



EMPLOYMENT TRIBUNALS

Claimant: Ms. H. Stochniol
Respondents: (1) PUNO (Polish University Abroad)
(2) Mr. T. Kazmierski

London Central Remote Hearing (CVP)

29 June 2021

Employment Judge Goodman

Representation:

Claimant: Mr. A. Stochniol (husband)
Respondent 1: Mr W. Mier-Jedrejowski (trustee)
Respondent 2: in person

PRELIMINARY HEARING

RESERVED JUDGMENT

The claimant was employed by the first respondent.

REASONS

1. In December 2020 Halina Stochniol, the claimant, presented a claim to the employment tribunal that she had been dismissed from her employment with PUNO, the first respondent, by its Rector, the second respondent. That decision followed a letter she had circulated that was critical of the Rector. As a matter of law though, she cannot bring an unfair dismissal claim against both the Rector and the employer, as in law it is the employer who dismisses an employee, regardless of which individual did the deed.
2. The Rector, Tomasz Kazmierski, responded to the claim on behalf of both himself and PUNO. In essence, the defence is that the claimant was not employed by PUNO, in fact, PUNO that has no employees, and she was a self-employed contractor.

3. A little later, a group of four trustees also filed a response on behalf of PUNO, asserting that the Rector did not have authority to dismiss the claimant, and that she should be reinstated. The trustee group asserts that PUNO had three employees.
4. Both responses have been accepted by the tribunal, and the question of whether the Rector has actual or ostensible authority to act on behalf of PUNO in defending proceedings is a different issue.
5. None of the parties is legally represented. Only the claimant has taken any legal advice, and that only a few days ago.
6. Given the uncertainty over which respondent has authority to represent the institution, in this decision I will call the second respondent the Rector, and the other purported representatives of PUNO, the trustee group, so as to avoid prejudging which of them represents PUNO in these proceedings.

Amendment of Claim

7. At the beginning of this morning's hearing the claimant's representative, who is her husband, applied to amend the claim to add that she had been dismissed on grounds of making a protected public interest disclosure, stating that he did so because in her view the Rector was responsible for her dismissal, and would escape liability if she only brought an unfair dismissal claim, whereas in a public interest disclosure claim he could be personally liable. It was clear from his prepared speech that he knew the factors a tribunal should consider when deciding an application to amend. I explained to the claimant's representative that only an employer can be liable for *dismissal*, and if she sought to make a claim against the Rector personally she should bring claims of detriment for making a public interest disclosure, not just dismissal. If the amendment was allowed, and the claim included detriment as well as dismissal, the claims must be heard by a judge sitting with non-legal members, not judge alone (as for unfair dismissal) and it would be necessary to adjourn the proceedings to a later date. Mr Stochniol indicated that he did seek to add claims of detriment.
8. The Rector asked for time to consider how to respond to the application to amend the claim. I considered this reasonable, given that the application was made only at this morning, was not written down, it was not yet clear exactly what the alleged detriments were, it could involve personal liability, and additional compensation if successful, and was made without any notice to the respondents, though the trustee group stated they had no objection to the amendment. I made an order that the claimant file, in the next seven days, written particulars of her proposed amendment of claim, identifying the disclosure, the grounds on which it qualifies for protection, and listing the detriments alleged to have occurred on grounds of having made that disclosure. The respondent then has seven days to reply. I will then decide the application to amend the claim on the basis of the written representations.

9. The final hearing has been relisted for **18-20 November 2021**. A Polish interpreter will be booked by the Tribunal service, as two witnesses are not competent in English.
10. It was explained that if the claimant was not an employee, and the amendment is not allowed, the claim ends and that hearing would not be needed. If the claimant was an employee, and the amendment is not allowed, it will be a hearing of the unfair dismissal claim before judge alone. If the claimant was not an employee, but was a worker, and the amendment is allowed, it will be a hearing of public interest disclosure detriment before a full panel. If the claimant was an employee, and the amendment is allowed, it will be a hearing of the claims of public interest disclosure detriment and unfair dismissal.

