EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Same	**v**	TWI Limited

Heard at: Bury St Edmunds **On:** 10 December 2020

Before: Employment Judge KJ Palmer

Appearances
For the Claimant: Mr D Beemah, Counsel
For the Respondent: Mr J Cook, Counsel

RESERVED JUDGMENT

Pursuant to a Preliminary Hearing

It is the Judgment of this Tribunal as follows:

1. The Claimant has pursued no claims under to the Employment Rights Act 1996.

2. The Respondent was not an employment service provider as defined at Section 55 and 56 of the Equality Act 2010 and the Claimant was not undertaking Vocational Training within the meaning of Section 56(2)(a) of the Equality Act 2010.

3. The Claimant was not an employee of the Respondent as defined at Section 83(2) of the Equality Act 2010.

The Tribunal therefore has no jurisdiction to hear the Claimant's claims in this action and they are dismissed in their entirety.

RESERVED REASONS

Background

1. This matter came before me pursuant to a Preliminary Hearing before Employment Judge M Warren on 29 June 2020. In the summary pursuant

to that Hearing Judge Warren sets out the difficulties he experienced during the course of that Hearing due to the lack of documentation before him and the difficulty the Claimant had with the Cloud Video Platform (CVP) system.

2. Pursuant to that Hearing, Judge Warren set the matter down and listed the matter for a Preliminary Hearing which is the Hearing before me today. Judge Warren set out the issues to be determined at this Hearing as follows:

   2.1 Whether the Claimant has brought any claims pursuant to the Employment Rights Act 1996, and if he has, whether he had the requisite status of an employee or worker to bring such claims;

   2.2 Whether the Respondent was an employment service provider as defined at Section 55 and 56 of the Equality Act 2010; and

   2.3 Whether the Claimant was an employee with the Respondent as defined in Section 83(2) of the Equality Act 2010.

3. I had before me the Claimant, Mr Same, who was represented by Mr Beemah of Counsel. The Respondents were represented by Mr Cook of Counsel and I also had before me Laura Murfin, Head of Legal Affairs at TWI Limited who gave evidence on behalf of the Respondent.

The Identity of the Respondent

4. The proceedings currently are against The Welding Institute who are shown as the Respondent. However, it is common ground between the parties that the name of the Respondent should be TWI Limited with whom the Claimant had entered into an agreement and against whom he pursues his claims in discrimination.

5. I therefore make an Order that the name of the Respondent be changed from 'The Welding Institute' to TWI Limited and that these proceedings are only against TWI Limited.

The Claimant's Claims

6. The Claimant has from time to time been unrepresented and in fact attended at the Preliminary Hearing before Judge Warren in person and not represented. There, during the course of these proceedings, has been some confusion as to whether the Claimant was bringing claims under the Employment Rights Act 1996 and / or claims under the Equality Act 2010. That is why Judge Warren set out as his first question, whether there were any claims ranged against the Respondent under the Employment Rights Act 1996. The reason we need clarity on this point is that the test as to whether this Tribunal has jurisdiction to hear claims from an employee is somewhat different for claims brought under the Employment Rights Act

1996 being the test under Section 230 of that Act, than the test under the Equality Act 2010 which is under Section 83(2) of that Act.

7. I am pleased to say that the parties agree, at the outset of this Hearing, that the Claimant is not pursuing any claims in these proceedings under the Employment Rights Act 1996.

8. Therefore for the purposes of deciding whether this Tribunal has jurisdiction to hear the Claimant's claims in this matter, I am only concerned with determining whether the Claimant was an employee under the definition set out at Section 83(2)(a) of the Equality Act 2010.

9. I am asked to consider whether the Claimant's arrangement entered into with the Respondent falls within the ambit of Section 56(2)(a) of the Equality Act 2010 in that it satisfies the definition of 'Vocational Training' at Section 56(6) of the Equality Act 2010.

10. I had before me a Bundle running to some 70 pages and witness statements from the Claimant and from Ms Murfin. I am also grateful to Counsel for handing out skeleton arguments which I have before me. One difficulty at the outset of this Hearing was that, as had been the case at the Preliminary Hearing, the Claimant had requested an interpreter who could speak Iranian Farsi and that interpreter had not attended at this Hearing.

