farris asserted that the claimant could provide a substitute if he could not attend work on any particular day but there was no documentary or other evidence to support this. The claimant's evidence was that there was no power of substitution: he was obliged to perform the work personally and there had never been any discussion about substitution. It was common ground that there were in practice no occasions when the claimant sent a substitute.

5.9 There was disagreement between the parties as to whether the claimant was working under a probationary period. He claimant said that he asked to be paid for a day's leave he took for a pre-arranged engagement early in 2019, but was told he was not eligible for paid leave as he was "on probation". The respondent denied telling the claimant at any time that he was on probation. Mr Farris's evidence was that the claimant had been informed that because of his previous record of absences and poor time-keeping they could not offer him a permanent position, only "casual work".

However he said the claimant was told that if, after an initial period, things improved, he could be made full time.

5.10 There were invoices in the bundle (pp44-63) purporting to be from the claimant, billing the respondent for work carried out by the claimant throughout the period December 2018 to June 2019. The claimant said he had never seen these invoices before these proceedings: he had no computer and was unable to produce such documents. It was put to him in cross-examination that Mr Farris assisted him to prepare the invoices but he refuted this, saying that they did not have that kind of relationship. I accept the claimant's evidence on this point. Mr Farris, in his witness statement said he prepared the invoices on the claimant's behalf and provided him with a copy. I find the respondent produced the invoices for its own accounting purposes and accept the claimant's evidence that he had not seen them before. But even if I am wrong about this, I did not consider the existence of invoices prepared by the respondent for the claimant to be evidence that the claimant was a self-employed contractor in business on his own account. Rather, I considered they supported the opposite conclusion.

5.11 It was also clear from the evidence that the respondent did not pay tax and national insurance for the claimant after his return to work on 19 December 2018. However I do not find this evidence alone to be conclusive of the claimant's employment status. I accept the claimant's evidence that he was not aware that tax was not being paid, though in the absence of pay slips it would have been prudent for him to have made enquiries of the respondent in order to satisfy himself that tax and national insurance was being paid on his behalf.

5.12 The claimant did not work for any other employer during the period of his contract with the respondent and did not contract with any other person or business to work for them in any capacity. He did however apply for other jobs when her realised his position was not going to be made permanent. It was put to the claimant in cross examination that (at p41 of the bundle) there was a text message from him dated 25 May 2019 indicating that he was in business on his own account selling vapes. However I accept the claimant's evidence that he bought the vapes from ebay on a "one-off" basis and resold them to friends to raise a bit of money. He was not operating a business.

The Law

6. Regulation 86(1) ERA gives an employee whose contract of employment is terminated by his or her employer the right to a minimum period of notice. Any contractual provision which seeks to give a lesser period of notice is subject to this statutory right. Paragraph 3 of the Employment Tribunals (Extension of Jurisdiction (England and Wales) Order 1994 ("Extension of Jurisdiction Order") allows an employee to bring proceedings before an employment tribunal for damages for breach of contract (subject to certain limitations) if their contract is terminated by their employer without their contractual or minimum entitlement to notice being given.

7. Section 230(1) ERA defines an "employee" for these purposes as an individual who has entered into or works under (or, where the employment has ceased, worked

under) a contract of employment. Section 230(2) defines a contract of employment as "a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing." These definitions are identical to those contained in s42 ETA which apply to proceedings brought under the Extension of Jurisdiction Order. "Contract of service" is not further defined in statute, but caselaw (Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance [1968] 1 All ER 433, Nethermere (St Neots) Ltd v Gardiner and anor [1884] ICR 612, CA; Carmichael and anor v National Power PLC [1999] ICR 1226 HL; Autoclenz Ltd v Belcher and ors [2011] ICR 1157 SC) has established that for a contract of service to exist there must be "an irreducible minimum" of the following –

a) a contract (whether express or implied) to provide his own skills in return for remuneration;

b) mutuality of obligation, on the employer to provide work and the employee to perform it;

c) control by the employer over the employee sufficient to make him/her a master.

If this "irreducible minimum" is not met, there cannot be a contract or employment. If it is met, the tribunal should go on to look at all the provisions of the contract and consider whether they are consistent with there being a contract of employment. Such terms might include, but are not limited to, whether tax or national insurance are paid by the employer and how far the employee is integrated into the employer's business.

8. Section 230(3) ERA and regulation 2(1) of the Working Time Regulations 1998 (WTR) define a "worker" as someone who works under a) a contract of employment; b) any other contract, expressed or implied, whether oral or written, where the individual undertakes to do or perform personally any work for another party to the contract whose status is not, by virtue of the contract, that of client or customer of any profession or business undertaking carried on by the individual.

9. Section 83(2)(a) of the Equality Act 2010 (EqA) provides that "employment" means employment under a contract of employment or apprenticeship or a contract personally to do work.

10. In Allonby v Accrington & Rossendale College (2004) the ECJ held that a "worker" for the purposes of European equal pay law is a person who, for a certain period of time, performs services for and under the direction of another person for which he receives remuneration. Workers can be distinguished from independent providers of services who are not in a relationship of subordination to the person who receives those services. This interpretation was applied by the Supreme Court in Jivraj v Hashwani [2011] UKSC 40, a case under the Employment Equality (Religion or Belief) Regulations 2003. The Supreme Court held that the relationship turned on whether the employee agreed personally to perform services and a requirement that the employee was subordinate, to the extent of being generally bound to act on the employer's instructions. At para 27 the Supreme Court held that the interpretation in Allonby must remain the correct approach to the definition of employment in section 83(2) EqA.