Employment Status

11. The preliminary issue for today is whether the claimant was an employee or a worker of PUNO. If she was an employee, she can bring a claim for unfair dismissal. If she was not an employee, she cannot, and can only bring a claim for protected disclosure detriment *if* that amendment is allowed, and if it is found that she was a worker. If she was self-employed, and not a worker, she cannot bring any claim in the employment tribunal.
12. To decide the employment status issue, I heard evidence from the claimant, **Halina Stochniol**, from **Michael Fleming**, a member of PUNO's Senate, and Vice Director of its Institute for European culture, who is unpaid except for lecturing duties, and from the Rector, **Tomasz Kazmierski**. I was able to read documents contained in separate bundles prepared by the claimant and the Rector, as sadly they had been unable to agree which documents the tribunal should read to decide the issues. Documents in Polish had been retyped in parallel translation. Over the lunchtime adjournment, at my request, copies of the claimant's tax returns for the years ending April 2016 and April 2019 were sent to the Rector and the Tribunal, as the claimant's bundle only included lists of payments and it was unclear from her replies to questions how she had paid tax or national insurance.

Findings of Fact

13. The Polish University Abroad (Polski Uniwersytet na Obczyźnie - PUNO) is an educational institution first set up by the Polish government in exile in London after World War II. In 1990, and following political changes in Poland, the government in exile was dissolved. Meanwhile PUNO had registered as a charity in the UK. The 1988 trust deed lists its aims and powers. Clause 2(n) permits the trustees "to employ and pay any person or persons (not being a trustee) to supervise, organize and carry on the work authorised by the trustees". The trustee exemption was, apparently, to meet UK charity law which precludes trustees from benefiting from their charities' funds, though they may be paid for specific services if the governing document permits it or the Charity Commission agrees.

14. PUNO adopted statutes in 1990 providing for a board of trustees comprising the Rector, Vice-Rector, Secretary, Bursar and 3 nominees of the Senate on 5 year terms. Thus the claimant, being the Secretary, is, or could be, by statute one of the trustees, but according to the Rector she is not registered as a trustee because she benefits from PUNO's activities.
15. By clause 25, the Rector is the individual executive authority.
16. Clause 26 provides that the Senate is made up of the Rector, Vice Rector, deans and vice-deans of faculties, directors and vice-directors, institutes, heads of department with their deputies, the secretary of PUNO, nominated professors, department managers and the Bursar, together with individuals from each department, and three representatives of students and doctoral candidates. The range of titles suggests a large institution, but currently there are about 20 students following bachelors and master's degrees, and 7-10 doctoral students. All teaching staff are paid by the hour as and when required.
17. The Rector convenes and presides over Senate meetings. The current Rector has been in post since 2017 and is shortly due for reelection. By clause 35 he directs PUNO's activities, developing strategy, representing the organization externally, overseeing departments and institutes of faculties, overseeing administrative and economic activity, and supervising employees, PhD candidates and students. He is elected for a four-year period by secret ballot of the Senate.
18. By clause 42 he is assisted in his administrative function by the Secretary, who is elected by the Senate for an indefinite period. The secretariat consists of "the PUNO secretary, the PUNO bursar who is employed by the Rector, and other administrative personnel who are employed according to requirement and means".
19. Until her contract was terminated with effect from the 30 September 2020, the claimant was the secretary.
20. There is a dispute about when she started. The claimant says that she has carried out secretarial duties from 11 September 1995, but the earliest document that either side can find is a written agreement dated 11 January 2013. According to the claimant, since 1995 she has attended work on Mondays and Wednesdays, initially five hours each day, latterly six hours each day, and been paid a fixed hourly rate. She was given a list of duties, which she cannot find. A sample of university records shows that in 1995-96 she was recorded as one of two personnel within the secretariat. In 2000/2001, and 2003/04 the position is unchanged. By 2009/2010 she is listed as the first member of the secretariat, and head of the Rector's office, secretary of PUNO and Senate secretary.
21. The agreement of 11 January 2013 was, according to the claimant, prepared by the previous Rector to ensure that payment for her services was in

accordance with Charity Commission guidelines. It is made between the Polish University abroad (PUNO) “represented by the Rector of PUNO, Prof Halina Taborska”, and the claimant, Halina Stochniol. It states that the claimant “is appointed the secretary of the university on January 11, 2013”. Her duties are listed as assisting the Rector, managing PUNO administration, acting as secretary of PUNO Senate, supervising student registration, results and graduation, supervising administration for lecturers and assistants, and other tasks commissioned by Rector. Her working days are Mondays and Wednesdays, except when public holidays in the UK, from 1:30 p.m. to 7:30 p.m. Days and hours may be changed by agreement with the supervisor (the Rector). Remuneration is fixed at £15 per hour plus travel expenses. It is for an indefinite term. Termination can be initiated by either side, but no later than one month before the end of the current semester.

