EMPLOYMENT TRIBUNALS

Claimant: Mr G Okunniga

Respondent: Clifton Law Ltd (Trading as Clifton Law Solicitors)

Heard at: Birmingham (by CVP) **On:** 26 January 2021

Before: Employment Judge Miller

Representation

Claimant: In person
Respondent: Mr R Bradley (Counsel)

JUDGMENT having been sent to the parties on 27 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form dated 9 March 2020, following a period of early conciliation from 6 February 2020 to 13 February 2020 the claimant brought claims of unfair dismissal, unauthorised deductions from wages, failure to pay holiday pay, and failure to provide a statement of main terms and conditions of employment.

2. The claimant started working for the respondent in around May 2018. Regardless, therefore, of his employment status by the date of the end of his relationship with the respondent in January 2020 the working relationship had lasted for less than two years and consequently the claimant's claim for unfair dismissal was dismissed on the basis that the claimant had insufficient service to bring a claim on 12 June 2020.

3. The issues to be determined today were as follows:

    a. Whether the claimant was an employee of the respondent at any point. I explored with the parties at the outset whether the claimant brought a claim also as a worker but it was clear from the pleadings, the case management order of Judge Dean and the

evidence before the tribunal and the claimant confirmed that he said he was an employee. The claimant's case therefore stands or falls on whether he was an employee;

b. If the claimant was an employee whether

   i. he experienced a deduction from his wages;

   ii. If so how much; and

   iii. Whether that deduction was authorised;

   iv. Whether the claimant was entitled to a written statement of terms and conditions of employment in accordance with section 1 of the Employment Rights act 1996

   v. Whether the claimant is entitled to a payment in lieu of accrued untaken holiday at the termination of his employment (if it was such).

The hearing

4. The hearing was conducted by CVP. I was provided by an agreed bundle of documents and witness statements from the claimant and, on behalf of the respondent, from Mrs Onwuka, the respondent's director and Ms Gurung, the respondent's administration apprentice. All witnesses attended and gave evidence.

Findings

5. The claimant commenced working for the respondent in around May 2018 as a consultant. There is a copy of the consultancy agreement in the bundle at pages 119 to 132 and it is signed on 27 September 2018.

6. The terms of that contract are clear and the basis of it is undisputed. The claimant was contracted to carry out services as defined. Those services were the work of a solicitor and, particularly, civil, criminal, immigration, family, mental health, landlord and tenant and prison law matters or such other matters as may be agreed in writing.

7. The contract imposes obligations such as maintaining a valid practising certificate at the claimant's cost, to undertake services with reasonable skill and care, and to seek to promote the interests of the respondent. The contract requires the claimant to generate his own clients were possible, requiring a minimum of five clients being referred to the firm within the first 60 days of the commencement of that agreement.

8. The agreement anticipates that the claimant will account for his own tax and national insurance and that the claimant will be able to decline specific instructions if he so wishes.

9. It is not necessary to scrutinise the particular terms in any detail as it was agreed between the parties that this contract did not create a contract of employment. It is, they say, what it says it is: namely a contract for services.

I find, therefore, that in May or June 2018 the claimant entered into this contract and it was for the provision of services.

10. The contract provides for remuneration at paragraph 6. Paragraph 6.1 says "the consultant will be entitled to claim payment for the services undertaken (of which bills have been rendered to the legal aid agency as the case may be) in accordance with the following bands".

11. It then specifies that the claimant will be entitled to claim 60% of fees for work he has brought in and 50% of fees for work that the respondent has brought in.

12. I refer also to clause 4.17 of the contract which says "in the event that an exceptional file is returned by the legal aid agency to the firm, reduced payment, or no payment being processed the consultant shall be responsible for any appeal process required to secure funding".

13. I find, therefore, that this contract for services anticipated that the claimant would or might do legal aid work under this arrangement. It is correct that this did not include housing or debt work at the outset but it is equally clear that the matters could be amended under clause 3.2.

