EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Teacher	**v**	**Bobroff Real Estate Llp**

Heard at: Watford by CVP **On**: 7 & 8 February 2022

Before: Employment Judge R Lewis sitting alone

Appearances

For the Claimant: Mr D Oakland, solicitor
For the Respondent: Mr M Humphries, counsel

JUDGMENT was been sent to the parties on 27 February 2022. Reasons were requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. This was a preliminary hearing in public. The claim was presented on 18 December 2020. Day A was 2 November and Day B was 20 November.

2. The ET1 brought claims for unfair dismissal and disability discrimination. It named a number of respondents. The claims against all respondents other than the one named above were rejected on grounds of failure to undergo early conciliation.

3. A preliminary hearing took place by telephone before Employment Judge Alliott on 2 August 2020. Both parties had the same representatives as appeared today. This hearing was listed to decide whether the claimant was an employee or worker of the respondent within the meanings of the Employment Rights Act 1996 or Equality Act 2010, and if so for what period. Judge Alliott set a case management timetable.

4. Shortly before the hearing, it was necessary to convert the hearing to be dealt with wholly by CVP. I thank the representatives and parties for their cooperation in that regard.

5. There was a witness statement from the claimant and one from Mr Nigel Bobroff on behalf of the respondent; opening submissions from each representative; and a bundle of some 1,284 pages.

6. In brief case management at the start of the hearing, I asked the representatives to prepare an agreed introductory reading list of no more than 50 pages from the bundle; while I was then during an adjournment reading the statements and submissions, a joint email from both sides said that there was no need for me to read any of the bundle. In the event, at this hearing, I was referred to a handful of items in the bundle, notably emails at pages 178 and 880, of May 2018 and May 2020; to a specific item sent by the claimant in October 2017 (100); emails sent by the claimant after the end of the working arrangement (937-938) and Mr Bobroff's text (1151) terminating the arrangement.

7. The claimant was cross examined for just over an hour, and Mr Bobroff for a fraction under an hour. With the cooperation of both parties, I was able to hear closing submissions at the end of the first day, and deliver judgment on the afternoon of the second day.

8. I thank the parties and their representatives for their cooperation in the effective use of time, and for their dignified presentation and conduct of a troubling, emotive hearing.

9. At the start of the hearing, I had asked the parties to deal in closing submission with any application under rule 50; both confirmed that they made no application. In closing, both sides asked me to make no ruling on issues relating to the details of any loan arrangements between the parties, including terms as to interest or repayment; and likewise to make no ruling or finding as to any commission arrangement between the parties. I understood the basis of these requests to be to avoid any question of issue estoppel arising in the event of further proceedings. It was, in the event, not necessary for me to make any findings which go beyond those set out below.

10. The factual background is that the claimant, who was born in 1976, suffered a serious accident in 1996, since when he has been a person with disability. At paragraph 3 of his witness statement, he described the effect of disability. The respondent accepted that the claimant meets the s.6 definition of a person with disability.

11. Mr Bobroff is the claimant's brother-in-law. He is married to the claimant's half-sister. His evidence was that he has known the claimant since the claimant was aged about 14. Both the claimant and Mr Bobroff acknowledged the depth of their long, affectionate relationship, and its roots in what sounded like a large, close-knit family.

12. The family setting of this dispute meant of course that the claimant and Mr Bobroff knew each other in a personal setting for over three decades, and Mr Bobroff's long witness statement in particular discussed factual evidence about the family setting, which went beyond the issues usually heard in an

employment tribunal, and far beyond the usual information which an employer might be expected to have about an employee. When delivering judgment, I told the parties that I would not go into those matters unnecessarily.

13. Mr Bobroff has built up a substantial property development business. At paragraphs 5 and 6 of the claimant's witness statement, and in Mr Bobroff's statement at paragraphs 28-32, and 56 and 58, I could see common ground about the background setting of the present case.

14. For about the 12 years before spring 2017, the claimant worked (when he did work) in settings provided by family members, or by a close family friend. He acknowledged in his own statement his reliance on family. He has not been able to carve an independent working life.

15. The claimant was at a low ebb, and out of work, in spring 2017. He was in financial difficulties, not able to keep a job, and was involved in family disputes. All of this was known to Mr Bobroff. More detail is set out at paragraphs 61 to 78 of his statement.

