CASE NO: 2601299/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: Mr P Horton
Respondent: Plastic Omnium Automotive Ltd

Heard at: Nottingham
On: 1, 2 and 3 March 2021
Before: Employment Judge Blackwell (sitting alone)

Representation
Claimant: Ms C Jennings of Counsel
Respondent: Mr C Khan of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

The decision of the Tribunal is as follows:-

1. The Claimant is not an employee within the meaning of section 230(1) of the Employment Rights Act 1996 (the 1996 Act).

2. The Claimant is a worker within the meaning of section 230(3) of the 1996 Act.

3. Neither the contract between the parties nor its performance was illegal.

4. By consent, the Respondent will pay to the Claimant in respect of his unlawful deduction from wages claims, the sum of £28,500.00.

REASONS

1. Ms Jennings ably represented Mr Horton, who she called to give evidence together with Mr Griffiths, a former colleague. Mr Khan ably represented the Respondent (hereinafter called PO). He called:

- Mr C Oldham, Mr Horton's former Line Manager
- Mr Cantrill, a Programme Director who succeeded Mr Oldham
- Mr Hands, a Platform Programme Manager
- Ms Thomas, Engineering Support
- Mr Cracknell, an Engineering Manager
- Ms C A Latham, a Receptionist.

There was an agreed bundle and references are to page numbers in that bundle. I am grateful to both Counsel, both for their conduct of the case and their helpful submissions.

2. The issues I have to determine are firstly was Mr Horton an employee of PO within the meaning of section 230(1) of the 1996 Act. In the alternative, if he was not, was Mr Horton a worker within the meaning of section 230(3) of the 1996 Act. The third issue is set out in Employment Judge Clark's case summary as follows:-

> "*… The first is that if the claimant is found to be an employee or worker, that the claimant has dishonestly misrepresented to the respondent and HMRC his independent contractor status for which the claim should be struck out on public policy grounds. Secondly, and alternatively , if the claim of unfair dismissal succeeds, it would not be just and equitable to award any compensation. …*"

3. Obviously, the second limb of that paragraph falls away because Mr Horton cannot pursue a claim of unfair dismissal.

4. There is a set of agreed findings of fact which I will not repeat, save to say that I would add to paragraph 2 at the end "at the request of PO" and in paragraph 7, I would add at the end "because his relationship with Wendy Cotton had broken down" and then at the end of paragraph 13, I would add "Wendy Cotton had 49% shareholding and drew both dividends and a salary. The Claimant says that that was a tax efficient arrangement."

Further findings of fact

5. PO is a large employer being the UK's subsidiary of a French owned multi-national automotive components manufacturing group. Throughout Mr Horton's tenure, he worked on projects for the Jaguar Landrover Group. In relation to Mr Horton, I accept the following, that on his first day he was introduced and treated in exactly the same manner as Owen Tucker, the newly employed Programme Manager.

6. He was provided with:

   (a) a pass, a laptop and desk with the team outside of Mr Oldham's office, a direct dial, an email address and an email signature.

   (b) He reported to Mr Oldham in the same way as all other programme

managers, whether employed or not.

(c) As Mr Oldham accepted, Mr Horton only had to sign in and out at sites which were not his base or usual place of work (Measham then Tamworth). This was the same for all employees.

(d) He worked regular hours Monday to Friday each week.

(e) In terms of home working, Mr Oldham's evidence was that when the Claimant was based more in Warrington, he requested to work from home and this was authorised by Mr Oldham but that appears to have changed once Mr Oldham departed in 2017 and I accept that Mr Horton worked more from home thereafter.

(f) He had attended training days paid for by the Respondent alongside the Respondent's employees and he was paid his usual daily fee for attendance.

(g) His holiday reflected the time employees had off, some 25 days. Mr Oldham conceded that the Claimant requested the same and I accept that that was normally the case, although there were occasions when, as did employees, Mr Horton forgot to request leave.

(h) He liaised with the Respondent's client, Jaguar Landrover, on the Respondent's behalf and there was no difference in the way he worked as compared to employed programme managers. He had the same level of autonomy.

(i) He represented the Respondent in China and was tasked with developing the Respondent's relationship with Yanfeng Automotive.

7. Thus, he was broadly treated in the same way as all other programme managers. The only differences in respect of his treatment as compared to employed programme managers was that he did not have to clock in and out and he was not appraised on an annual basis or indeed on any basis nor was he subjected to any disciplinary procedure.

8. He also performed the role on a temporary basis as the Engineering Manager at Warrington and, to all intents and purposes, he acted in that role as would have an employee.

Issue number 1- Was Mr Horton an employee within the meaning of section 230(1)?

9. I adopt with gratitude Ms Jennings paragraphs 1 to 6 of her closing submissions and I note that Mr Khan also adopts those submissions.