14. The respondent had bid for and been awarded a legal aid contract for debt and housing. Mrs Onwuka said that the contract between the respondent and the legal aid agency was awarded in March 2018 but was not finally signed until 11 October 2018. The contract was expressed to run from 1 September 2018 and the claimant took issue with this apparent inconsistency. I find, however, that Mrs Onwuka's explanation as to the delay-namely delays in the provision of information-was perfectly realistic.

15. It was a requirement of the legal aid contract into which the firm entered that a supervisor be appointed. Mrs Onwuka asked the claimant to undertake the role of supervisor and he confirmed that he had the experience and that he would do so. This was in June 2018 – I was shown an exchange of messages on 11 and 12 June 2018 in which Mrs Onwuka asked the claimant if he had done the types of work referred to in the Housing Supervisor Requirement form and the following day the claimant confirmed that he had, although he said he had only advised on mortgage arears.

16. I was taken to 2 supervisor 'standard and declaration' forms for housing and debt in the bundle. These are forms used by the Legal Aid Agency to check compliance with the contract requirements. Mrs Onwuka signed these forms on behalf of the respondent to confirm that supervisor is "either a sole principal, an employee, a director, partner in or member of the organisation".

17. Mrs Onwuka gave evidence that this was not true – that it was not in fact the case that the supervisor was "either a sole principal, an employee, a director, partner in or member of the organisation". She did not provide any explanation as to why she would mislead the legal aid agency in this way. In her witness statement Mrs Onwuka says "I accept that the LAA contract specified that a full time supervisor should be employed or a director or member of your organization, and a breach of this condition would result in

the LAA withdrawing the contract, and if files have been billed during the period of the breach, the LAA would recoup all the monies paid to the firm". Mrs Onwuka says that as all of the claimant's legal aid work was below standard and there was very little of it the respondent never in fact received any money from the legal aid agency.

18. The claimant says that as a result of this new contract, and sometime in June 2018, Mrs Onwuka offered to employ him as the respondent's legal aid supervisor. He does not give any detail about this alleged conversation and Mrs Onwuka denies that it happened. The claimant points to messages and texts as evidencing this. In my view they do not. There is nothing in any of the exchanges to which I was taken that could come anywhere close to an offer of employment. Particularly as both of the parties to these exchanges were solicitors.

19. The claimant also says in his witness statement "the Respondent informed me that it would be covered under the legal Aid agency contract and that I would be paid a figure around the approved industry rate for a solicitor of my standing and experience which was between £25,000- £32,000 per annum"

20. The claimant did not receive any money in respect of this alleged employment. He says that there was no explicit agreement as to how much money would be paid but that Mrs Onwuka said that he would not be paid for the first three months until they saw how the legal aid contract was going and they had recovered money from the legal aid agency.

21. The claimant was not paid by January or February and he says that he chased this up.

22. I do not accept the claimant's evidence that this conversation happened. There is simply no contemporaneous evidence to support it – even in the form of text or WhatsApp messages – and the claimant's witness evidence is vague and unparticularised. He does not refer to a date or even any approximate time scale.

23. In my view, the claimant's conduct in undertaking the limited amount of legal aid work that he did do is evidence of the true agreement. The claimant's case was somewhat unclear on this. He says in his witness statement that he commenced work as the LAA supervisor on 29 September 2018. He says that before he started work he told Mrs Onwuka he would be setting aside two days within the week for file update when he would be doing mainly desk work with the rest of his weekly hours being flexible.

24. I take this to mean that the claimant said he would be in the office for two days each week, it being a term of his consultancy agreement that he was entitled to work from home. It was agreed that the claimant had a key for the office and could come in when he wanted to.

25. The claimant pointed to the obligations under the legal aid contract to be in work five days a week seven hours a day. I do not accept that the claimant was applying his time in this way to the legal aid contract. The evidence of

the respondent is that the claimant could only evidence work for 14 clients in 14 months for both his private and legal aid work. I heard nothing to contradict the evidence of the respondent on that basis and I accept it.

26. Further evidence of the respondent was that none of the work that the claimant did for the legal aid agency was of sufficiently adequate quality to enable payment so that the respondent received no payments at all from the Legal Aid Agency for Housing work.

