



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr T Roe

Swift Scaffold Partners LLP

RECORD OF A PRELIMINARY HEARING HELD BY CLOUD VIDEO PLATFORM RESERVED JUDGEMENT

Heard at: Nottingham

On: 28 October and 1 November 2021

Before: Employment Judge Blackwell (sitting alone)

Appearances

For the Claimant: Mr I Dean – Lay Representative

For the Respondent: Mr G Bartlett - Director

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.

RESERVED DECISION WITH RESERVED REASONS

1. The Claimant is an employee within the meaning of Section 230 Sub-Section 1 of the Employment Rights Act 1996.
2. It follows therefore, that Mr Roe is also a worker within the meaning of Section 230 Sub-Section 3 of the 1996 Act.

Introduction

3. This hearing began on 7 April 2021 and was adjourned for the reasons set out in paragraphs 3, 4 and 5 of the Reasons sent to the parties on 19 April 2021.
4. The issues were identified in paragraphs 1 and 2 of those Reasons;-

1. The purpose of today's hearing was to determine whether Mr Roe was an employee of the Respondents within the meaning of section 230, subsection 1 of the Employment Rights Act 1996. It was agreed that the relevant authorities are the cases of **Tiffin v Lester Aldridge LLP** [2012] ICR beginning

at page 647. The decision of the High Court in **Hands, Henning, Reinhard v Ondra LLP**, case number 8C12C01765 judgment being handed down on 14 January 2015 and the decision of the Supreme Court in **Uber BV and Others v Aslam and Others**, a judgment handed down on 19 February 2021.

2. We also identified that Mr Roe's claim for "other payments" relates to the alleged none payment of wages. There will also have to be determined whether Mr Roe was a worker within the meaning of section 230, subsection 3 of the 1996 Act. Again the **Uber** case is relevant; so to is the case of **Bates van Winkelhof v Clyde and Co LLP** [2014] UKSC 32.

5. In fact, the parties could not come to terms on the instruction of an expert witness to determine the authenticity or otherwise of the signatures in issue. There was therefore a Case Management Discussion held on 6 July 2021 with Summary and Orders sent to the parties on 12 July 2021.

6. The Respondents were given leave to call Mr D Hart who is said to have witnessed the signature on Mr Roe on page 80 of the bundle. In fact, they did not call Mr Hart. Mr Bartlett's explanation was that Mr Hart was no longer instructed to act for the Respondent's and its associated companies and did not respond to requests.

7. Mr Roe was given leave to call a Mr Faulconbridge but in fact he did not do so. No further evidence whether documentary or otherwise was introduced.

Findings of fact

8. Mr Roe began work as a scaffolder on 3 April 2018. His task was to erect or strip down scaffolding.

9. He was instructed which sites to go to by his Supervisor, an employee or member of the Respondent and in conjunction with the Site Agent (an Employee of the house builder on whose site Mr Roe was working) what work to carry out.

10. He was supplied with a van by the Respondent's for travel to and from home and work sites. He was supplied with some but not all of the necessary tools.

11. His evidence was that he worked most days Monday to Saturday between April 2018 to the national lockdown at the end of March 2020. He also said that he took little holiday and had no sick leave.

12. However, as Mr Bartlett pointed out, there are gaps in the limited number of diary entries that are in the bundle, see 266 – 270, but on balance I accept that he worked most Monday's to Friday's in that period.

13. He submitted a daily timesheet but did not raise invoices at any time.

14. Up to June 2018, he was paid on a self-employed sub-contractor basis and thereafter he received pay-slips in the form of that on page 271 on the basis of a gross profit share with deductions for Income Tax, National Insurance and Pension Contributions.

Conclusions

15. I need first to determine the issue of whether Mr Roe became a Member/Partner of the Respondent's on 4 June 2018 which is the backbone of the Respondent's case. They say he did sign the relevant documents, in particular the

Deed Of Adherence on pages 79 and 80 and the Intellectual Property Licence Agreement at pages 76 to 78. The evidence is limited. Mr Roe says that he does not remember signing either document and in particular, he is clear in his evidence that the signature on page 80 on the Deed Of Adherence is not his signature.

16. As I have indicated above, the Respondent's did not call Mr Hart who is alleged to have witnessed Mr Roe's signature.

17. I have also at page 343, Mr Roe's diary entry which indicates that on 4 June, he was on site and Mr Roe's evidence in that regard is that he worked a normal day on that day and did not travel anywhere else.

18. On balance, I prefer Mr Roe's evidence and it therefore follows that he did not join the Respondent's as a Member/Partner.

19. Mr Bartlett argues however, even if he did not join, he acted in accordance with the Deed Of Adherence and the Members' Agreement which begins at page 85.

20. In fact, the only act on Mr Roe's part which might be seen to be acting in accordance with the Members' Agreement, is the way in which he was paid. Even in that regard, I am not convinced that that is so, given the limited material available, see pages 265, 271 and 272.

21. It seems to me that Mr Roe was in fact paid in accordance with Clause 10.2 of the Members' Agreement. I note that that assumes a Contract Of Employment immediately before joining the LLP with "*any associated enterprise*".

