



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Nottage

NEC (UK) Limited

PRELIMINARY HEARING

Heard by CVP

On: 8 June 2021

Before Employment Judge Manley

Appearances

For the Claimant: Mr P Tapsell, counsel

For the Respondent: Ms L Banerjee, counsel

RESERVED JUDGMENT

1. The claimant was neither an employee under the definition in the Employment Rights Act 1996 nor in employment under the definition in the Equality Act 2010.
2. The claims for unfair dismissal and/or age and/or disability discrimination must therefore be dismissed as the tribunal has no jurisdiction to hear them.

REASONS

Introduction

1. By a claim form presented on 1 July 2020 the claimant brought claims for unfair dismissal and age and disability discrimination.
2. In its response, the respondent said that the claimant was neither an employee for the unfair dismissal claim, nor employed for the discrimination claims. The matter was listed for a preliminary hearing to be held on 19 April to consider the question of the claimant's employment status. The matter was listed for three hours but when we met on that date it was clear to everyone that it was not capable of being completed within that time; there being two witnesses for the respondent and the claimant's own evidence. We therefore undertook some

case management so that the matter could be fully completed on the new listing of 8 June 2021.

The issues

3. The issues for the tribunal are whether the claimant can show he was an employee under the definition in section 230 Employment Rights Act 1996 (ERA) and/or whether he meets the definition of employment under section 83 Equality Act 2010 (EQA). It appeared there might also be an issue whether section 41 EQA, which provides protection for contract workers, applies in this case.
4. Although the notification of the hearing suggested that there might be a question about whether the claimant was a “*worker*” under section 230 ERA, he has no claims for which that definition is relevant.
5. The respondent’s case is that the claimant was self-employed and engaged by it through a limited company as an independent contractor.

The hearing

6. In preparation for the hearing the parties sent various documents, as agreed at the earlier hearing. There were two witness statements for the respondent, one from Mr Woolger, who is a Programme Director and who worked most closely with the claimant, and the other from Ms de Sa, who is Head of HR for the respondent.
7. The claimant had already sent a witness statement before the date of the first hearing and he provided a supplementary statement as agreed. There was also an electronic bundle of documents that had been available at the first hearing and a couple of pages were added to that. The bundle extended to about 460 pages. As agreed with the representatives, both parties sent written submissions before the hearing so that I could carry out some pre-reading before the case started.
8. The claimant was cross examined first, followed by Mr Woolger and Ms de Sa. Both representatives then added to their written submissions orally. I decided the matter needed some reflection and informed the parties that I would reserve judgment.

The facts

9. These are the facts that are relevant to the issues which I have to determine. In this case there are not many disputed facts but rather the dispute is about how those facts should be interpreted.
10. The claimant has very long experience in telecommunications. Some years ago, he and Mr Woolger worked together at Ericsson and then there was further contact in 2014 when Mr Woolger’s Line Manager, Mr Tutill, was discussing a service contract for another business where the claimant was working. There

was then discussion with the claimant about carrying out some work for the respondent.

11. The respondent's arrangement is that a "*Vendor Assessment*" Form is completed for people or organisations who are to provide services or goods to the respondent.
12. The respondent wished the claimant to carry out the role of Revenue Assurance Delivery Manager. The agreement that was entered into was with Alan Nottage Consulting Limited which was a registered limited company (Company Number 7109334). There does appear to be an error (page 43) where the company is said to be Alan Nottage Consultancy Limited but that is not repeated in the body of the form. The name of the company would appear to be Alan Nottage Consulting Limited. That company was registered for VAT.
13. The arrangement therefore was for the claimant to work through this limited company being paid on a daily rate. He was not paid sick pay or holiday and submitted invoices for payment and filled in expense requests.
14. The claimant's role was to improve performance with a number of businesses. It is accepted that he was highly successful in this role and he was very respected by Mr Woolger and everyone at the respondent. He spoke regularly, either daily or a few times per week, to Mr Woolger about the work that he was doing.
15. The claimant was employed at a senior level and therefore had a high degree of autonomy. He did have to speak to Mr Woolger on a regular basis but he could not commit any of the respondent's finances. At a meeting in April 2019 Ms de Sa met several contractors, including the claimant, to discuss the impact of smart working which would lead to contractors not having allocated desks in the respondent's offices. The meeting was by phone and Ms de Sa recollected that the claimant supported her in saying it was not appropriate for contractors to have permanent desks. When the claimant was asked about this at the hearing, he said she had lost control of the meeting and he simply said "*If that's what the company wants to do, that's what they'll do*". He agreed he said to the people he was in contact with through work that he was a contractor.
16. When working on one of the projects, the claimant was based in Manchester and was responsible for a team of people which comprised 2 of the respondent's (NEC) employees and approximately 10 to 12 independent contractors. His responsibilities did not extend to line management responsibilities for the NEC employees, with respect to matters such as sick pay, holidays and matters of that kind which were dealt with through HR and Mr Woolger as their line manager for those purposes.
17. The arrangement over the daily rate of pay was that an offer was made which the claimant accepted. There did not seem to be much negotiation about it apart from one occasion in 2017 when Mr Woolger asked the claimant whether he