27. It is, in my view, inconceivable that the claimant was in the circumstances working for five days a week seven hours a day on housing and debt - related legal aid matters whether at home or in the office.

28. Further, the evidence of Mrs Onwuka and Ms Gurung was that the claimant rarely if ever came into the office. Ms Gurung started work for the respondent in September 2019 and she says that she only saw the claimant for five times. This evidence was unchallenged and I accept it.

29. In any event, the claimant's own evidence is that his intention was only to work two days per week form the office. This is inconsistent with his assertion that he must have been an employee because he was, effectively via the Legal Aid Contract, mandated to be in the office 5 days per week.

30. The claimant said that he stopped going into the office as a protest because he had not been paid.

31. In January 2020 the respondent gave up the debt and housing legal aid contract. On 22 January 2020 the claimant tendered his resignation in respect of being housing and debt supervisor for the legal aid contract. The respondent's evidence was that this was the first time the claimant had referred himself as being employed and I neither saw nor heard anything to contradict this.

32. The previous day to that letter, on 21 January 2020, the claimant had written to Mrs Onwuka saying "by the way my job with the firm is that of an independent contractor is clearly defined in the consultancy contract ... Unless you're admitting that my work as an independent contract under the consultancy agreement has been at variance with the legal aid contract for the past 14 months which requires the housing supervisor to be paid employee and be at work 9 AM to 5 PM. Otherwise I do not see why I should be attending the office save and except when it is required". (sic)

33. In my view, the claimant clearly believed as at 21 January 2020 that he remained an independent contractor.

34. This is consistent with the evidence I heard. The Claimant clearly enjoyed the flexibility of being able to work from home and, despite what he said in submissions about not being able to turn down clients, he clearly did do so and also enjoyed that flexibility. Both of these issues were consistent with the contract for services.

35. The claimant sent a further letter dated 23 January 2020 terminating his contract of service with the respondent. He refers to that referring only to his privately funded work.

The law

36. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from the wages of workers employed by him.

37. Section 13 (3) says where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion the amount of the deficiency should be treated for the purposes of the act as a deduction

38. Section 23 of the Employment Rights Act 19956 enables a worker to bring a claim for an unauthorised deduction from wages.

39. Section 1 of the Employment Rights Act 1996 provides that an employee shall be entitled to a written statement of particulars of employment

40. In respect of entitlement to pay in lieu of holiday, regulation 14 of the Working Time Regulations 1998 provides, as far as is relevant:

    (1) Paragraphs (1) to (4) of this regulation apply where—

    (a) a worker's employment is terminated during the course of his leave year, and

    (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

    (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

41. In the absence of an agreement to the contrary, the leave year runs from the start date of workers employment.

42. A worker is defined in section 230 the Employment Rights Act 1996:

    (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,

43. The claimant brings his case solely on the basis that he is a worker who is also an employee.

44. Regulation 2 of the Working Time Regulations contains the same provision in respect of workers who are also employees:

    "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

    (a) a contract of employment

45. In Ready Mixed Concrete v Minister of pensions (1967) MacKenna J set out the following well known principles:

    "A contract of service exists if these three conditions are fulfilled. (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.(ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master. (iii) the other provisions of the contract are consistent with its being a contract of service".

46. Lord Irvine said, in Carmichael v National Power PLC (1999)

    "In my judgment it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties' true intention, along with the other objective inferences which could reasonably be drawn from what the parties said and did in March 1989, and subsequently".

47. The principles in *Autoclenz Ltd v Belcher* [2011] UKSC 41are that the tribunal may indeed look behind the words of a written agreement if it does not reflect the true contract position. Citing *Firthglow Ltd (t/a Protectacoat) v Szilagyi* ("*Szilagyi*") [2009] EWCA Civ 98, Lord Clarke said "*The kernel of all these dicta is that the court or the tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by"*

48. These cases establish the principle that, in determining the employment (or otherwise) status of a claimant, the tribunal may look behind the written terms of the contract but only if they do not or no longer reflect the agreement or the whole of the agreement.

