



THE EMPLOYMENT TRIBUNALS

Claimant: Mr M Francis & Others
Respondent: Newcastle City Council
Heard at: Newcastle upon Tyne Hearing Centre
On: 9th & 10th February 2022
Before: Employment Judge Speker OBE DL

Representation:

First Claimant: (In Person)
Respondent: Mr Andrew Webster of Counsel

JUDGMENT

1. The first claimant Mr Michael Francis (Snr) is not an employee of the respondent.
2. The first claimant was not a worker for the respondent.
3. All claims by the first claimant against the respondent are dismissed.
4. The 2nd, 3rd and 4th claimants were Employed by the first claimant and not by the respondent. All and any claims made by them against the respondent are dismissed.
- 5 If any of the 2nd, 3rd and 4th claimants wish to pursue claims against the 1st claimant as their employer they must write to the tribunal by 4pm on 23 March 2022 (time extended by the Judge) with details of their application to amend their claims with full details of such claims and calculations

REASONS

1. At a preliminary hearing on 21st September 202 Employment Judge Martin directed that a public preliminary hearing be listed for two days to consider the status of the

claimants, namely whether any of the four claimants are employees and/or workers and if so who is the claimant's employer and/or who engaged their services.

2. The first claimant is Mr Michael Francis and the case revolves around care provided for his wife, Mrs Medina Francis, who sadly died late in 2021. Mr Francis and his three children have brought claims in the employment tribunal with regard to payments which they received and suggesting that further money may be due to them and that the fact that no such money has been paid potentially gives them claims for unauthorised deduction of wages under Section 13 of the Employment Rights Act 1996. The respondent, Newcastle City Council, is the local authority which provided funds for the delivery of care to Mrs Francis during her lifetime. The claims being brought have not yet been specified, clarified or calculated but this hearing is limited to determining matters of status.

The Hearing

3. Mr Francis gave oral evidence and represented himself. On behalf of the respondent, evidence was given by Ms Rebecca Crawford, Senior Practitioner. I was provided with a bundle of documents running to 396 pages. Counsel for the respondent produced detailed written submissions and Mr Francis also provided written submissions. An e-mail was sent to the tribunal by one of the respondents, Caroline Heron, a daughter of Mr Francis, explaining reasons why she was unable to attend the hearing. The other two claimants, Mr Michael Francis junior and Claire Francis did not attend and provided no submissions.

Findings of fact

4. I make the following findings of fact.
5. Under Section 8 (2) of the Care Act 2014 if an adult is assessed as having an eligible need a local authority can meet these needs by providing to the individual direct payments so they can arrange their own care. By virtue of Section 32 if an adult lacks capacity then a request can be made for an alternative person to be assessed by the local authority to receive and administer the direct payments on the service user's behalf. The Section 32 authorised person has the ability to use the direct payments to provide the required care and support usually by employing appropriate carers to meet the assessed care needs. Local authorities cannot compel anyone to become a Section 32 authorised person. The role must be taken on voluntarily. If no one does volunteer then the care needs must be met by other means typically by the local authority directly providing or commissioning the care. When a direct payment is made the local authority will set out the overall number of care hours a person is assessed as requiring. The direct payment will be that number of hours multiplied by the set hourly rate which produces the direct payment budget.
6. It is set out in a document DP3 which provides the obligations upon the Section 32 authorised person generally and in relation to the provision of carers. This includes that the Section 32 authorised person must ensure that tax and NI payments are made with regard to monies paid to personal assistants arranging employer's liability and public liability and insurance with appropriate legal advice support,

providing personal assistants work place pensions, holiday pay sick pay and a sum to cover contingencies about which guidance is given. The Local authority funds a direct payment advice support scheme. The DP3 also lists other obligations including the proper use of the funds, the keeping of proper financial records, co-operating with financial audits and repaying unused or misused money. There is also an obligation to provide contracts for those employed to deliver care referred to in various places as 'personal assistants'.

