



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Patrick Cusack

**Respondent:** Specialist Cars Limited

**Heard at:** Cambridge (CVP)

**On:** 7 January 2022

**Before:** Employment Judge Hutchings (sitting alone)

## Representation

Claimant: Mr England of counsel

Respondent: Ms Davies of counsel

# RESERVED JUDGMENT

1. The claimant is an employee within the definition of section 230 of the Employment Rights Act 1996.

# REASONS

## Introduction

1. The claimant, Mr Patrick Cusack, worked for the respondent, a specialist car dealership, delivering new and used cars to customers. The claimant has brought a claim for unfair dismissal under section 98 of the Employment Rights Act 1996 (the 'Act') on the basis that he was an employee within the definition set out in sections 230(1) and 230(2) of the Act.
2. The respondent contests that the claimant was an employee; the respondent asserts that the claimant is a worker within the definition set out in section 230(3) of the Act.

**Issue for the Tribunal to decide**

3. Is the claimant an employee under sections 230(1) and 230(2) of the Employment Rights Act 1996 and therefore entitled to bring a claim for unfair dismissal?

**Procedure and evidence**

4. The claimant was represented by Mr England of counsel and gave sworn evidence. The respondent was represented by Ms Davies of counsel, who called sworn evidence from Mr Clive James, the respondent's finance director. I considered documents from an agreed 65-page Bundle of Documents (the 'Bundle').

**Findings of fact**

5. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers (in brackets) are to the Bundle.
6. The respondent, Specialist Cars Limited, operates a car dealership employing in the region of 300 staff. The claimant, Mr Patrick Cusack, worked for the respondent from July 2009 delivering new and used cars to the respondent's customers. In evidence to the Tribunal Mr Cusack accepted that at the outset of his employment in 2009 he was a casual worker. He submits subsequently, as the business expanded, his role became that of employee. He is a 'Corporate Driver'; this job title was used by Manjit Ahluwalia (Head of Business for the respondent's Stevenage dealership) in an email to the claimant on 11 January 2021 (45).
7. I have seen a copy of the claimant's terms of employment set out in a letter from the respondent dated 7 July 2009 (34–38), signed by the claimant on 15 July 2009. The letter incorporates the respondent's Company Handbook into the claimant's terms and conditions. The letter refers to the claimant being employed on a 'Casual / Flexible basis with no guaranteed working hours' (34). By this letter the claimant and respondent agreed that (i) the respondent could check the claimant's CV; and (ii) the 48-hour cap under the Working Time Directive would not apply to the arrangement (38), in the same way the respondent did for all employees.
8. The claimant was paid an hourly wage, monthly on the 28<sup>th</sup> of each month. I have seen copies of the claimant's pay slips for June 2019 and August 2019. (62-65). The respondent paid national insurance contributions and PAYE. The claimant was not paid for holiday; Mr James confirmed to me in his evidence that the respondent inflated this hourly wage to compensate for holiday pay.
9. The claimant's employment is subject to the terms set out in the respondent's Company Handbook, which applied to all staff. I have seen a copy of the notice terms set out in the Handbook (51). After 4 weeks of employment the claimant was required to give 4 weeks' notice. This provision is more than the statutory minimum and applied to all staff. After 4 years of employment the claimant was required to give notice of 1 week per year of employment to a maximum of 12 weeks. Having been employed

since 2009, the claimant was subject to a notice period of 12 weeks, the same as all employees whose service exceeded 4 years. The respondent can choose to pay all staff in lieu of notice (51).

