EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114370/19 (V)

Held on 29 January 2021

Employment Judge J M Hendry

Mr. C Duncan	**Claimant** **In Person**
Rigmar Services Ltd	**Respondent** **Represented by** **Mr. P Singh,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal finds that the claimant was not an employee during the period from 13 May 2016 to 31 May 2018 and accordingly has insufficient service to pursue a claim for unfair dismissal which claim is dismissed on the grounds that the Tribunal does not have jurisdiction to entertain it.

REASONS

1. The claimant in his ET1 sought findings that he had been unfairly dismissed by the respondent company. The respondent argued that the Tribunal had no jurisdiction to hear the complaint of unfair dismissal on the basis that the claimant did not have sufficient qualifying service. They argued that the claimant started working with the respondent company as a self-employed worker and had insufficient service.

2. The Tribunal heard evidence from the claimant on his own behalf and from Mr Neil Lindsay his former line manager. The respondent led evidence from two witnesses namely Keith Nelson Chief Executive and Janet Brewster Director of Compliance and Risk.

3. At the close of the evidence it was agreed that Mr Singh would prepare written submissions which he would copy to the claimant allowing him an opportunity of reflecting on them before making his own submissions. This was duly done and both parties lodged written submissions.

Issues

4. The issue for the Tribunal was whether or not the claimant had sufficient qualifying service and whether he had started working with the respondent company in the capacity of worker or employee. This meant investigating the claimant's actual status whether worker or employee during the initial period when he first began working for the company.

Facts

The Tribunal made the following findings in fact:

5. The claimant Mr Charles Duncan has had a varied career since leaving school. Latterly, and for some years he had worked in the oil industry. He had experience both as working as a contractor and employee. The claimant has an aptitude for repairing machinery particularly heavy machinery. He had worked on diving machinery and worked worldwide in the offshore oil industry in this role. He became tired of travelling between assignments and left that occupation. He then worked for a couple of months as a delivery driver with a friend's butchery business until early May 2016.

6. The respondent is based in Altens Industrial Estate in Aberdeen provides various services to the oil and gas industry but also to other industrial sectors. They employ about 24 employees there.

7. In early 2016 the claimant was contacted by Keith Nelson the respondent's CEO who he had known previously about some work the respondent needed to machinery at their yard. This involved the repair of a large HPU spooling machine used in the oil industry. The claimant attended the premises, repaired the machine, ran and tested it.

8. Mr Nelson was impressed with the claimant's work. He explained to him that there were other pieces of equipment he could repair for them. The discussion turned to the claimant working for the respondent. An hourly rate was agreed at £25 per hour. The claimant lives in Turriff some distance from the site and wanted to start work early and leave before 5 o'clock in order to miss the worst of the traffic congestion causes by workers leaving Aberdeen. The claimant asked if he could work from 7am until 4pm.The usual hours for employees were 8am until 5pm. This was agreed. Thereafter, he worked regularly 7am until 4pm for five days per week.

9. The claimant was paid his wages net after deduction of Income Tax and National Insurance.

10. When the claimant started work with the respondent he was not put through the usual induction process for employees. He was given an induction process for contract workers by Ms. Janet Brewster. Ms Brewster was the Director for Compliance and Risk and was responsible for the induction of new staff. She oversaw risk management, health and safety and human resource management.

11. The claimant's first day working was 13 May 2016. Ms Brewster met him that day having received instructions to do so from Mr Nelson. She completed a Temporary Workers' Agreement (JB16). The agreement was signed by the claimant on 17 May. He was given the title "Maintenance Supervisor".

12. The Agreement made was as follows:

"***1 Status of this Agreement***

1.1 This contract governs your engagement from time to time by Rigmar Services (Company as a temporary worker. This is not an employment contract and does not confer any employment rights on you (other than those to which workers are entitled). In particular, it does not create any obligation on the Company to provide work to you and by entering into this contract you confirm your understanding that the Company makes no promise or guarantee of a minimum level of work to you and you will work on a flexible, "as required" basis. It is the intention of both you and the Company that there be no mutuality of obligation between the parties at any time when you are not performing an assignment.