22. In practice it was not disputed that she worked those hours, which were when PUNO’s office in King Street, London W6 was open. Sometimes she swapped days, if the Senate was meeting on another evening, so that she could be in attendance. From time to time she was assisted by volunteers, for example when there was a conference to be organised. When in the office she used PUNO’s desktop there, and would use PUNO’s email, either rector@puno or enquiries @puno. If she sent emails on the institution’s business out of hours she used her own device and email address.
23. She completed a time sheet showing hours worked which was sent to the bursar, leading to payment to her bank account. The same system was adopted for her assistant, who worked one afternoon a week. The timesheets show she regularly worked 6 hours per day, 2 days a week. There are monthly variations in the figures corresponding to how working days fell in each month.
24. She usually took holiday, for which she was not paid, in the month of August, and at Christmas. When absent at other times, she obtained the Rector’s agreement, and in evidence Mr Kazmierski confirmed he would need to agree any change in hours.
25. There is no provision in the agreement for substitution, and there is no evidence this occurred in practice, although on occasions, as noted, volunteers might assist. In evidence Mr Kazmierski said that if asked about sending a substitute he would have agreed if they were a suitably qualified person, though that person might not be given access to the email system as the claimant had, because it contained confidential material. A substitute could not attend senate as secretary.
26. The claimant was one of three signatories on PUNO’s bank account. It is not known who the others are.
27. The claimant worked for other organisations. She is a Polish language examiner for AQA. She also teaches in Polish Saturday school. From time to time she also provided teaching for PUNO. In August 2020 she was paid

£600 for this. The payment spreadsheets show payments for secretarial duties as *Rozliczenie*, timesheets, and for teaching as *Pokwitowanie*, which I was told means receipt.

28. The claimant was paid without statutory deductions. Her husband prepared and filed her self-assessment tax returns. These show that she declares income from secretarial work for PUNO, for examining work for AXA and teaching for Polish Saturday School, all as income from self-employment, with some small deductions for expenses. In the year ending April 2019 she earned (gross) £7,903 from PUNO and £5,260 from AXA, plus £1,472 for teaching. She pays a class 4 (self-employed) National Insurance contribution of £552, and £145 as class 2 (voluntary) contributions. Mr Stochniol explained the claimant had no choice but declare as self-employed, as PUNO was not on PAYE.
29. In March 2020 at the start of the Coronavirus restrictions, the secretariat closed. PUNO was not eligible for furlough payments as there was no PAYE record. The claimant was to work from home. According to the spreadsheet she received normal pay for February and April; the claimant said she was off sick, unpaid, in March.

Relevant Law

30. The terms *employee* and *worker* are defined in section 230 of the Employment Rights Act, which states:
- “(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.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
- (a) a contract of employment, or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
- and any reference to a worker’s contract shall be construed accordingly.
- (4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

that service he was subject to the other's control "in a sufficient degree to make that other his master" and thirdly that the provisions of the contract were consistent with its being a contract of service. This reflected the old model in English law distinguishing servants, who had masters, and tradesmen, who did not, and were their own bosses, running businesses selling a product or skill. The third category, worker, has grown up to catch those not in business on their own account, who are entitled to rights and protection under EU law, but might not have been defined as employees in English law.