would prefer a 6-day arrangement at £400 per day or 5 days at £480 a day. The claimant responded that he would prefer the 5 days at £480.

18. The claimant presented invoices for the work that he carried out. Those invoices appear to have been paid without any difficulty with an occasional administrative question. The invoices I saw state that they are for the services of Alan Nottage. I have not seen all invoices submitted but it appears that, at some point in 2019, they appear to be headed "*Alan Nottage Consulting*" rather than "*Alan Nottage Consulting Limited*". It is not quite clear how that occurred because the limited company had ceased trading in 2016. The claimant did not know why that had happened and I have no other evidence about it. When Mr Woolger was asked about the fact that the invoices only said "*Alan Nottage Consulting*", he said that he had not noticed and did not think it was particularly important. It appears that those at the respondent believed that the claimant was still working through a limited company until 2019.
19. There was no written contract apart from the Vendor Assessment Form already referred to until October 2018.
20. There are then two relevant contractual documents, one for 2018 and one in 2019. The first starts at page 203 of the bundle and is headed "*Contract for services between Alan Nottage Consulting Limited and NEC Europe Limited*". This is a contract for the engagement of the contractor for services between December 2018 and November 2019. In summary, it states that the contractor can work elsewhere; that the contractor should render invoices at monthly intervals and maintain records; that the daily rate in the schedule will be paid and that the contractor is responsible for taxes.
21. It includes various warranties and indemnities and says this under Clause 11 headed "Independent Contractor":

"The contractor acknowledges and declares that in relation to its activities under this agreement it should be acting in its own account with no authority to act as an agent or partner of the company. Nothing in this agreement should be taken as implying the existence of any partnership, joint venture, relationship of employment or similar arrangement between the contractor and the company. The contractor shall not advertise itself as a contractor to the company without prior written consent say that it may include the companies name in its client list".

22. Clause 14 of the 2018 reads:-

"14. Personnel

14.1 The Contractor shall employ or engage personnel with the qualifications and experience required to perform the Services to the standard necessary to fulfill The Contractor obligations hereunder.

14.2 The Contractor shall not remove personnel from the performance of the Services unless they are replaced forthwith with personnel of substantially equal qualifications and competence. The Company shall be entitled to review the qualifications and experience of any proposed replacement and, if he or she is found to be unsuitable, the Company may require the Contractor to offer alternative candidates where such are available.

14.3 Notwithstanding its entitlement to approve the Contractor's personnel and their replacements, the Company shall have no supervisory control over their work and nothing in this clause 14 shall relieve the Contractor of any of its obligations under this Agreement or of its responsibility for any act, omission or negligence of its personnel".