10. The performance procedure for Mr Cusack's role was determined by the respondent. Mr Cusack would collect the key for the car he was delivering from his locker (to which he and his manager had a key), collect the paperwork from a cabinet opened with the respondent's fingerprint, drive the car to the purchaser, hand over the car with an explanation and/or demonstration of the vehicle features and functions. The respondent would return signed paperwork to the respondent's administration team. To carry out deliveries the claimant wore a branded anorak provided by the respondent and a collar and tie. The respondent provided Mr Cusack with a corporate credit card and a cash float of £100 for his travel expenses. The same arrangements governed all employees with the 'Corporate Driver' job title.
11. In evidence Mr James told the Tribunal that the claimant was offered and accepted work on a regular basis in the 10 years prior to the Covid-19 pandemic. While not every day, work was offered and accepted every week in this period. Mr Cusack told me he was allocated work a week in advance in a schedule of work from the respondent's office manager. The hours and days varied due to the different distances the claimant was required to travel to deliver cars and due to wider market pressures, such as quiet periods before the introduction of a new numberplate.
12. I have copies of the availability log recorded by the respondent for the period 1 January 2019 to 31 March 2020 (52-61). This is a limited snapshot of the claimant's working hours, considering the claimant had worked for the respondent since 2009. Mr Cusack told me that he did not know a record of his working hours was kept. The claimant did not have set working days; during this period he did make himself available at least a couple of days, usually more, every week and was offered work every week. While some weeks he was offered more work than others, this was due to fluctuations within the market for the car industry (holiday periods, the weeks before the release of a new numberplate when new car demand dropped as customer for the new plate). The claimant worked for the respondent every week during this period, frequently 3 or more days a week. Overall work was provided and performed on a regular basis.
13. The respondent was expected to be available personally on the days he was available. He was not able to send a substitute driver in his place. For the period of his employment Mr Cusack did not decline any work he was offered. Mr Cusack told me more in his evidence about how his availability and the allocation of work had been handled during the period of employment. If for any reason Mr Cusack was not available, he would inform the respondent in advance the reason why. He was not expressly required by the respondent to provide a reason if he was not available; it was something he had always done. If the claimant was unable to work on a particular day the respondent would allocate work to another Corporate Driver. Mr Cusack could not send a replacement. Mr Cusack was invited to the respondent's Christmas parties.

14. Mr Cusack's performance was governed by the disciplinary process set out in the Company Handbook. In his evidence Mr James told me that the respondent had never had reason to discipline the claimant, but if a reason arose disciplinary proceedings would be available.
15. I have seen the claimant's pay summary for the period January 2019 to December 2020. The monthly amount paid to Mr Cusack fluctuates. Given Mr Cusack was employed by the respondent from July 2009 it is a very small snapshot, covering a period of the Covid-19 pandemic and furlough payments so is not necessarily representative of Mr Cusack's monthly income over the period of his employment.
16. From the snapshot of work schedules (1 January 2019 to 31 March 2020) and limited view of salary records (summary of January 2019 to December 2020) it is not possible for me to determine if Mr Cusack was employed on average 40 hours a week. I find that Mr Cusack was available to work regularly throughout the period for which records have been made available to the Tribunal and was offered work frequently during this period.
17. On 24 March 2020 the claimant attended a briefing by Mr Ahluwalia which explained the impact of the Covid-19 pandemic on the respondent's business and notified all staff that changes to working and financial arrangements would be considered from 1 April 2020.
18. A letter dated 25 March 2020 from Clive Fletcher and Mick Donovan of the respondent informed the claimant that the respondent was considering implementing the government's furlough scheme. The same letter was sent to all the respondent's staff. The letter stated that '*[you] will continue to be employed by us .... terms and conditions of employment and continuity of employment will not be affected*' (40). The letter informed staff that the alternative to accepting furlough '*may be compulsory redundancy or unpaid leave*'. No distinction was made between staff the respondent considered to be 'casual' workers and other staff; all staff were asked to return an acceptance slip indicating if they were willing to accept furlough (41). Mr Cusack accepted the offer of furlough.
19. On 1 October 2020 Mr Ahluwalia informed the claimant that his furlough would end on 31 October 2020. On 2 November Clive Fletcher and Mick Donovan sent a letter (42-44) to all staff updating on business performance and future planning following further government announcements. This letter was sent to all staff.
20. In an exchange of emails between the claimant and Mr Ahluwalia between 8 December 2020 and 11 January 2021 the claimant queried the decision not to place him on furlough for a second time and suggested a redundancy situation. Mr Ahluwalia stated on 11 January that the Corporate Driver role not being made redundant (45-49). Around this time Mr Cusack was told that he was free to find work elsewhere. This was the first time Mr Cusack was told he could do so. Mr Cusack told me he did not work for anyone else until 21 November 2021.
21. Mr Cusack admits he was employed on a casual basis in 2009, but at some later date he became an employee of the respondent. Mr Cusack has not provided evidence as to the date he believes this change in status occurred,

other than a statement in oral evidence that '*sometime in the last 5 years as the business expanded*' he was accepted as '*a permanent fixture to the business.*'

### **Relevant law – employment status of the claimant**

22. Section 98 of the Employment Rights Act 1996 (the 'Act') confers on employees the right not to be unfairly dismissed. This right does not apply to workers. Section 230 of the Act defines employee and worker.