7. Under the Care Act the local authority maintains its responsibilities to regularly review the care needs of individuals and also to ensure that the support provided is appropriate. There are relevant regulations, namely the Care and Support Direct Payments Regulations 2014.
8. As stated Mr Francis agreed to be the Section 32 authorised person for his wife. Mrs Francis was in receipt of direct payments from 2003. Mr Francis was formally the Section 32 authorised person from 2014. The needs of Mrs Francis were met by a combination of informal support from her husband, Mr Francis, support from direct payments and additional support from a care agency commissioned by the local authority. In this case, the local authority was unable to produce the actual DP3 agreement which may originally have been signed by Mr Francis or any other contemporaneous documentation which was unfortunate and surprising notwithstanding the number of years which has elapsed. It was clear from the evidence that Mr Francis was aware of the contents of the DP3 agreement form and worked on the basis of it although there were various respects in which he did not comply with the precise terms.
9. In June 2020 Mr Francis was requested to sign a new DP3 form but declined to do so giving the reason that there was a historic dispute with the independent living fund, the precise details of which were not within this hearing. It was also alleged by the local authority that he declined to provide required audit information. It was noted that he did not take out the required employers liability insurance. Mention was made of court of protection proceedings but the details of these appeared not to be relevant for the purposes of the current hearing and therefore no details were given and no papers provided.
10. Later in June 2021 Mr Francis was told that if he did not sign the DP3 forms then the local authority could not accept responsibility for the personal assistants and he was advised to take legal advice. On 25th June Mr Francis stated that he was willing to continue arranging Mrs Francis care pending resolution of legal issues. Rebecca Chapman, on behalf of the local authority, gave notice of intention to end Mr Francis' Section 32 authorised person role but, due to ongoing processes, the local authority did not proceed with that. The direct payments continued.
11. Mr Francis utilised a payroll provider called Accountability. They provided the usual payroll services calculating wages and seeing to tax and national insurance deductions and also having relevant lists which would be required by the local authority when undertaking the necessary reviews and audits. It was suggested by Mr Francis that Accountability provided some financial details to the local authority without him having given authority for this and he took exception to this and he suggested that this demonstrated control being taken by the local authority over the

bank account and over the whole arrangement. Mr Francis had raised issues as to liability for redundancy payments in the event of his wife's demise and he disagreed with the suggestion as to when the calculation of redundancy payments should commence.

12. In calculating the payments to be made to the personal assistants Mr Francis paid his son more than was paid to his daughters and he stated that the circumstances justified this. He maintained that he had sought authority from the local authority but there was no evidence to confirm this. Mr Francis' failure to sign the new DP agreement in 2019/2020 meant that he did not receive the enhanced hourly rate which the local authority was prepared to pay consistent with the living wage. Mr Francis also had issues as to whether he could furlough two of his personal assistants. He said he referred this to the local authority and they responded by telling him that he should take advice through his insurance policy. When Mrs Francis died in November 2021 Mr Francis made redundancy payments to the personal assistants. Those facts led to the issue of these four sets of proceedings in the tribunal against Newcastle City Council.
13. The relevant law is Section 230 of the Employment Rights Act 1996 which provides statutory definitions of the terms 'employee' and 'worker'. There are also relevant cases in relation to the test which should be applied and some recent cases such as the Uber case and the Pimlico Plumbers case.
AutoclenzLtd v Belcher and Others [2011] UKSC 41; Uber BV and Ors v Aslam and Others [2021] UKSC; Ready-Mixed Concrete. (South East) Ltd v MPNI [1968] 2WB 497; Byrne Brothers (Formwork) Ltd v Baord and Ors [2002] ICR 667.

Submissions

14. Mr Webster provided the tribunal with detailed submissions setting out comments upon the evidence and also his submission that all of the evidence pointed to the fact that Mr Francis senior was not an employee and indeed that he did not, himself, argue that he was. Mr Webster submitted that Mr Francis was not a worker within the statutory definition. When pressed Mr Webster accepted that the lacuna was to say that, inevitably, the argument must be that Mr Francis was self-employed and that he was the person who engaged the personal assistants on a self-employed basis initially under a title suggesting a business in his name, Michael Francis Care Services, and latterly solely in his name, Michael Francis, which is the name shown on the pay slips and the banking details provided by the payroll provider.
15. Mr Webster referred to relevant leading cases with regard to status and also brought to the attention of the tribunal to a case of Mr S Afful against R1 R2 and London Borough of Haringey, case number 3323990 of 2019 which was heard by the Watford Employment Tribunal on 28th January 2021. I have read the reserved judgment in that case. The relevance of it and of course I note that it is a judgment of a tribunal and therefore only of information and possible persuasive influence that it arises out of similar circumstances under the provision of direct payments to a person in care. The circumstances set out in that judgment are helpful in that they show again the operation of the direct payment scheme and the fact that the employees, the assistants, were deemed not to be employees of the local authority

and, indeed, it was never seriously suggested by anyone in the present case that they were but the issue there was whether they were the employees of one of the other two respondents, one of which was the person who was the recipient of care. Various factors including the appointment of the payroll provider are echoed in that case and I find it of some assistance by way of illustration.