11. The option was given to the Claimant to postpone this Hearing, or at least to seek a further interpreter which the Tribunal Administration informed me was proving very difficult, but after due consideration and having discussed the matter with his Counsel, the Claimant determined to proceed today in any event as his English was good if not perfect. That was his decision.

Further Preliminary Point

12. Mr Cook on behalf of the Respondent, pointed out that the second question ranged by Judge Warren, namely that relating to Sections 55 and 56 of the Equality Act 2010 and the vocational training, was something that hitherto the Claimant had not ventured. His witness statement did not deal with it and the only time it has been put is very briefly in one paragraph in the Claimant's Counsel's skeleton argument before me today. He requested that in the giving of his evidence the Claimant should not be permitted to give evidence on this point as this would be fresh evidence put before this Tribunal at the disadvantage of the Respondents. He pointed out that this Hearing had been set down some six months ago and the Claimant had had plenty of opportunity to consider the arguments under Section 55, but had not done so in a witness statement produced and exchanged only this week. He asked me to disallow any supplementary questions on this issue.

13. Mr Beemah for the Claimant, pointed out that the Claimant has been largely represented throughout this process by legal advice centres and

then on a pro-bono basis and that at points had been advised by the Citizen's Advice Bureau. In a lengthy and glowing eulogy of Mr Cook, Mr Beemah pointed out the difference in the level and quality of legal representation that the Claimant had had the opportunity of availing himself of as opposed to the Respondent. He said there had not been a quality of arms here to date.

14. I briefly considered this argument and determined that pursuant to the overriding objection Rule 1 of the Employment Tribunal Rules of Procedure 2013, it was in the interests of a fair trial to have the Claimant be allowed to give supplementary evidence on this point for the reasons Mr Beemah had set out. I therefore allow Mr Beemah to adduce such evidence from the Claimant.

15. I heard evidence from the Claimant and from Ms Murfin.

Findings of Fact

16. The Claimant was a doctoral student at Coventry University ("Coventry"). On 15 September 2016 he entered into a tripartite Studentship Agreement with Coventry and TWI Limited. That document was before me and is central to the issues I have to determine in this case.

17. The Welding Institute formally the Respondent in these proceedings, is a membership based research organisation co-ordinated and directed by a Council of up to 32 people. The Respondent is a subsidiary of The Welding Institute whose purpose is to provide advice, guidance and applied research in welding and allied technology to members of the Welding Institute and other stakeholders. The Welding Institute runs the National Structural Integrity Research Centre in collaboration with a number of Universities. The NSIRC is an industry driven education research centre for post graduate research into structural integrity. The Agreement was for a fixed period of three years to expire on 18 September 2019.

18. Matters progressed smoothly until October 2018 when the Claimant alleged that his Supervisor Mr Tyler London had subjected him to discrimination on the grounds of his race. Ultimately the Claimant presented claims to this Tribunal in this matter alleging direct race discrimination, harassment related to race and victimisation.

19. I had before me the tripartite Agreement ("the Agreement") and I am directed to certain clauses in that Agreement by those in front of me.

20. Key clauses are at Recital D of the Agreement, which set out the following terms:

> *"To enable the student to carry out a research project and submit a related thesis for examination in accordance with the University's*

Regulations governing post graduate study in fulfilment of the requirements of a Higher Degree of the University."

21. At Clause 9.2 of the Agreement, it stipulates:

"Nothing in this Agreement or in any antecedent negotiations or proposals shall create, imply or evidence any partnership or joint venture between the University or the student and TWI or the relationship between them of principle and agent or employer and employee. For the avoidance of doubt, the student will not be entitled to any remuneration and / or any benefits given to employees of TWI".

22. The Claimant's PhD Research Project was entitled "The Development of Advanced Crack Modelling Techniques for Fracture Mechanics Assessments".

23. The Claimant undertook his PhD under the academic supervision of Professor Xiang Zhang at Coventry University. The Claimant was also assigned a Supervisor, Mr Tyler London, at the Welding Institute to provide support and guidance during the time the Claimant spent working from The Welding Institute's site. The Agreement envisages that the Claimant spend 90% of his time using the facilities provided by TWI Limited, Professor Zhang retained overall supervisory oversight.