23. Sections 230(1) and 230(2) of the Act define 'employee' and contract of employment. Section 230(3) defines 'worker':

23.2 (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.

23.3 (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.

23.4 (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.

24. 'Employee' is not precisely defined in the Act. The test for determining employee status is objective. The Tribunal must consider all terms to determine whether there is a contract of employment. Case authorities identify important considerations for the Tribunal to take into account to determine if the terms achieve the irreducible minimum of a contract of employment; these include control, mutuality of obligation and personal service. It is not an exhaustive list and there is no precise definition of these phrases; case law is emphatic their meaning depends on the circumstances of the case. No one factor or combination is determinative; however, to achieve the irreducible minimum both control and mutuality of obligations must be found. The Tribunal should consider the cumulative effect of contractual terms, the reality of how they operate in practice in all the circumstances of the relationship between the parties.

25. Mr England and Ms Davies provided me with agreed written legal submissions setting out relevant legal authorities to assist determination of status. In particular, I was referred to the following authorities to assist the Tribunal's interpretation of section 230 of the Act:

25.2 *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, QBD. *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB: contract for service or contract of service.

25.3 *Catholic Child Welfare Society and Ors. v Various Claimants and Ors.* [2012] UKSC. *Autoclenz Ltd v Belcher* [2011] UKSC. *Ready Mixed*

Concrete v Minister of Pensions and National Insurance [1968] 2 QB: control.

25.4 Khan v Checkers Cars Ltd EAT 0208/05. Dakin v Brighton Marina Residential Management Co Ltd EAT 0380/12: mutuality of obligation

## **Conclusions**

26. It is not disputed that at the start of his employment in July 2009 Mr Cusack's status was that of worker. The question for the Tribunal is two-fold: did Mr Cusack's status change to that of 'employee'? If the Tribunal concludes that at some stage Mr Cusack was an employee, then on the basis that he was not an employee at the start of his employment can the Tribunal determine on the evidence before it when status changed?
27. I have in my mind that there must be an irreducible minimum of obligation for the parties to create a contract of service for an employee. In considering whether there is a minimum obligation between the Mr Cusack and the respondent I have to determine if there is mutuality of obligation (to determine if there is a contract of employment) and control (to determine if it is a contract of service). Case authorities make it clear the status of control and mutuality are dynamic, and depend on the particular circumstances.
28. Mr Cusack was not in business on his own account; he provided driver services for the respondent delivering their vehicles. Mr Cusack provided the respondent with his availability. If he was not available to deliver cars on certain days, he could not send an alternative driver in his place. The respondent would arrange cover by another of their Corporate Drivers. This points to a contract of service.
29. Mutuality of obligation does not require Mr Cusack to work a particular amount; he may refuse work. If a person has considerable freedom in terms of the hours and amount they work this arrangement does not in itself mean there is no mutuality. The Court of Appeal decision *Clark v Oxfordshire Health Authority [1998] IRLR 125* informs that the mutuality of obligation is flexible. It is not a prerequisite for an employee to have regular hours. The nature of the mutuality depends on the circumstances of the case.
30. To be an employee Mr Cusack is obliged to do a minimum amount of work for which he was paid. I have seen schedules of Mr Cusack's availability for the period January 2019 to December 2020. The vast majority of the time Mr Cusack is listed as available for work. When he was not available for work he told the respondent the reason why; while he was not expressly obliged to do so, he always had and this seemed to be an expectation. Mr Cusack did not refuse work when he had told the respondent that he was available. Often on the dates Mr Cusack informed the respondent he was available he was allocated work. I do not have to identify a minimum number of hours or pattern of days to satisfy the mutuality of obligation. While Mr Cusack did not work set days I find that the respondent expected Mr Cusack to be available on a very regular basis and he made himself available. I find the expectation of the respondent for Mr Cusack to be regularly available is reinforced by the regularity at which the respondent allocated work to Mr Cusack. The periods where work was not allocated are consistent with period where the car industry as a whole is quieter, such as prior to the introduction of a new numberplate. There is a history in the relationship

between the claimant and respondent where the claimant regularly and consistently made himself available to work and when he did so he was frequently allocated work. Even though not every day the work undertaken by Mr Cusack was regular and substantial. Putting Mr Cusack on the government's furlough showed a desire on the part of the respondent to retain the Claimant throughout a challenging period in 2020 so that he could be available for work once restrictions places on the car industry were eased. I find these facts point to a contract of employment.