Conclusions

49. The starting point in determining a person's employment status is their contractual position.

50. The principles in *Carmichae*l and *Autoclenz* are that the tribunal was entitled to look behind a written contract but only if the written contract does not reflect, or does not fully reflect, the nature of the employment relationship.

51. In my judgement the contract for services signed by the claimant on 27 September 2018 accurately reflected the whole of his working relationship with the respondent.

52. That contract anticipates the claimant undertaking legal aid work under that contract and the conduct of the claimant in infrequently attending the office, rejecting work on occasions when referred to him and, in fact doing very little legal aid work at all, is consistent with that contract. In fact, the parties were in agreement that that contract covered at least some of the claimant's work.

53. It was for the claimant to show that a new further contract of employment had arisen which ran alongside the contract for services. The claimant sought to show that there had been an oral contract arising sometime between June and September 2018 in which the respondent agreed to employ him as a legal aid supervisor.

54. There is simply no evidence from which I can conclude that such contract was concluded. The claimant himself was vague as to the terms of that contract. He said that the terms of remuneration had never been agreed and he did not give any indication in any context at all that he was an employee until he handed in his notice in January 2020.

55. The claimant seeks to rely on the respondent's obligation to employ a legal aid supervisor as evidence that he must have been that employee. The respondent's evidence was that, effectively, they had lied to the legal aid agency. While wholly unacceptable I do accept this evidence. While I am prepared to accept that evidence of this nature (namely of the third party contract) might be relevant as to the nature of the contract between the claimant and the respondent, it is not of itself enough to demonstrate the existence of the contract of employment between the claimant and respondent.

56. The first test in *Ready Mix Concrete* is that there is a contract under which the employee undertakes to do work and the employer undertakes to pay for it. In my judgement there was no such contract. There must, as every lawyer including, presumably, the claimant knows be a meeting of minds, an agreement, for the formation of a contract. My findings are that the claimant had no belief himself that he was an employee and he certainly never expressed such a view prior to 22 January 2020 and, in any event, no terms were agreed as to remuneration. It is clear that the respondent has not been accurate in its declaration to the legal aid agency. In my judgment, it is equally clear that the claimant had no genuine belief in his employment status. The claimant said that he was owed 14 months; wages. It is inconceivable that the claimant would have worked, as a solicitor, for over a year as an employee with no pay and without taking any steps to recover that pay. The far more obvious explanation is that the claimant was

continuing to work as a consultant under the services agreement and obtain remuneration from that.

57. The relationship between the claimant and the respondent continued to be governed by the contract for services dated 27 September 2018.

58. I have seen no evidence to support the claimant's asserted belief that he was ever an employee and to that extent, the claimant's claim to the Employment Tribunal, was at best, opportunistic.

59. In so far as it is necessary to consider it, my findings above are that the claimant enjoyed a high degree of autonomy. He was free to accept or refuse particular instructions, free to come and go at the office to suit his convenience and was not under any real or effective control of the respondent as an employee would experience it. Further, the claimant was, under the consultancy agreement, able to use his ability to manage his working time and source his own clients to increase his profits.

60. For these reasons all the claimant's claims must fail as he was not an employee of the respondent. As stated above, it was the claimant's case that he was an employee, not otherwise a worker. I heard no evidence or submissions as to whether the claimant would satisfy any other definition of worker and I made it clear at the outset that the claimant's claim would in those circumstances, stand or fall on whether he was an employee.

61. However, in respect specifically of the claim of unauthorised deductions from wages, I also make the finding that there was no identifiable amount of money properly payable to the claimant. This is obviously the case in the absence of the contract but the claimant cannot bring a claim for unauthorised deduction from wages when there is no fixed amount payable as wages. The claimant's own evidence was that, even by the date of the end of his relationship with the respondent, the actual amount that he was entitled to as alleged wages was not settled. So, in any event, the claimant's claim for unauthorised deductions from wages must also fail.

Employment Judge Miller

Date: 8 February 2021