1.2 *It is entirely at the Company's discretion whether to offer you work and it is under no obligation to provide work to you at any time. The Company reserves the right to give or not give work to any person at any time and is under no obligation to give any reasons for such decisions.*

1.3 *Each offer of work by the Company which you accept shall be treated as an entirely separate and severable engagement (an assignment). The terms of this contract shall apply to each assignment but there shall be no relationship between the parties after the end of one assignment and before the start of any subsequent assignment.*

1.4 *The fact that the Company has offered you work, or offers you work more than once, shall not confer any legal rights on you and, in particular, should not be regarded as establishing an entitlement to regular work or conferring continuity of employment.*

5 Hours of work

5.1 Your hours of work will vary depending on the operational requirements of the Company. You will be informed of the required hours for each assignment.

5.2 This assignment may involve working during evenings, weekends and bank or public holidays depending upon the needs of the business.

7 Pay

7.1 Payment of such fees is subject to the Temporary Worker receiving approval from the Company for all hours worked and documented on timesheets.

7.2 A percentage of 12.07% of your hourly fee is specifically allocated for the purposes of holiday pay, which will amount to a payment of £20.00 inclusive of your hourly fee. Therefore you will not receive any additional holiday pay over and above this when utilising annual leave.

7.3 These fees will be subject to statutory deductions for National Insurance and income tax in accordance with current legislation. You will be paid in arrears by BACS.

8 Holidays

8.1 Your holiday entitlement will depend on the number of hours that you actually work and be pro-rated on the basis of a full-time entitlement of 28 days' holiday during each full holiday year. The Company's holiday year runs between January and December."

13. A further Agreement in the same terms was executed on the 5 September 2016. The Agreements were for indefinite periods.

14. A couple of weeks after the claimant began work with the company he was given use of a Transit van to and from work. This was necessary because he used his own tools as the tools available in the yard were limited and he transported them to the yard in Altens. This arrangement ceased shortly afterwards because of the tax implications for the claimant having the use of a company vehicle and he reverted to using his own. He continued to use his own tools throughout his period of working for the respondent.

15. Because of the ongoing downturn in the oil and gas industry the respondent and other companies in the group were required to make redundancies between October 2015 and mid 2016.

16. On 1 September 2016 employees were issued with new contracts of employment reflecting new less favourable terms and conditions. At this point after a discussion with Mr Nelson the claimant's hourly rate was cut from £25 to £20. He reluctantly accepted the cut. The claimant was shown a draft contract of employment (JB20) at this time. The claimant did not sign the contract. It provided for the claimant to receive an annual salary of £35,000 per year. Shortly after the claimant started work in 2016 he was given a key fob, security codes and allowed access to the yard as he was one of the first

to arrive in the morning. His name was also shown on the office "swipe board" where people working on site were recorded for health and safety purposes.

17. The respondent company wanted the claimant to become an employee as they intended doing more work that would entail the need for repairs to heavy machinery. It was hoped that the claimant would stay with them for that purpose and they were keen to have him as an employee.

18. The claimant was regarded an as employee by other workers and management other than Mr Nelson and Mrs Brewster.

19. The claimant was put on a forklift truck conversion course in January 2017 by the respondent. The course was run for employees. It was a 'block booking'. The respondent put the claimant on the course as he had periodically assisted with other work in and around the yard and having this training would allow him to use the forklift trucks there.

20. Ms Brewster periodically asked Mr Nelson asked if the claimant had joined as an employee. She was advised that the claimant was steadfast in refusing employment status. Another contract of employment was prepared for his consideration in June 2017 (JB19) with an annual salary of £40,000. He rejected this.

21. On the 31 May 2018 the claimant signed a contract of employment at a salary of £45,000 (JB15). It gave the 1 June 2018 as his commencement date as an employee. At this point the claimant was required to go through the induction process applicable to employees. This included a medical assessment. The claimant was also required to enter into a training agreement which provided that if he left he would have to pay a percentage of the training costs. The contract provided that he would be entitled to overtime and to a discretionary bonus.

22. On one occasion the claimant was off work sick for three weeks in May 2018. He was not paid sick pay. He did not query the non-payment of sick pay. The respondent claimed that the claimant as a worker was paid holiday pay 'rolled up'' in his pay.

23. The Claimant also worked for less than 40 hours per week on the following weeks:

a. 10th June 2016 (39 hours)
b. 19th August 2016 (32 hours)
c. 2nd September 2016 (29 hours)
d. 9th September 2016 (32 hours)
e. 7th October 2016 (32 hours)
f. 30th December 2016 (32 hours)
g. 6th January 2017 (14 hours)
h. 13th January 2017 (24 hours)
i. 3rd March 2017 (32 hours)
j. 28th April 2017 (28 hours)
k. 3rd November 2017 (32 hours)
l. 10th November 2017 (12 hours)
m. 23rd February 2018 (32 hours)
n. 13th April 2018 (30 hours)

Witnesses

24. The Claimant was generally a credible and reliable witness but had some difficulty recalling exact events around how he came to work for the company. I found it difficult to accept his evidence that he had not read the contracts sent to him or was aware that the respondent wanted to regularise his position by getting him to sign an employment contract.