23. The claimant agreed that meant that the Contractor (Alan Nottage Consulting Limited) could send someone else, rather than himself to carry out the work. He added that did not happen "*in the real world*" and, as matter of fact, all work under these contracts was carried out by the claimant.
24. That document was signed on behalf of Alan Nottage Consulting Limited by the claimant and for somebody on behalf of the respondent's HR.
25. At some point it became clear that the claimant had perhaps been working as a sole trader and it was suggested, perhaps by the respondent or the claimant's accountant, that a new company should be formed. The claimant's evidence was that he was told that he could no longer be a sole trader and that he therefore set up ATNCOMMS Limited (Company Number 11926641) in April 2019. That company was also registered for VAT and the claimant agreed that VAT documentation states that the company is in business on its own account.
26. The next contract between the respondent and the claimant (or the claimant's company) was therefore with ATNCOMMS Limited and is dated 4 December 2019. It is very similar to the previous contract. It refers to the contractor providing services to the company, stating the agreement is not exclusive and contains a number of clauses under Intellectual Property, taxes, company property with various indemnities and so on.
27. The Independent Contractor Clause at Clause 11 is identical to the one in the previous contract. There are provisions for termination and there is some provision under "*Restrictions*" to provide against competition during the agreement and for a period of six months thereafter. That clause does not prevent employment with a competitor at the end of the arrangement.
28. The second contract in 2019 contains a different and longer clause on personnel at Clause 15 which reads:

"15. Personnel

15.1 The Contractor shall employ or engage personnel with the qualifications and experience required to perform the Services to the standard necessary to fulfill the Contractor's obligations hereunder and any specific profile required.

15.2 The Contractor shall not remove Key Personnel from the performance of the Services unless they are replaced forthwith with personnel of substantially equal qualifications and competence. The Company shall be entitled to review the qualifications and experience of any proposed replacement and, if he or she is found to be unsuitable, the Company may require the Contractor to offer alternative candidates where such are available.

15.3 Notwithstanding its entitlement to approve the Contractor's personnel and their replacements, the Company shall have no supervisory control over their work and nothing in this clause 15 shall relieve the Contractor of any of its obligations under this Agreement or of its responsibility for any act, omission or negligence of its personnel.

15.4 Contractor shall comply with all applicable security, health and safety regulations and any measures required by the Company or its customers, and shall ensure the health and safety of its personnel at all times whilst performing the Services.

15.5 As a fundamental condition of this Agreement, the Contractor agrees to comply, and procure that the Contractor personnel and all its subcontractors are aware and comply, with NEC's Corporate Code of Conduct and NEC Vendor Charter of Responsible Business Conduct (NEC Charter) as may be notified by the Company to the Contractor from time to time.

15.6 In performing its obligations under this Agreement, the Contractor shall:

- a) comply with all applicable anti-slavery and human trafficking laws, statutes, regulations from time to time in force including but not limited to the Modern Slavery Act 2015; and*
- b) comply with the NEC Charter and the NEC Human Rights Policy, and have and maintain throughout the term of this agreement its own policies and procedures to ensure its compliance; and*
- c) not engage in any activity, practice or conduct that would constitute an offence under sections 1, 2 or 4, of the Modern Slavery Act 2015 if such activity, practice or conduct were carried out in the UK.*

15.7 The Contractor will, and will procure that the personnel will, comply with all applicable laws, statutes, rules, orders and regulations in providing the Services, including all immigration and employment requirements imposed by any applicable jurisdiction.

15.8 The Contractor will indemnify and hold harmless the Company from damages arising out of any failure to comply with clause 15.4 to 15.7.

29. In the schedule there is reference to "Key Personnel" (as in clause 15.2) which reads, "For the performance of the services, the company shall provide the profile of Alan Nottage". The claimant agreed that there would be few people with his "profile". He did not say there was no such individual.