16. Mr Francis submitted largely in relation to specific points which he had made which he felt were significant in that he maintained that the local authority had taken inappropriate control of the arrangements made with regard to the engagement of personal assistants. In particular he alleged that the local authority effectively had control of the bank account and that, in those circumstances, they should be treated as the employer of the personal assistants and, indeed, they had reduced him to what he described as being a manager and therefore someone who was delivering services for the local authority and therefore that he had worker status.
17. The evidence with regard to the banking arrangements appeared to be that the local authority obviously paid money into the bank account which effectively was the operation of the direct payments scheme but there was no evidence that they had access to the account even though, as would be expected, they were recipients of unused money which had to be paid back to them which, in the general nature, is how the scheme had to operate.

Findings

18. I find that the arrangement which Mr Francis had with the local authority was pursuant to the provisions of the Care Act 2014 direct payments scheme. He volunteered to be the Section 32 authorised person, he took that role voluntarily. Initially he operated it as business Michael Francis Care Services and this was changed to his own name but in either capacity he was the person who was operating the arrangement whereby carers were provided for his wife.
19. Although Mr Francis did not sign a DP3 form, or indeed none was produced at the tribunal as having been signed, it was clear that the arrangement under which Mr Francis worked was that DP3 arrangement, even though he failed to comply with all the terms of it. I do not find any basis for the suggestion that Mr Francis senior was an employer of the local authority and, indeed, he did not strongly suggest that this was the case. In assessing this I have applied the standard test of mutuality of obligation and control which, clearly, did not exist here. I have also applied the recognised cases on employment status including Ready Mixed Concrete.
20. I find that the terms of the contract between Mr Francis and the local authority were as set out in the DP3 form. As stated he took on this role voluntarily and, by definition, there was not, and could not be, any payment to him personally for the delivery of anything that was to be provided using the budget. It was he who set up the budget and he engaged and appointed the personal assistants. He made the decisions as to who would be employed. He organised the rotas of work. He arranged who was to be paid what. He was the person to whom the personal assistants would report with regard to rotas or with regard to sickness or absences. Ultimately he made the redundancy payments himself accepting responsibility to do so. There were also periods when there was insufficient money to pay the

wages and he took responsibility for making those payments on his own credit cards.

21. I find that the payroll agency was engaged by Mr Francis himself and that he was responsible for giving instructions to them. I do not find any evidence to the effect that they were subjected to any control by the local authority in any way which altered the status of Mr Francis from being a self-employed person operating the scheme under Section 32 into a person who could possibly be described as a worker under the statutory definition in Section 230. He was receiving statutory funds to enable him to operate a system whereby his wife received appropriate care. In that sense he was not delivering services for the local authority and he was not delivering services under any contract within the statutory definition.
22. Accordingly I find nothing to justify Mr Francis' contention that he should be recognised as a worker. I understand that he may have been influenced by what he has read with regard to cases such as Uber and Pimlico Plumbers but I do not find that this is a case where there was any attempt by the local authority to set up a sham arrangement and to describe Mr Francis as being anything different from what he actually was. As stated the direct payment arrangement was part of a recognised national scheme to enable persons needing care or persons on their behalf to control the care arrangements. The local authority still must follow its statutory responsibilities with regard to assessment of the care and auditing public money. These do not in any way make them in control of the arrangements which Mr Francis took on as a Section 32 provider.
23. Accordingly my conclusion is that Mr Francis was not a worker but was a self-employed person. In that event, the tribunal has no jurisdiction to hear any claims made by him against the local authority and those claims are dismissed.
24. With regard to the other three claimants they have not been here to argue a case but I am charged with making a resolution with regard to their status. I have no doubt whatever that their status was as employees of their father, Mr Michael Francis senior. He was the person who engaged them, he was the person who arranged their work and controlled their working arrangement and ensured that they were paid and, through his payroll agency, ensured that their tax and national insurance were properly dealt with. As they are not here and as potentially in view of my findings, their claims should be against their father, Mr Michael Francis senior, I am not dismissing all of their claims. I am dismissing their claims against the local authority as I find no basis and no jurisdiction for those claims to continue. I will give the other three claimants a period of time within which to write to the tribunal to indicate if they are requesting the tribunal to allow their claims to continue and, if so, whether they are applying to add Mr Michael Francis as a respondent as I find that he was their employer and that if they maintain that they have suffered unauthorised deduction of pay then any such claims should be against him as their employer.
25. I fully understand that it may be an unsavoury prospect for them to consider continuing proceedings against their father but, in fairness to them, it is appropriate that they should be given the opportunity to clarify their own position on their own behalf and they have twenty-one days (Extended) within which to write to the

tribunal to do so. If they fail to do so then the tribunal will consider whether their claims should be struck out in total.

EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
2 March 2022**

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