10. In the bundle at page 41 we see a letter from ProMan Design Ltd, the Company set up by Mr Horton at the request of PO enclosing at page 42 a document headed "CONTRACTOR ASSIGNMENT CONFIRMATION DETAILS HEREIN

THERAFTER(sic)" and then at pages 43 to 45, a contract as between ProMan Design and PO. Of particular note is clause 2.3 at page 43 which reads:

> "*2.3 For the avoidance of doubt these terms shall not be construed as a contract between any individual supplied or any representative of the contactor and any of the liabilities of an employer arising out of the assignment shall be the liabilities of the contractor.*"

11. At clause 4.2 on page 44, reads:

> "*Subject to any agreement by the parties to the contrary the Contractor shall not be entitled to receive payment from the Client for time not spent on Assignment whether in respect of holidays, illness or absence for any other reason*."

12. In relation to ProMan Design, Miss Cotton (who was at that time Mr Horton's partner) was a 49% shareholder and she drew both a salary and dividends. Mr Horton's evidence was that Miss Cotton provided both business ideas and also did some administrative work.

13. Late in 2015/early 2016, I find as a fact that Mr Oldham, on the instructions of his Managing Director, approached Mr Horton to see whether Mr Horton would consider becoming an employee. Mr Oldham's evidence, which I accept, was that he set out the typical main terms and conditions, ie a salary of £65,000 to £75,000 per annum, plus a bonus, plus a car allowance, plus a contribution to pensions. Mr Horton denies that any such details were put to him. Mr Oldham goes on to assert that Mr Horton was not interested in that offer. Mr Horton denies that. I prefer Mr Oldham's evidence; he was a candid and credible witness. Mr Horton on the other hand was often evasive. It is simply not credible that on being approached by Mr Oldham, that Mr Horton would not have asked for the main terms and conditions. I therefore accept that at that point Mr Horton was satisfied that the arrangement that he then had was beneficial to him.

14. On 10 January 2018, the agreement was reviewed by the parties; by Mr Cantrill on behalf of PO, Mr Cantrill having succeeded Mr Oldham, Mr Horton sent at pages 119 and 120 simply the equivalent of page 41. There was no suggestion from Mr Horton at that meeting that the agreement did not reflect the true relationship between the parties.

15. Later in 2018 after the breakdown of his relationship with Miss Cotton, Mr Horton formed a second company, ProMan 1, which then invoiced the PO in the same way as its predecessor had.

16. On being given notice of termination of the agreement orally by Mr Hands on or around 9 October 2019, there was an exchange of emails which we see at pages 143 and 144. It is clear from that exchange that Mr Horton was relying on the terms of the agreement, albeit that he had provided a first draft which did not reflect the terms of the agreement.

17. Those then are the relevant facts taken with both the agreed facts and the further finding of facts.

Submissions

18. Ms Jennings submits that Mr Horton was fully integrated into PO's business for more than 8 years. That I accept. Cleary, he was also under the control of PO through either Mr Oldham or, latterly, Mr Cantrill. Clearly also, there was mutuality of obligation and Mr Khan does not dispute those matters in his submissions. Mr Khan relies on the case of ***Calder v Kitson Vickers Ltd*** , the Judgment of Lord Justice Ralph Gibson in which he said:

> "*It is trite law that the parties cannot by agreement fix the status of their relationship, that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship and in a case where the position is uncertain it can be decisive.*"

19. Mr Khan also submits that there was no contractual relationship as between Mr Horton and PO though it seems to me that that rather avoids the real issue. After the decision in ***Calder v Kitson Vickers Ltd***, of course came the Supreme Court's decision in the well-known case of ***Autoclenz v Belcher & others [2011] IRLR beginning at 820***. A short extract from the headnote reads as follows:

> "*The question in every case is what is the true agreement between the parties; the approach of the EAT in **Kalwak** and of the Court of Appeal in **Szilagyi** is to be preferred to that of the Court of Appeal in **Kalwak**.*"

It goes on:

> "*Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other. Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations …*"

20. The two first elements set out in the case of ***Ready Mix*** are present, ie sufficient control and mutuality of obligation. However, it seems to me that the agreement of 2011 does reflect the true agreement between the parties. It was clearly regarded by Mr Horton as beneficial and both parties complied with its terms

throughout. That agreement is also plainly inconsistent with there being a contract of employment as between Mr Horton and PO.

21. I therefore find that Mr Horton was not an employee of the PO.

The second issue

22. Was Mr Horton a worker within the meaning of section 230(3)? Mr Khan accepted that Mr Horton worked under an express contract to perform work personally for PO.

23. The issue here is whether PO was client or customer of the business or undertaking of the ProMan Companies/Mr Horton? The relevant facts are of course set out above but, in addition, as follows.

    (a) The ProMan Companies supplied Mr Horton to PO over a period of more than 8 years.

    (b) It supplied the services of a Mr D Beckett but that was at the request of PO and was merely a vehicle to enable that relationship to exist.