24. One of the key clauses in the Agreement is at paragraph 5; it is entitled "Contributions". It states as follows,

"5.1 During the term of this Agreement TWI shall pay to the University:

(a) against an appropriate invoice, £12,500 (exclusive of VAT) per academic year ("The Contribution") payable annually in advance to be used to support the stipend paid to the Student by the University, the University's Course fees, academic support and costs."

25. When I heard evidence from the Claimant, he confirmed that he was not paid any monies direct by the Respondent under the Agreement, but that he received a monthly sum from the University of £1,350. He used that for living expenses, rent and commuting to sites.

26. Under cross examination, the Claimant tried to suggest that he was under the control of the Respondent on a daily basis. However, I found his evidence in this respect to be unconvincing. The purpose of a PhD is for a Student to plan and conduct a Research Project. A spoon fed Student would not be undertaking a PhD in the normal sense. He accepted that there was no money paid to him directly by the Respondent and that the stipend paid by the Respondent to the University was paid annually, whereas he was paid direct by the University monthly. Mr Cook read out

Clause 9.2 to him from the Agreement to the Claimant, the Claimant argues that he was an employee.

27. The Claimant certainly had to submit monthly progress reports, but this is entirely consistent with someone undertaking a PhD.

28. In his witness statement, the Claimant sets out the rationale for the argument that TWI, the Respondent, exercised a very significant degree of control over him in respect of his working practices. He cites that he was set hours at 40 hours per week from 8:30am to 4:30pm with a specified lunch break. He said he could not attend the site over the weekend and on one occasion when he needed to work over the weekend, towards the end of May 2018 due to a fast approaching deadline, he had to seek approval from Mr Tyler London so that access could be authorised by security at the building.

29. The Claimant said he was obliged to book annual leave in advance and he could take no longer than two weeks. He said he had to submit a request for annual leave through the Human Resources software system. In his evidence he also argues that the Research he is undertaking and the completed Thesis are of significant advantage to the Respondent. It is the Respondent's case, advanced by Ms Murfin, that this is not at all unusual and not inconsistent with the way in which any PhD student progresses towards their PhD. She accepts that the Respondents benefit from the arrangement between the Student and the Respondent because under the terms of the Agreement, any new intellectual property created either by the Student or the Supervisor, must be assigned to the Respondent. She says the purpose for this is to enable such Research to be disseminated worldwide. The University in such an arrangement is granted a licence under the same intellectual property to ensure the Research can be built upon by the University. Sometimes commercial benefit will be derived from this intellectual property, but that is not the principal aim of the collaboration between the Respondent and the University in facilitating Post Graduate Research. She says that the IP arrangements are driven by the terms of the grant to the Respondent received to enable the construction of the NSIRC facility. The Department of Business Energy and Industrial Strategy Grant includes a State Aid driven Clause that obliges the Respondent to broadly disseminate the Research amongst the Research community.

30. The Respondents argue that they accept there was some degree of control, but that that was necessary in providing facilities to the Claimant.

31. The necessity to seek permission to enter the premises at the weekend would simply be something that would be normal for anyone to enter the building whether they were an employee or not and is a matter of security and health and safety.

32. I accept the Respondent's evidence in this respect. I do not see that the necessity to seek permission to enter the building at weekends to be evidence of control, merely evidence of proper security arrangements.

33. I was impressed by the evidence of Ms Murfin who clearly has much experience of these arrangements.

34. It is clear that some of the facilities used by the Claimant were provided by the University. In particular, the Claimant accepted in cross examination that contour residual stress measurements were conducted at the University. The IT used by the Claimant was also supplied by the University as well as the Respondent. I also accept that the Claimant did experiments elsewhere in the UK and that not all of these were within the control of the Respondent. He also attended an experiment in Switzerland during the course of his pursuing his PhD.

35. Where there is conflict between the evidence in front of me, I accept the evidence of the Respondent. I do not accept that the purpose of the arrangement was for the Respondent to benefit commercially from the Research done by the Claimant. There clearly was some element of control, but nothing that was inconsistent with the terms of the Agreement. Ms Murfin's evidence illustrated that the type of arrangement entered into by the Claimant was very commonplace and that there might be up to 75 on the Respondent's site at any one time conducting PhD research under the terms of an Agreement similar to the one entered into in this matter. She said that Universities all over the world follow this type of model and that Masters Degrees are also pursued in the same way.