22. Associated enterprise is defined as "*Swift Scaffold (Midlands) Limited*" which acts as agents for and licence for the LLP in connection with the conduct of the business. That explains what Mr Bartlett could not explain, namely why much of the correspondence is in the name of the limited company rather than the LLP, i.e the limited company was acting as agent for the LLP.

23. Returning to adherence to the Members' Agreement, the Adherence Agreement required a capital contribution of £19,655. It is common ground that Mr Roe did not make such contribution. Mr Bartlett explains that by saying that in lieu of the capital payment, the Intellectual Property Licence Agreement was entered into. Recital B of that Agreement reads as follows:-

"TR (Thomas Roe) has developed or otherwise owns certain knowledge and methodologies which SSL desires to make use of in conducting its business. Furthermore, TR owns the exclusive rights over the use of the name THOMAS ROE together with associated personal information and personal contacts and relationships which SSL also desires to make use of in conducting its business".

24. This device is clearly both a nonsense and a sham. It is a mere device to avoid the payment of capital and has no value whatsoever.

25. I also note that the Intellectual Property Licence Agreement and the Adherence Agreement are both contradictory in principle and in detail. For example, the sum differs between the two Agreements.

26. The Members' Agreement also requires three monthly Members' Meetings. Mr Roe tells me, and I accept, that he never attended such meetings and indeed was

unaware of them. He also tells me, and I accept, that he played no part in the management of the LLP.

27. Also in relation to the expulsion of Mr Roe from the LLP, there appears to be no explicit expulsion provision, though at clause 4.2 reads;-

“The LLP may remove and/or appoint any Designated Member by one month’s written notice to the person concerned, provided that the LLP shall at all times have at least two Designated Members”.

28. However, Mr Roe was not a Designated Member, see clause 6 of the Deed Of Adherence. In fact, in “*dismissing*” Mr Roe, the process and terminology used was entirely consistent with a Contract Of Employment, see for example the invitation to the disciplinary meeting at page 151 and the dismissal letter itself at page 230 – 232. I note that Mr Roe was to be paid two weeks’ pay in lie of notice and was to receive 4.5 days of accrued Holiday Pay. Again, these payments do not appear to be in accordance with the Members’ Agreement but look suspiciously like payments brought about by the end of a Contract Of Employment. Mr Bartlett’s explanation was that they were all mistakes.

29. Thus, it cannot be said that either Mr Roe joined the LLP or that the parties acted in accordance with the Members’ Agreement. Indeed, all of the evidence is to the contrary.

30. To return to the principal issue in this case, namely whether Mr Roe was an employee, I am satisfied that there was mutuality of obligation, Mr Roe was provided with work by the Respondents and carried it out personally. The Respondents did not advance any evidence that Mr Roe could provide a substitute.

31. As to control, I am satisfied that Mr Roe worked under the control largely of Swift in his day to day activities. They also subjected him to a process of discipline which lead to the end of the relationship with Swift.

32. Mr Bartlett relied in his submissions in the alternative the fact that Mr Roe was a Self-Employed Sub-Contractor for the whole of the period and he relies on the Agreement which begins at page 55 and appears to be signed by Mr Roe at page 62. I accept that the Agreement is inconsistent with a Contract Of Employment subsisting between Mr Roe and Swift Scaffolding Midlands Limited.

33. However, is this an Agreement such as that which was considered in the case of **Autoclenz Limited -v- Belcher 2011 ICR 1157** which was discussed and applied in the Uber case. Again, in Autoclenz, the Claimants signed contracts which stated they were Sub-Contractors and not Employees, so the question is, does the Sub-Contracting Agreement reflect the true Agreement between the parties? In my judgement, it does not for the following reasons;-

- a). Mr Roe acted like an employee and was in reality paid like one.
- b). He was subjected to a disciplinary process that bears all the hallmarks of a Contract Of Employment.
- c). He was clearly integrated into the business and was provided with a van and some tools and was sent to the appropriate site by Swift.

34. Applying Uber the protection given by the Employment Rights Act would be seriously undermined if the putative Employer could by the way in which the

relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as an Employee.

35. I am therefore satisfied that Mr Roe was an Employee from April 2018 on 7 August 2020. It therefore follows that because Mr Roe was an Employee, he is also a worker.

36. I note from the Members' Agreement that even had Swift succeeded in showing that Mr Roe was not an Employee, then it would appear that clause 14 of the Members' Agreement would have required Swift to indemnify Mr Roe against any losses arising from the fact that he did not have the benefit of "*legislation or regulations for the protection of employees and workers that they would have been entitled to under any contract between him and any Associated Enterprise which subsisted immediately before the date upon which he became a Member of the LLP*".

37. I note that this litigation has been prolonged by reason of a lack of co-operation between the parties and a lack of common courtesy. I trust that the issues to be determined will be approached in a professional and respectful manner on both sides.

Employment Judge Blackwell

Date: 25 November 2021

Sent to the parties on:
25 November 2021

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For the Tribunal:

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