    (c) Apart from Mr Horton mentioning to Mr Cantrill on 10 January 2018 that he could supply further contractors, there was no other activity.

    (d) Mr Horton denied that conversation but I prefer the evidence of Mr Cantrill.

    (e) Mr Horton worked exclusively for PO for the whole of the relevant period.

24. As to the law, Ms Jennings relies on the EAT case of ***Byrnes Bros (Formwork) Ltd v Baird and others [2002] ICR 667***. The relevant paragraph is set out at paragraph 71 of the ***Uber*** decision, to which both Counsel referred me. It reads as follows:

> "*The policy behind the inclusion of limb (b) ... can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the*

other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects"

25. Ms Jennings also relies at her paragraph 26 on the words of Langstaff J in the case of ***Cotswold Developments Construction Ltd*** as follows:-

"*… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls*"

26. Turning back also to ***Uber***, as Ms Jennings correctly submits one does not have to be a valeter of cars or a driver of taxis to have the benefit of the protection of worker status. Again, quoting from ***Uber*** at paragraph 38 as follows:-

38. The effect of these definitions, as Baroness Hale of Richmond observed in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014] 1 WLR 2047, paras 25 and 31, is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. …".

27. The ***Bates van Winkelhof*** case concerned a solicitor and she was held to be entitled to the protection of worker status. Again, from ***Uber*** at paragraph 73 as follows:-

"73. In Hashwani v Jivraj [2011] UKSC 40; [2011] 1 WLR 1872 the Supreme Court followed this approach in holding that an arbitrator was not a person employed under "a contract personally to do any work" for the purpose of legislation prohibiting discrimination on the grounds of religion or belief. Lord Clarke, with whom the other members of the court agreed, identified (at para 34) the essential questions underlying the distinction between workers and independent contractors outside the scope of the legislation as being:

> *"whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."*

28. Mr Khan's submissions are set out at his paragraph 14 b. c. and d. which read as follows:-

> "*b. However, in matter of fact, each of the ProMan companies was undoubtedly a "business undertaking carried on by" C.*
>
> *c. Further, R was undoubtedly a ProMan "client or customer". That is exemplified by: (i) the express terms of contract at page 43; (ii) the c.200 invoices they submitted to R [165 – 167]; and (iii) their internal company accounts (about which the Tribunal can draw the obvious inference).*
>
> *d. Further, the factors at paras. 13a – e. above point away from worker status being the answer. In particular, the Tribunal would have to override cl.4.2 of the express terms at page 43, even though this was a premise of the original bargain.*"

29. I am reluctantly drawn to the conclusion that Ms Jennings' submissions are to be preferred because Mr Horton was clearly subordinate and dependent. I accept that his bargaining power was a good deal higher than those of the valeters in ***Autoclenz***, the drivers in ***Uber*** or the construction workers in ***Byrne***. Nonetheless, he remained in a subordinate or dependant position in regard to PO. I am particularly persuaded by the quotation from Langstaff J's Judgment in the ***Cotswold*** case. I therefore come to the conclusion that Mr Horton is a worker within the meaning of section 230(3). I say reluctantly because that leads to the conclusion that Mr Horton can pursue a claim for holiday pay that, on his own evidence, he accepts was already factored into his daily fee payable under the agreement.

The third issue illegality

30. It seems to me that both parties' submissions in regard to illegality are predicated on a finding that Mr Horton was an employee but in fact that is not the case – I have found him not to be an employee but to be a worker. There are the agreed facts at paragraph 13 and it is also common ground that Mr Horton made tax returns to HMRC on the basis of being self-employed. Ms Jennings helpfully referred me to the most recent authority on the point; a decision of the Court of Appeal in the case of ***Enfield Technical Services Ltd v Payne [2008] IRLR at page 500***. An extract from the headnote reads as follows:-

> "*A contract of employment may be unlawfully performed if there are misrepresentations, express or implied, as to the facts. An obvious example occurs when what is in fact taxable salary is claimed to be non-taxable expenses. That is, however, distinguishable from an error of categorisation unaccompanied by such false representations, even if the employee had claimed the advantages of self-employment before the dispute arose. There are limits to that principle and the circumstances in which a miscategorising is made may amount to misrepresentation and bad faith which would deprive the employee of the right subsequently to claim the benefits of employment….*"

31. In my judgement, there is neither a miscategorisation nor is there any false

representation. As I have said, Mr Horton made tax returns on the basis of being self-employed and though I am no tax expert, it seems to me that that was probably correct.

32. Further, the PO have throughout understood that they were acting under the agreement of January 2011 and there is no evidence at any stage that Mr Horton represented to them otherwise. Thus, I find that the contract itself was not illegal nor was its performance therefore there is no cause to intervene on the grounds of public policy.

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Employment Judge Blackwell

Date: 8 April 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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