30. There has never been a written contract between the claimant as an individual and the respondent, nor is there any evidence of a contract between the claimant and either limited company referred to.
31. Although the claimant's evidence in cross examination was that he did not read the contractual documents; that he had just signed them as he had been there many years, it does not prevent the fact of the matter being that those were the written contractual arrangements.
32. In any event, the claimant worked on a number of projects at a senior level when he was engaged by the respondent. Some changes were anticipated in the IR35 Tax Rules in April 2020 and the respondent had a number of independent contractors which it felt it had to assess whether they were properly designated as independent contractors. HMRC have an online tool "CEST" which was initially completed by Ms de Sa in December 2019 and which indicated that the claimant would not be deemed to be an employee of the respondent for tax purposes. Ms de Sa attended further training on IR35 and felt that a further CEST exercise might be needed. Along with Mr Woolger and the claimant, the form was completed again and this led to the respondent believing that he might fall within scope of IR35 and be deemed the respondent's employee for tax purposes. This appears to be in connection with a question about financial risk. The claimant disagreed with the assessment.
33. Discussions were held with Mr Woolger and the claimant about this and the claimant was offered the possibility of becoming an employee. The claimant's witness statement at paragraph 16 says this was an offer of "*£100,000 per year for 6 months, permanent fixed contract*" although, in his supplementary statement at paragraph 6 v, the claimant says he was "*never offered a fixed term contract*", but was told Mr Woolger wanted him to stay for at least another six months. The claimant did not accept any offer of employment and the respondent decided to terminate the contract with ATNCOMMS Limited as at the end of March 2020.
34. Unfortunately, the claimant had suffered a cardiac arrest in January 2020. He received no pay whilst he was off sick for about three weeks. Ms de Sa was concerned about health and safety obligations towards contractors and asked Mr Woolger to ask the claimant to provide a fit note before he returned. She enclosed H&S guidance about contractors. There was no risk assessment or return to work interview as would have taken place with an employee.
35. Although the respondent has asked, in these proceedings, for copies of accounts for the two limited companies named above, these have not been supplied. The claimant did not know why they have not been provided, stating he had sent what his accountant had supplied. What appears to have been supplied were profit and loss accounts in the name of "*Alan Nottage Consulting*" for the years ending March 2017 and 2018 which may be sole trader or partnership accounts, as there appear to be two "*partners*", the claimant and his wife. The claimant was asked questions about these accounts which showed a split in the income as between himself and his wife in both years. The claimant agreed the income was derived from his work for the respondent but that his wife carried out no work for the respondent. He said that his accountant recommended this course of action

and could give no explanation for the fact that there were no accounts for ATNCOMMS Limited.

36. The claimant asked questions about the termination of his contract and discussed matters with Ms de Sa. He raised a grievance. He complained about the offer of employment and the outcome of the IR35 assessment. He stated that he was an employee and questioned the decision to end the working relationship. Ms de Sa informed him that grievances could only apply to employees but decided to investigate the matter. She discussed matters with Mr Woolger and prepared a detailed Investigation Report. In summary, she found that the claimant was not an employee as he then appeared to be arguing.

Law and submissions

37. Section 230 of the ERA provides:

“1) In this Act “employee” means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.

2) In this Act “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. There is a significant body of case law which assists with the question of whether a person meets the definition of employee.
39. Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 10 England reports 433, sets out some of the minimum requirements for a contract of service, that is employment. These include control and mutuality of obligation as well as personal service. Personal service will be found when there is an obligation for the individual to perform the work without being able to provide a substitute.
40. Control is another factor but this is always difficult to assess when the person involved is of some seniority. One factor is whether the person is integrated into the organisation and what arrangements there are for tools and equipment.
41. A number of questions are usually asked with respect to the sort of contract it might be. These include questions such as where the financial risk lies; what benefits there are such as sick pay or holiday pay and how income tax and National Insurance contributions are paid.
42. The recent Supreme Court decision in Uber BV and others v Aslam and others [2021] UK C5 gives some guidance with respect to contractual arrangement stating that it is one of the factors relevant to determine status. The claimant’s representative reminded me that labels applied to the relationship are of less importance than the reality of the situation. (Autoclenz v Belcher [2011] ICR 1157).