25. Mr Lindsay gave straightforward evidence which I believed was both credible and reliable. I concluded that Ms Brewster in particular had a better recollection of events no doubt because her role was to oversee the

contractual 'paperwork' and training. She appeared to be a credible and reliable witness whose evidence I preferred when in conflict with that of the claimant. Mr Nelson was a confident witness who recollected some of the interactions he had with the claimant before he started working for the company. He was generally credible and reliable as a witness but I did not accept his evidence that the claimant was reluctant to join the company because he had other interests at that point. I suspect that was speculation on his part. I also preferred the claimant's evidence when he alleged that set hours were agreed with Mr Nelson who denied this in his evidence. The claimant's position on this point was bolstered by the efforts the respondent company made to keep the claimant working during the agreed weekly hours despite at points a lack of heavy machinery for him to repair asking him for example to help generally in the yard with various duties.

Submissions

26. Mr Singh reviewed the authorities I should have regard to starting with the case of **Ready Mix Concrete v Minister of Pensions and National Insurance [1968]** ***2 QB 497, 515C,*** which he submitted established the "multiple test" and set down the authority that a contract of employment requires:

- Personal service – an agreement exists to provide the servant's own work or skill in the performance of service for the master in return for a wage or remuneration.
- Control – in the performance of the services, the master has a sufficient degree of control over the servant; and
- Other provisions that are consistent with a contract of service, known as "other factors".

27. These factors were he said the "*irreducible minimum*" and approved in ***Autoclenz Limited v Belcher & Others 2011 UKSC 41***. At para.19, Lord Justice Clarke quoted Stephenson LJ in ***Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612****,* in stating that there must also be "*an irreducible*

minimum of obligation on each side to create a contract of service". In ***Carmichael*** the House of Lords held that mutuality of obligation was an irreducible minimum for employment, such that without it the person was not an employee. All elements of this test must be present for employment status to be obtained.

28. Mr. Singh then submitted that before it can be established whether the claimant is a worker or an employee it is necessary to first examine the contract as a whole between the parties and whether it is a sham.

29. The Supreme Court established in ***Autoclenz*** that a Tribunal is entitled to look at the true agreement between the parties. In addition, the Court of Appeal in ***Carmichael*** held that, in establishing the terms of agreement between the parties, the Tribunal should be able to look outside the terms of the contract to the overall factual matrix. It was the respondent's position that the Temporary Worker Agreements signed by the claimant on 17th May 2016 and subsequently on 5th September 2016 were intended by both parties to be the exclusive record of the terms of their agreement, until the parties chose to change this relationship and entered into an employment relationship on 1st June 2018. The Tribunal had heard Ms Brewster's evidence that these Agreements were issued to the claimant following his refusal to accept an offer of employment. The Tribunal had also heard that Mr. Nelson sought to bring the claimant on as an employee, but he made a conscious decision to reject this opportunity on a number of occasions.

30. The claimant had made the conscious decision to reject an offer of employment at £35 000 per annum and then £40 000 per annum. When offered an annual salary in excess of what he believed he was earning as a worker, he finally relented and accepted the contract of employment, at £45 000 per annum.

31. The respondent believed that the written agreement was not a "sham". Taking into consideration the case of ***Protectacoat v Szilagyi [2009] EWCA***

Civ. 98, it was the respondent's position that the contractual documentation did reflect the reality of the relationship in practice, and the intentions of the parties. There was no intention by the respondent to mislead the claimant or create a "sham" contract. Nor can the claimant be said not to have understood the terms of the agreements he entered into. Not only did the claimant sign and return his Temporary Worker Agreements, he embraced the specific nature of this engagement and was aware that he was not required to adhere to a standard 40 hour working week. In the current case he focussed on the requirement for mutuality of obligations arguing that the Agreements provided no obligation to provide or take work and that the fats supported this. The claimant had taken days off and shown by the Payslips. This inferred that he was aware that he was not required to work. Mr Singh asked me to prefer the evidence of Mr Nelson that no hours of work were discussed and agreed at their initial meeting.