Submissions

36. I had detailed and erudite submissions before me and I will not seek to repeat them all.

37. Mr Cook submits that there is a significant risk of over complicating the issues before me. He says that this is quite a straightforward issue. The central question is whether the Claimant was operating under a contract personally to do work. He directs me to Section 83(2) of the Equality Act 2010. This states,

> *(2) "Employment" means-*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*
> *(b) Crown employment;*
> *(c) employment as a relevant member of the House of Commons staff;*
> *(d) employment as a relevant member of the House of Lords staff.*

38. The definition of employee for the purposes of Section 83(2) is a broader definition than the equivalent definition in Section 230(1) of the ERA. Employee for Equality Act purposes can be considered broadly analogous to the definition of worker.

39. Here, the Claimant will have to show that he was operating under a contract personally to do work.

40. Mr Cook refers me to the classic definition under **Ready Mix Concrete (South East) Limited v Minister of Pensions [1968] 2QB497**, and the three key questions set out in that case:

> *"1. Did the worker agree to provide his or her own work or skill in return for remuneration?*
> *2. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?*
> *3. Were the other provisions of a contract consistent with it being a contract of service?"*

41. Case Law has expanded the factors that may be relevant. These include the extent to which the individual is subject to the control of the employer, economic realities, nature and method of payment, mutuality of obligation and ability to substitute. I am referred to

- **Mirror Group Newspapers Limited v Gunning [1986] ICR 145**; and
- **Patterson v Legal Services Commission [2004] ICR 312**.

42. I am also referred to and have taken into account

- **Patterson v Legal Services Commission [2004] ICR 312**;
- **Allonby v Accrington and Rossendale College and Ors. [2004] ICR 1328**;
- **Jivraj v Hashwani [2011] ICR 1004**;
- **Cotswold Developments Construction Limited v Williams [2006] IRLR 188**; and
- the recent high profile Tribunal case of **Varnish v British Cycling Federation t/a British Cycling and Anr. 2404219/2017**.

43. Mr Beemah also refers me to many of the same Authorities but he also asks me to consider another line of legal reasoning pursuant to what can be described as the Autoclenz principle established in the case of **Autoclenz Limited v Belcher [2011] UK SC41**, and subsequent cases which have proved that reasoning.

44. He reminds me that a Court or Tribunal is entitled to look behind the written terms of a contract where that contract does not truly reflect the arrangement between the parties. He refers me to the recent case of

Uber BV and Ors v Aslam and Ors [2019] ICR 845, where the Judiciary were highly critical of the contract written for Uber drivers. Here, the contract clearly did not reflect the true nature of the arrangement between the parties. Mr Beemah lists a series of points which he says illustrate that the truer arrangement between the parties was that in many ways the reality was identical to the reality of an individual working under a contract of service employed to work fixed hours in a laboratory type environment every Monday to Friday. He says the Agreement contains many Clauses which are either the same or similar character to Clauses that one would expect to find in a Contract of Service and he lists them. He also refers me to the NSIRC Student Handbook which lists, he says, many similar Clauses reflecting the truer arrangement between the parties.

45. He asks me to go behind the written contract and examine the reality on the ground. He also points out this is a case where there was inequality in bargaining power.

46. I am very grateful to both Counsel for the detail in which their submissions ventilate the various arguments.

Conclusions

47. Dealing first with the Agreement and whether this truly reflected the arrangement between the parties. I conclude that it does. I am only duty bound to look behind the terms of the Agreement where there is a basis for doing so. In my judgment the Agreement accurately reflects the relationship between the parties and there is therefore no reason for me to engage with the Autoclenz principle and look behind it as if it were a sham. The key Clauses in the Agreement are very defining and are those that I have set out earlier in this Judgment. The Agreement expressly states that the parties do not have a relationship of employer and employee. I entirely agree with Mr Cook's analysis that this is the starting point.

48. There is no doubt that there was some element of control, but this is reflected in the Agreement and it is not inconsistent with the principle terms of the Agreement. I consider that Mr Same attempted to 'guild the lily' in his evidence and I do not accept that he was subject to the strictures he argues to the extent which he suggests. The Agreement of its nature envisages an element of control but the true purpose of the Agreement is to facilitate Mr Same pursuing his own Research in order to enable him to succeed in the gaining of a very prestigious qualification, a PhD. Thousands of PhD students perform and operate through third parties in precisely the same way that Mr Same did. It does not make them employees.

49. It was a requirement that the Claimant undertake his Research personally. It would be odd if it were otherwise when he is seeking to obtain a PhD. I agree with Mr Cook's submission that it would be absurd if he were to be permitted to appoint a substitute to undertake his own Research Project as that would have prevented him from satisfying the academic requirements

of his PhD course. That does not mean there was an obligation to provide a personal service because he was not providing a service to the Respondents or undertaking work for the Respondents. Rather, the Respondent was supporting the Claimant to meet the requirements of his Course. I have already dealt with control, but it is the case that the Respondents accept that there were expectations as to what hours the Claimant should attend its premises. This was to ensure the Claimant made appropriate progress with his own Research so that he would successfully complete his PhD. It is not uncommon for such arrangements to be in place in such circumstances.

50. Moreover, with respect to the Policies I have been referred to by Mr Beemah, it is not unusual for there to be disciplinary policies governing Doctoral Students and I accept that it is common for Universities to have grievance and disciplinary procedures.

51. The Claimant's case is terminally holed below the waterline when one considers whether the Claimant agreed to provide work or skill in return for remuneration. Very clearly, under the terms of the Agreement, which was entirely reflected in reality and accepted by the Claimant in evidence, he was not paid any remuneration by the Respondent at all. A contribution was paid by the Respondent against an invoice raised by the University annually in advance to support the stipend paid to the Student by the University. It also supported course fees and other support costs. It was only a contribution. The amount clearly did not cover the Claimant's fees and the sums paid to him monthly by the University. It is absolutely plain on any analysis that he was not paid by the Respondent. This alone, in my judgment, is fatal to the Claimant's argument.

52. However, the Claimant fails on virtually every limb of the various tests set out in the Authorities. There was no mutuality of obligation. The Respondents had no obligation to provide work for the Claimant. An employer is required to provide work to an employee and pay the employee for that work and in return the employee must personally perform that work. At no stage were these tests satisfied in the arrangement between these parties. The Respondents supported the Claimant's PhD Project by hosting him and providing him with the facilities to undertake his Research in fulfilment of their requirements of his PhD Course. If his Research proved to be successful, a broader contribution to academic and industrial knowledge may be something from which the Respondent benefitted. There was no requirement or expectation the Claimant would contribute directly to the Respondent's business.

53. I carefully read the Authorities, but it is clear for the reasons I have set out that the Claimant has not been able to demonstrate employment for the purposes of Section 83(2) of the Equality Act 2010.

Sections 55 and 56 of the Equality Act 2010 – "Vocational Training"

54. The Claimant advances very little in this respect save to say that it is obvious that he was undertaking vocational training. I do not accept that. Mr Cook points out to me the inconsistencies in running an argument in that the Respondent was an employment service provider pursuant to s.55 and 56 and that the Claimant was undertaking vocational training alongside an argument in the Claimant's primary case that he was an employee or worker of the Respondent. Employment Judge M Warren observed in his summary of the Preliminary Hearing that he had his doubts whether someone conducting research for a PhD could be said to be in receipt of vocational training.

55. I am directed in submissions by Mr Cook to the definition of vocational training at s.56(6) and the explanatory notes. Essentially, it deals with the provision of training for employment. It is not just training, it has a specific focus of training for employment. Nowhere in the Agreement is it stated or implied that the purpose of the Agreement between the Claimant and the Respondent was vocational. The only submission I have from Mr Beemah is that it is obvious that it is. That is not an attractive argument.

56. The Claimant was pursuing a PhD which is an academic qualification like any other. There is no difference between a PhD Student, a Masters Student or an Under Graduate Student. There is no evidence before me at all that the purpose was to enter into academia or industry. There is no evidence to support the assertion that there was any vocational training. I reject that argument. The Respondent was not an ESP for the purposes of s.55 and 56 and the Claimant was not undertaking vocational training.

57. For the reasons set out above this Tribunal has no jurisdiction to entertain the Claimant's claims. They are therefore dismissed in their entirety.

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Employment Judge K J Palmer

Date: 4 March 2021

Sent to the parties on: .12th March 2021

...R Darling.....
For the Tribunal Office