Conclusions

Was the claimant an employee under s230(1) ERA (and thus 42 Employment Tribunals Act 1996 (ETA)?

11. I find the claimant was employed by the respondent under a contract to provide work personally and there was no power of substitution. Although it was asserted by Mr Farris that the clamant was entitled to send a substitute if he could not attend work, there was no written contract between the parties and no evidence from the respondent of any discussion or communication with the claimant about substitution. In practice no substitute was sent on any of the 19 occasions the claimant refused work and the text messages at pp36-43 show that the respondent at no time suggested he could have sent a substitute. I have had regard to Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, where the EAT held that *'as a matter of common sense and common experience, where an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work'.* I find there was no power of substitution in the agreement between the parties.

12. I find there was a significant degree of control over the claimant by the respondent. First there was control over his hours of work. I prefer the claimant's evidence that once he accepted work he was expected to attend from 8am to 5pm and could not leave early. The text messages at pp36-43 show that during the 6-month period of his contract there were three occasions when the claimant contacted the respondent to inform them he would be in "late". On one occasion in March 2019 (p39 column 1) he messaged at 7.25am to say he had to sort out something with the job centre (though it was not clear from the message how late he expected to be or whether he was in fact in work late on that occasion). In May 2019 (p.41 column 3) he messaged to say he would be late (though the relevant message does not contain any information about the reason). In June (p42 column 4) there was an occasion when the claimant had a hospital appointment and did not arrive in work until 11am. But these occasions were the only evidence of the claimant working other than the normal 8am to 5pm shift, and it is clear that he was expected to notify the respondent if he expected to be late. Secondly, there was control by the respondent over the work the claimant carried out: I have accepted his evidence that if there was no welding to be done, the claimant was required to do other work. Thirdly the claimant wore the company uniform and the respondent provided his tools. Fourthly the respondent set the rate of pay.

13. The claimant was also integrated into the respondent's business in that he was regularly called to attend meetings with managers alongside his fellow welders and fabricators who were accepted by the respondent to be "employees".

14. However, I find there was not mutuality of obligation between the parties sufficient to meet the "irreducible minimum" required for the existence of a contract of employment. It was clear from the evidence of both sides that work did not have to be offered (and the evidence showed occasions when it was not offered) and work could be refused by the claimant without a reason being provided. Following the line of

authorities referred to at paragraph 7 above, the claimant cannot therefore be an employee under s230(1) ERA.

Was the claimant a "worker" under section 230(3) ERA/reg 2(1) WTR?

15. I find the claimant satisfies the definition of 'worker' under *230(3) ERA/* reg 2(1) WTR. He was providing work for the respondent in circumstances where the respondent was not his client. In reaching this conclusion I have had regard to the distinction drawn by Lady Hale in Clyde & Co LLP and another v Bates van Winkelhof [2014] UKSC 32, between a self-employed contractor who provides services to a third party who is a client of a business or undertaking he carries on on his own account, and a self-employed contractor who provides these services as part of the respondent's undertaking. I find the claimant very clearly fitted within the second category. He was not in business on his own account; he worked only for the respondent, the respondent determined his pay: he wore the respondent's uniform and tools and he was integrated into the respondent's business. The degree of control exercised by the respondent over the claimant was inconsistent with him being a self-employed contractor in business on his own account. Though there were two occasions when work was not offered and 18-19 occasions when it was refused, in practice the claimant was regularly offered and regularly accepted work from the respondent during the period 19 December 2018 to 14 June 2019. In that period he was not working on discrete separate assignments basis but worked pretty well continuously for the respondent. In reaching my conclusion that he was a "limb (b) worker" I have had regard in particular to the guidance of the ECJ in Allonby, Clyde & Co v Bates van Winkelhof and the decision of the Supreme Court in Pimlico Plumbers and anor v Smith [2018] ICR 1511 SC.

Was the claimant employed for the purposes of section 83 EqA?

16. I find the claimant was an "employee" for the purposes of section 83(2)(a) EqA. For a certain period of time he performed services for and under the direction of the Respondent and received remuneration. He was required to perform the work personally and could not send a substitute. He did not work on an assignment by assignment basis but worked pretty well continuously. I find he was in a position of subordination to the Respondent, given the level of control exercised by the respondent, and this was not undermined by the agreement that he did not always have to accept the work that was offered. Whilst in work, the claimant was generally bound to act on the respondent's instructions. Recent case law shows that "employees" under section 83(2)(a) are the same group of self-employed people who fall within S.230(3)(b) ERA *(*Secretary of State for Justice v Windle [2016] ICR 721, CA; Pimlico Plumbers (above))*.*

17. In conclusion I find that the claimant was not an employee within the definition in s230(1) ERA. I find he was a 'worker', for the purposes of s230(3) ERA and regulation 2(1) WTR. I find he was also an "employee" in the wider sense, under section 83(2)(a) EqA.

18. As I have found the claimant was not an employee within s230 ERA, it follows that the tribunal has no jurisdiction to hear his claim for pay in lieu of notice under the Extension of Jurisdiction Order.

19. The claimant's claims for pay in lieu of untaken annual leave and his claim of discrimination under the EqA can proceed. Accordingly, directions have been made for the future conduct of this case, including the fixing of a further preliminary hearing.

Employment Judge V Jones

08 January 2021