33. Characteristics of those in business on their own account are that they bear the financial risk of the operation, they use their own equipment to do the work, they do not get a regular wage, instead, they invoice for their services. In the ECJ judgment in **B. v Yodel Delivery Network 2020 IRLR 550**, the first test to distinguish a self-employed subcontractor from a worker was whether he was "subordinate" to the putative employer; if he was not, the tests were whether the subcontractor could decide to accept work or reject it, or work for others in competition, or fix their hours to suit themselves rather than the employer. As for distinguishing employees (a contract of service) from workers (who have contracts for services), **Cotswold Developments Construction Ltd v Williams (2006) IRLR 181** set out that if there was mutuality of obligation (essential for a contract) and personal service, a tribunal must check if there was one contract or a series of contracts; if one, was a set minimum of work to be provided for pay, was their "such control as to make it a contract of employment, (if there was insufficient control, was the individual obliged to do some work personally, making him a worker if not an employee).
34. Examining the facts of the claimant's position, she could not choose her hours, as they could only be varied by agreement (and if Senate met another day, is likely to have been required to change them). She was given work to do, and had to follow direction from the Rector, her supervisor. When her actions displeased him, he could and did dismiss her. She had to work at the secretariat during normal hours, and could not do the work when it suited her. Working outside hours on occasions on her own devices or own email does not indicate she was in the business of providing secretarial services, or that PUNO was her customer. Volunteers might assist her, but she was not delegating her regular duties to them and they were not substituting for her, only helping out. Nothing in the written agreement or in practice shows that either party contemplated that she could send a substitute without asking. Submitting timesheets cannot be seen as invoicing. Where pay is calculated by hours worked, and there is no pay if the person is absent, it is normal practice to complete a timesheet for payroll calculations to be made. It cannot be said that PUNO was her client. PUNO, in the person of the Rector, were in control of what she did and when she did it.
35. Much was made by Mr Stochniol about the translation of the Polish documents, although I explained that I was not qualified to adjudicate on the accuracy of translation of Polish terms without the assistance at least of an independent translator. *Umowa*, the title of the document of 1R January

2013, means “agreement” according to the Rector, and “contract” according to the claimant. The difference is not significant in English law, where a contract is an agreement between the parties where they intend to enter into contractual relations and one side gives consideration for the promise of the other, in this case a work wage bargain. The Rector was also challenged about the meaning of “*Umowa na pracie*”, rendered on the claimant’s side as employment contract, and on the Rector’s, as an agreement for work. In England the names given by the parties to their agreement - and also whether they agreed that the taxation arrangement was to be that of self-employment – can be an indicator of what the nature of the agreement was, but cannot be determinative if other features suggest otherwise. There is also the difficulty that the legal significance of these differences may vary from state to state. The tribunal was also taken to a translation of a piece of text from a publisher’s website rendering as ‘employee’ a party to an *umowa na pracie*. But the definition in that text appears to reflect the EU category of worker, and it may well be that in Polish law there is no concept of employee as a subset of worker as there is in England and Scotland. “Employee” and “worker” may be interchangeable. This tribunal is unable to consider it significant.

36. The claimant’s declaration of self-employment to HMRC, and her national insurance contributions at the lower, self-employed level might suggest that she was self-employed and that secretarial services were part of a range she provided along with examining and teaching. Secretarial services however were not casual services provided from time to time as agreed, but claimant a commitment to work regular hours in a set place, under control and supervision. Further, the circumstances do not suggest this was the claimant’s choice. The advantage was largely that of PUNO, which thereby escaped liability to pay an employer’s National Insurance contribution amounting 13.8% of earnings above the upper secondary threshold, as these earnings were, and pension contributions, and for holiday, and could probably pay less that they would have had to do if the employee was subject to statutory deductions. These will be a more likely incentive to pay as if the worker was self-employed that any administrative difficulty setting up PAYE. The advantage to the claimant was slight, given that the expenses she claimed against income were very modest, and are likely to amount only to the tax she would have had to pay on the cost of travel to work been reimbursed to her by the PUNO, which she could claim as an expense of self-employment, but would be a taxable benefit if an employee.
37. Features which do not assist particularly are being able to sign cheques for PUNO, as, subject to satisfying the bank’s need for documentary verification, this could be done by any trustee, employed or not, and the claimant’s role as Senate secretary. The secretary of the Senate, which appears to be an office, had to be the PUNO secretary. That does not mean the PUNO secretary was an office-holder (who could in any case be a worker for Employment Rights Act purposes – see **Gilham v Ministry of Justice (2019) UKSC 44**), rather than an employee. She could also be an employee who also held office for part of her job, as with someone employed by a local authority as registrar of births, an office.

38. In conclusion, the claimant was an employee. The employer was the first respondent, PUNO, whose previous Rector had signed her contract in the name of PUNO and by the statutes had authority to do so.

Employment Judge Goodman
30th June 2021

JUDGEMENT and REASONS SENT to the PARTIES ON
30/06/2021..

FOR THE TRIBUNAL OFFICE