32. The respondent's position was that there were insufficient elements showing an employer/employee relationship and that the Tribunal should place considerable weight on the signed Temporary Workers Agreements which reflected the contractual reality of the relationship.

33. The claimant also lodged written submissions. His position was that the facts showed that he was en employee. He pointed to the lack of mobilisation forms (common in the Industry) when someone is sent on an assignment. His position was that from the outset he was an employee working regular hours.

34. He put his position froward that we were arguing over what Rigmar intended based on bits of paper they had produced. His position was that the respondent knew what they were trying to do. They had put forward a paper argument, based on what they intended by different bits of paper that they controlled. The claimant reiterated that he worked best with tools and was not ''the best with paperwork''. He had signed what he had been given and handed it back. He did not ever read it or got a lawyer to look it over. That was not him being evasive. His position was that the respondent had been

evasive and that he had to fight for his notice pay. They had been reluctant to give him paperwork since the case started.

35. He explained that when he had started paid work on 13 May 2016 he did not know then how long it would last or when it would end. The pay records show that other than a short period of sickness he worked continuously between 13th May 2016 to 15th November 2019.There was nothing casual about the matter as it all went "through the books." His first wage went into his account on the 3rd of June 2016 with tax and NIC deducted. It was the same when he was finished in November 2019.

Discussion and Decision

36. The Employment Rights Act 1996 ("ERA"), section 230(1) contains the definition of an employee as being: "*an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment*".

37. Under section 230(2) of the ERA, 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*".

38. Worker status is defined by section 230(3) ERA as:

"*an individual who has entered into or works under (or where employment has ceased, worked under):*

(a) A contract of employment; or

(b) *Any other contract whether express or implied and (if it express) whether oral or in writing, whereby the individual undertakes to do or personally perform any work or services for another party to the contract whose status is by virtue of the contract that or a client or customer of any profession or business undertaking carried on by that individual*."

39. It was the respondent's position that from 13 May 2016 until 31 May 2018, the claimant was engaged as a worker and not an employee. As Mr Singh pointed out case law has established that this issue of employment status is

a question of both fact and a question of law (**Carmichael v National Power Plc *[1999] 1 W.L.R. 2042***.)

40. I was referred to the well-known case of **Ready Mix Concrete v Minister of Pensions and National Insurance [1968] *2 QB 497, 515C,*** as authority for a contract of employment top provide certain essential elements such as personal service and other provisions that are consistent with a contract of service, known as "other factors".

41. I was referred to the case of **Nethermere (St Neots) Ltd v Gardiner** [1984] IRLR 240. In that case, the Court of Appeal in England said as follows:

> *"21. Of (iii) the learned judge proceeded to give some valuable examples, none on all fours with this case. I do not quote what he says of (i) and (ii) except as to mutual obligations: "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill." … 38. … The inescapable requirement concerning the alleged employees however - as Mr Jones expressly conceded before this court - is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer. If not then no question of any 'umbrella' contract can arise at all, let alone its possible classification as a contract of employment or of service. The issue is therefore whether the Tribunal's findings and conclusions show that they took account of this essential requirement."* This "*irreducible minimum*" and was approved in the **Autoclenz Limited v Belcher & Others** 2011 UKSC 41."

42. I accepted the submission that in determining whether an individual is an employee or a worker, it is necessary to first look at the contract as a whole to determine the weight to be placed on the agreed terms, written or otherwise. As established in **Autoclenz** a Tribunal is entitled to look at the true agreement between the parties. To do this the Tribunal has to construct the overall factual matrix (**Carmichael*)***. There are various elements that a tribunal will consider, some vary in importance from case to case, and some are essential.

43. The Temporary Worker Agreements signed by the claimant on two occasions (17 May 2016 and 5 September 2016) provide that they are intended to be the exclusive record of the terms of their agreement. The Tribunal heard evidence from Ms Brewster's that these agreements were issued to the claimant following his refusal to accept an offer of employment. It is an important requirement that for there to be an employer/employee relationship there must be mutuality of obligation. The Agreements make clear that there is no obligation on the employer to provide work (although in practice they kept the claimant busy) and no obligation on the claimant to accept work.

44. The claimant's position, which I found difficult to accept was that he had not read them. He is experienced in the oil industry and the difference between being an employee and 'on the books' rather than a self-employed contractor/worker is well known and he must have come across this distinction before. I noted that he initially approached the company seeking sick pay but seems to have accepted he was not due sick pay. The claimant is an experienced and resourceful man and I am sure that he would have formally raised the issue of sick pay with his employer had he not accepted the position at the time. Similarly, in relation to paid holidays the undisputed evidence was that the claimant was paid 'rolled up' holiday pay which is common in relation to workers.

45. The irony in this case is that Mr. Nelson sought to bring the claimant into the company as an employee after he had repaired the first piece of machinery, but that the claimant seems to have made a conscious decision to reject this approach at this point and later. Mr Nelson speculated that this was to allow him to work more flexibly around his possible desire to carry out lucrative offshore work as and when the opportunity arose without being bound to the respondent. There was no evidence that this was the case. The claimant worked regularly and without break to the arrangement. The claimant's position was that from the outset he was an employee which leads to the

question then why did he sign the two Agreements and not confirm that his understanding was that he was an employee.

46. The claimant seems to have been conscious that he was earning £41,600 per annum as a worker (based on the agreed £25 per hour). It is the respondent's submission, that he made the conscious decision to reject an offer of employment which the papers show was at £35 000 per annum and then an offer at £40,000 per annum. When offered an annual salary in excess of what he believed he was earning as a worker, he finally relented and accepted the contract of employment he was latterly governed by, at £45 000 per annum.

47. The respondent also submitted that the written agreement between the respondent and the claimant was not a "sham" and should govern the relationship (***Protectacoat v Szilagyi [2009] EWCA Civ. 98***) as the respondent's position that the contractual documentation did reflect the reality of the relationship in practice, and the intentions of the parties. I accept that there was no intention by the respondent to mislead the claimant or create a "sham" contract. The arrangement made and how it was carried out in practice can amount to a worker relationship although in some respects it is close to that of an employee/employer relationship.

48. The claimant was not required to work the agreed hours but did so. It was clear that the respondent tried to keep the claimant occupied and they did so in the hope that the claimant would stay and not look for other work if his income dropped and in the hope he would finally accept employee status. Although he was integrated into the company and had to provide personal service there were some elements of the relationship pointing away from an employee/employer relationship. He used his own tools and had a large degree of autonomy. The respondent relied on his expertise in the way he approached repairing machinery. He was not paid sick pay. He was paid his

holiday entitlement as ‘‘rolled up’’ pay. In addition, he refused employee status and signed the agreements that certify his status as that of a worker.

49. It was argued that the claimant did not adhere to a standard 40 hour working week. The claimant’s adherence to working 40 hours per week seems to be generally the rule rather than the exception. Reference was made to payslips which showed significantly less hours were worked in some weeks. The claimant’s assertion was that these were times when he asked to be allowed to leave early and was not paid for the hours not worked. Unpaid leave is often a feature of an employment relationship. Unfortunately, there was no evidence other than the payslips themselves that might shed light on the arrangements being made and parties’ understanding of their respective rights. However, looking at the matter in the round the claimant did not work his full hours on a significant number of occasions and while I do not put too much weight on this matter on its own it is suggestive of a situation where both parties accept that the claimant can effectively refuse to work certain days or periods. The fact that as a courtesy these periods were discussed and agreed and does not alter the position. If the claimant was an employee one would expect that he would have been asked to take holidays and his holiday pay adjusted accordingly.

50. I was referred to the case of ***Byrne Brothers (Formwork) Ltd v Baird and others UKEAT/542/01***, in which the Judge at paragraph 17(5) commented that the effect of the definition of “worker” is to “*lower the pass mark*” so that those who fail to reach the high pass mark necessary to qualify as an employee may still qualify as a worker. I accept that during the period in question the claimant was undoubtedly a worker in terms of section 230(3)(b) of the ERA, and not an employee.

51. In conclusion, the claimant cannot argue that he did not understand the terms of the agreement he entered into. As noted he is someone experienced in the oil industry and aware of contractor status. If he had thought he was an

employee then he would have challenged the necessity of completing these two agreements. He would have challenged the non- payment of sick pay and the 'rolled up' holiday pay. He would not have refused to sign employment contracts. The Temporary Workers Agreements agreement can be said to accurately reflect the nature of the claimant's engagement between May 2016 and May 2018. The consequence is that the claimant has insufficient qualifying service to maintain a claim for unfair dismissal and that claim is dismissed. Any remaining claims will proceed to a hearing unless resolved.

Employment Judge Hendry

Dated: 3 March 2021

Date sent to parties: 3 March 2021