43. In this case, the written contractual agreements were made between the respondent and two limited companies although, of course, as a matter of fact it was always the claimant who carried out any work for the respondent. The respondent therefore says that there was no contract between the claimant and the respondent and therefore a contract would have to be implied. This is because the essence of the written agreement is such as to create a tripartite relationship. I was asked to consider the decision of Tilson v Alstom Transport [2011] IRLR 169 which said that the onus is on the claimant to establish a contract and that it should be implied only be if it is necessary to do so. In that case, which was heard in the Court of Appeal, the respondent reminded me that the judgment made it clear that *“a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end user”*. The respondent’s case is that such a contract cannot be implied.
44. The claimant’s case is that, as a matter of fact, he was the individual carrying out that work; that he worked for the respondent exclusively; that for at least some of the time the invoices were not in the name of a limited company; that there was mutuality of obligation and no real substitution provision.
45. As far as the discrimination claims are concerned, the relevant section is section 83 EQA which reads:- *“employment”* means:
- “(a) Employment under contract of employment, a contract of apprenticeship or a contract personally to do work.”*
46. The claimant’s representative made no specific reference to any other provision in EQA such as section 41 for contract workers so it appears that that is not relied upon by the claimant. In any event, he would not be able to satisfy section 41 as that requires a principal and another person in an employment relationship which is not argued by the claimant.
47. One important aspect of section 83 EQA is that the contract must require personal performance. There is little distinction between section 230 ERA and section 83 (Bates van Winkelhof v Clyde and Co LLP [2014] UKSC 32. The question is whether the person is an independent contractor. Where there is provision for another person to be able to provide services, that is a right to substitute, that is inconsistent with the employment relationship.

Conclusions

48. As with many cases where the question is whether somebody was an employee or an independent contractor there are a number of factors to consider. It is often the case that we need to look at those matters which would indicate employment and then look at those matters which would indicate that it was not employment but a contract for services.
49. I start then with the question of whether there was a contract in place. The first difficulty, as submitted by the respondent, is that the claimant himself had no

direct written contract with the respondent. The written agreement was between the respondent and limited companies, those companies using the claimant to provide the services needed. I cannot imply a contract between the claimant and the respondent. If I am wrong about that finding, I go on to consider what the nature of the relationship between the claimant and the respondent was, if there was a contract between them.

50. It seems to me that I must look at this in relation to what happened shortly before dismissal. Clearly the historical background does play a part and may be relevant, but I start with the position at dismissal as that is what the claimant is complaining about. At that point the second limited company ATNCOMMS Limited had entered into a contract through which the claimant carried out work for the respondent. At that point he had submitted invoices in the name of that limited company for some months. That company (and the previous one) was registered for VAT, the claimant says, on his accountant's advice.
51. My interpretation of the contract between ATNCOMMS and the respondent was that ATNCOMMS could have sent another individual rather than the claimant. Although the schedule suggests that it should be someone, "*with the profile*" of the claimant, and it may be that there are very few people with his experience in telecommunications, it was not suggested there was no individual who could conceivably carry out some of the work that he was doing. In my view that is a right to substitution.
52. I consider factors which might suggest that the claimant was an employee. These include the fact that he was working exclusively for the respondent for a number of years. He was fairly well integrated and had responsibility for some NEC employees up to a certain point and also for other independent contractors. At some point something called a job description was drawn up and it seems likely that the HMRC CEST form completed in January 2020 may have suggested that he was an employee for tax purposes. For a period of time, he seems not to have been working through a limited company.
53. I now consider factors that might suggest the claimant was not an employee. First, as already stated, I find there was a right of substitution. Secondly, the written contract sets out the position very clearly, was signed by the claimant who was well aware that he was working as an independent contractor. The regular invoices made that clear. Several factors suggest that he was an independent contractor - he had public liability insurance; was registered for VAT; paid his own income tax and National Insurance contributions; received no sick pay or holiday entitlement and was not subject to the policies and procedures of the respondent's employees. The claimant benefitted from arrangements which would reduce his tax liability, which are not available to those working under PAYE. These all suggest to me that this was somebody working as an independent contractor. He had worked as an independent contractor before working for the respondent through Alan Nottage Consulting Limited.
54. The claimant was not always completely clear about why arrangements had been made either in the formation or dissolution of companies or in matters recommended by his accountant. He is, however, responsible for those

arrangements and has benefitted from them. The claimant was not an employee and was not required to provide personal service. He was an independent contractor and the tribunal has no jurisdiction to hear his unfair dismissal or his discrimination claims.

Employment Judge Manley

Date: 21 June 21

Sent to the parties on:

24 June 21

For the Tribunal: