



EMPLOYMENT TRIBUNALS

Claimant
Joseph Kesler

v

Respondent
Mulalley & Company Ltd

Heard at: London (South) via Cloud Video Platform
On: 03/03/2022

Before: Judge of the First-tier Tribunal T Lawrence,
acting as an Employment Judge

Representation

For the Claimant: A Sharma

For the Respondent: A Barnes

JUDGMENT

1. The Claimant's claim for unfair dismissal does not succeed.

REASONS

Introduction

2. The Claimant claims that he was employed by the Respondent from 25 November 2013 until 17 January 2020. The Claimant complains that he was dismissed by the Respondent and that the dismissal was unfair.
3. The Respondent denies that the Claimant was ever employed by the Respondent.

The Hearing

4. The hearing was conducted on Cloud Video Platform with all attendees joining by video link.

5. I confirmed with the representatives that the documents for consideration were as follows:
 - 5.1. Core bundle (27-page PDF).
 - 5.2. Trial bundle (137-page PDF).
 - 5.3. Witness statement by the Claimant 08/04/2021.
 - 5.4. Witness statement by the Claimant 31/01/2022.
 - 5.5. Witness statement by Colin Watson 20/01/2022.
6. Oral evidence was heard from the Claimant and from Mr Watson.
7. Oral submissions were made by the Ms Sharma and by Ms Barnes.
8. I delivered an oral judgment during the hearing.

Issues for determination

9. It was confirmed by the parties at the outset of the hearing that the sole claim before the Tribunal is whether the Claimant is entitled to compensation for unfair dismissal, and that such entitlement was dependent on the Tribunal finding that he was an employee, as opposed to a worker, at the relevant time.
10. The Claimant's claim depends on his ability to establish that he was employed by the Respondent because (generally) only employees can claim unfair dismissal rights.
11. An employee is defined in S.230(1) of the Employment Rights Act 1996 (ERA) as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. Contract of employment is in turn defined as a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing' — S.230(2).
12. There is no precise and uniformly applied legal definition of a contract of employment. A contract is a promise, or set of promises, that the law will enforce. In the context of an employment contract, for example, the employee usually promises to perform certain tasks for the employer, who in turn promises to pay the employee wages or a salary. There will also usually be a range of promises made by the employer covering matters such as holiday, sick pay and working conditions. The employee may also make promises relating to subsidiary matters, such as not working for other employers. Such promises are enforceable in the sense that, if one party to the contract breaks a promise, the other party will be entitled to seek damages for that breach or, in exceptional circumstances, an order from a court preventing further breaches from taking place.

13. For a contract to exist, several conditions must be satisfied. There must be an agreement (usually consisting of an offer which is then accepted) made between two or more people, the agreement must be made with the intention of creating legal relations and the agreement must be supported by consideration — i.e., something of benefit must pass from each of the parties to the other. The individual terms of a contract must be sufficiently certain for the courts to be able to give them meaning.

Consideration and findings

14. The Claimant initially claimed to have been employed by the Respondent from 25 November 2013 until 16 or 18 August 2016, during a period of apprenticeship after which, he stated, he became self-employed and worked from 17 August 2016 until 17 January 2020. Self-employment from 17 August 2016 until 17 January 2020 would not entitle the Claimant to claim unfair dismissal on the latter date. However, the Claimant now puts the case that, in reality, he remained an employee throughout. The Claimant's apprenticeship and subsequent work for the Respondent was in painting and decorating.
15. The Respondent had responded that it considered the Claimant to have been employed until 7 August 2015 following the Claimant's resignation in writing on 31 July 2015, after which the Claimant entered into a series of sub-contract agreements with the Respondent.
16. The Claimant claims that he resigned his employment by the Respondent on the understanding that he would be provided with continuous employment, and that the mutual expectation was that he would make himself available for work and that he would be penalised by the Respondent if he did not do so. The Respondent denies the claim that there was any expectation of penalty if the Claimant did not make himself available for work, but in any event, the Claimant does not specify the expected penalty, and if what is meant is that he would have been less likely to be offered work in the future, that would not in my view be an element of control or obligation that is indicative of employment.
17. The Claimant claims that the Respondent had control over how much he was paid for this work on a daily rate, and the time in which the work needed to be completed, which was arranged with the Respondent's clients in discussions to which the Claimant was not involved. The Claimant claims that he was obliged to accept the daily rate and that he did not dispute those terms throughout the period in which he worked for the Respondent. Mr Watson stated that the time in which the work needed to be completed did not specify how or when the work needed to be done. Again, control over the remuneration for and time by which the work needed to be completed are not in my view elements of control or obligation that are indicative of employment.