31. For a contract of service there needs to be 'control', whereby the respondent determines the activities undertaken by the claimant. Mr Cusack worked under the direction of the respondent; his managers determined the process for collection of the cars, including keys collection and administration of paperwork. Mr Cusack was required to wear the respondent's branded anorak. He was provided with a corporate credit card and expense float of £100 to finance return travel after delivery of a vehicle.
32. Mutuality of obligation and control are not the sole requirements to establish a contract of service as an employee. I have considered the terms of the written contract between Mr Cusack and the respondent. These mirror the terms for the respondent's other employees. Mr Cusack's contract contained provisions (CV checking, disapplication of Working Time Directive) that applied to all the respondent's employees. The contract incorporates the respondent's Company Handbook containing terms governing (among others) notice and discipline; these applied to all the respondent's employees. The notice provision which applied to Mr Cusack in his first 4 years of service was more generous than statutory provisions. The claimant is required to give 12 weeks' notice to end employment; this obligation is mutual. The fact Mr Cusack was employed on the same terms as all staff, and was subject to generous notice provisions set the basis of a contract of employment, when considered cumulatively with the amount of work undertaken and how it was performed I find there is a contract of service between Mr Cusack and the respondent.
33. Other factors I find go towards Mr Cusack being an employee are: he was paid by the respondent on a PAYE basis; the respondent paid national insurance contributions; and it compensated Mr Cusack for holiday pay indirectly through an inflated hourly wage.
34. Mr Cusack's role is that of Corporate Driver. While this is a label, it is a label which becomes relevant to how the respondent viewed substantive rights available to the claimant. He was treated the same as other employees: the claimant received letters in March 2020 and October 2020 which were sent to all employees; respondent managers referred to him in correspondence a Corporate Driver. As such the respondent wrote to Mr Cusack along with other employees to tell him if he did not take up an option for furlough he may be considered in any redundancy process should this need arise due to changes to business resulting from the impact of the pandemic.
35. Looking at the cumulative effect of the factors governing the working relationship I find the features in the working relationship are consistent with a contract of employment for the purposes of section 230(2) of the Act and that Mr Cusack is an employee under section 230(1).

36. The reality of the situation shows that there was a mutuality of obligation above the de minimus where the claimant was obliged to make himself available, the respondent was obliged to offer work and pay for it. I find that the fact the respondent was not contractually obliged to offer work nor Mr Cusack refuse it does not defeat Mr Cusack's claim to be an employee, when the pattern of work undertaken is considered cumulatively alongside other facts such as the nature of the contractual terms and element of control the respondent had over working practices.
37. Mr Cusack is integrated as an employee within the definition of section 230 of the Act. There is a mutuality of obligation about a de minimis level. With the respondent controlling how he conducted his employment. He was employed on similar terms as other employees and sent correspondence received by all employees giving him the same options. He was even told that not accepting furlough may result in redundancy. There seems to be little distinction between the way Mr Cusack was treated and the way all staff was treated.
38. By his own admission Mr Cusack was a worker when he began employment with the respondent in 2009. As the evidence before the Tribunal relating to mutuality of obligations, wage records and communications with Mr Cusack dates from the period 2019 onwards and there is no substantive evidence before this period, nor does Mr Cusack himself identify a date on which he submits his employment changes, I am unable to determine the date from which Mr Cusack's employment status changed from that of worker to employee.
39. Mr Cusack may proceed to a final hearing in his claim for unfair dismissal. The date at which he became an employee will be considered at this hearing.

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*Employment Judge Hutchings*

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Date: 14 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE  
PARTIES ON

28 January 2022

FOR EMPLOYMENT TRIBUNALS