18. The Claimant claims that he was required to sign and accept the contractual terms stated on the back of written agreements with the Respondent, some examples of which have been included in the trial bundle. He claims that he had no right to amend the terms. However, he has not suggested that he ever attempted to negotiate different terms, and the Respondent replies that the Claimant was at liberty to enter or to decline to enter into any of the agreements. The Claimant has not suggested that he ever tried to decline to do so.
19. The Claimant denies the Respondent's claim that he signed the written agreements before commencement of the work referred to in the agreement, which he claims were signed by him on the completion of the work in question, and he claims that the Respondent has entered the dates of signing at a later stage. The Claimant did not raise that matter in his written statements and Mr Watson, who is a managing director of the Respondent company, denied that it was true, stating emphatically that it was mandatory that the agreements were signed prior to work commencing. The Respondent has also pointed out that the Claimant could have, but did not, enter a date in handwriting. I consider that the Claimant's assertion is not proven on a balance of probability, and that it is more likely than not that he signed the agreements on the dates that are stated by his signatures, which are prior to the commencement of the agreed work.
20. The Claimant claims that the Respondent had significant control over how the Claimant delivered the painting and decorating services to its clients, including which paint and which colour to use, and which buildings he painted and decorated. However, the Claimant also stated in evidence that he was responsible for supplying his own paintbrushes and rollers, and I consider that it is not indicative of employment that the Claimant was required to work at specified locations as arranged between the Respondent and its clients.
21. The Claimant claims that he had no right to appoint a substitute, that he was only allowed to appoint a labourer who had undergone an induction by the Respondent, and that he was discouraged from providing a labourer if he was unwell. The Claimant referred to clause 2.7 of the written agreements with the Respondent which purports to require the Claimant to ensure that any labourer has undergone such an induction. However, substitution is provided for in the purported terms of the written agreements, and no examples are given by the Claimant of any occasion when he attempted to provide a labourer as a substitute. Mr Watson's cogent evidence was moreover that the Respondent needed to ensure that anyone entering work sites received a health and safety induction in order to discharge the Respondent's responsibilities for health and safety in the performance of contracts with its clients. The Claimant notes that that the agreements required him to arrange public liability insurance for any labourers, but that the Respondent did so. However, the Respondent does not deny that and notes that it paid for the same through deductions from the

Claimant's remuneration, which I do not consider to be indicative of employment.

22. The Claimant also claims that he was tightly supervised by the Respondent at the locations where he worked, and that he was required to regulate his appearance by wearing a uniform and badge. Mr Watson's cogent evidence was that the Respondent visited the sites of the work to check that the work was being carried out safely and that it was completed to an acceptable standard before payment was made, which again are not elements of control that are indicative of employment. Mr Watson also credibly stated that the Claimant was only required to wear company branded clothing during his employment as an apprentice, and that he was free to continue to wear that clothing, or not, thereafter, and that the requirements to wear a high-visibility vest and photograph identification card were to ensure that residents of the buildings being worked on could be reassured that workers were not bogus persons.
23. The Claimant claims that the photographs in the bundle showing him in clothing bearing the Respondent's name illustrate that he was a part of the company throughout his seven years of work, but I find that the photographs are consistent with the earlier period of employment as an apprentice, which I find to have ended on 7 August 2015, after which, considering the evidence in the round, I find the Claimant was not an employee of the Respondent.

Judge of the First-tier Tribunal **T Lawrence**,
acting as an Employment Judge
29 March 2022