16. In those circumstances and at that time Mr Bobroff wanted to help the claimant. After talking matters over with other family members, notably his wife, he offered the claimant the work opportunity which became the subject of this case. The broad idea was that the claimant should have the opportunity to work for the respondent; Mr Bobroff would teach and mentor him; and there would be a financial arrangement set out in detail below.

17. The respondent was then a home-based business. Mr Bobroff obtained office space in a business centre for the claimant and the company to use. I accept that the respondent could function without this, as it had done before, but that Mr Bobroff wanted the claimant to have a working base. He provided the working equipment necessary, including a Mac, and business cards.

18. In my finding, the arrangement offered by Mr Bobroff fell within three headline categories. He offered the claimant a working space away from the stresses which the claimant was then experiencing at home. He offered a source of funds which the claimant needed, but which was not a gift (see below). Finally, he offered the claimant an opportunity to learn about his property development business and meet Mr Bobroff's contacts, in the hope that this might lead the claimant to have a positive record of achievement on his CV, which might in time lead to independent employment.

19. Underlying all this was Mr Bobroff's wish to teach the claimant what in evidence he called "work ethic." Mr Bobroff did not define that term, and my interpretation is that he envisaged self-discipline, structure and self-direction, leading the claimant to professional success and financial reward. It is, I hope, not the wisdom of hindsight to say that that goal contained the seeds of its own un-achievability. Mr Bobroff could no doubt teach technical knowledge about the business, but that is a different thing from teaching a

man in his 40s, with the claimant's disability, to develop attributes such as self-discipline and self-reliance.

20. The claimant agreed that when this arrangement started in May 2017 it was a form of support or charity or kindness, but not employment. When asked in cross examination if he could identify an event which, or time when, it was converted to employment, he was unable to do so.

21. The agreement was not put in writing. The claimant said that that was because Mr Bobroff did not like to put something in writing if he could avoid it, because it might create a form of words which would come back and bite him. That is surprising and I do not accept it as a generalisation. Mr Bobroff's business was in the world of property, development, urban regeneration, planning control, financial constraints and the like; much of it was in the public eye and was accountable to the public. In those areas of work, use of the written word is essential.

22. I do not accept that Mr Bobroff did not put the arrangement in writing in some way to mislead or deceive the claimant. I make no finding as to his reasons, and I do not criticise him for not doing so, although I add two obvious comments: a short email in May 2017, summarising the situation, might have avoided a great deal of anguish in the intervening five years; and secondly if his fear was that he might inadvertently create an employment relationship, a modest outlay on expert legal advice in 2017 might have proved a sound investment.

23. The claimant's evidence was that he and his father repeatedly asked Mr Bobroff to issue a contract of employment. I accept Mr Bobroff's denial that either did. In so saying I note that today's bundle included over 850 pages of emails (87 to 944). This was a workplace where email use was prolific. I was not referred to a single email reference about a contract of employment.

24. I must ask first, what was the arrangement between the parties, in the sense both of their shared understanding, and how it played out in practice.

25. I find that the arrangement was that Mr Bobroff provided the claimant with the structure which was needed to do the work of supporting Mr Bobroff in the respondent's business: an office, a business card, an email account, Mac and so on. Mr Bobroff also made available his own time to support the claimant, and access to, for example, meeting clients. He set the claimant specific tasks and assignments, but followed them up, in the sense that the claimant did not have full working autonomy to conclude agreements on behalf of the respondent. In addition, the claimant had the opportunity and the resource to pursue his own ideas and his own initiatives in the property business, but, I find, not to commit the respondent to them without Mr Bobroff's consent.

26. I accept Mr Bobroff's evidence that before the claimant came to work, there was no person in the respondent who had the job of carrying out these tasks, and I accept that the claimant was not replaced. I take those two

points – ie that the claimant had neither predecessor nor successor -- as evidence that a large element of what he did was supernumerary to the objective business need of the respondent. I find that it may have had some element of displacement activity: that is not a criticism of either party. It is a finding which is consistent with the strand of this arrangement which was educational or therapeutic, but not economic.

27. There was considerable dispute about what the claimant did for the duration of the arrangement. I make no finding about the quality of his work or the amount of his work. I accept that he was engaged in a range of activities ancillary to the core business of property development; some tasks were undertaken on his own initiative, and some at the direct request of Mr Bobroff.

28. A swathe of the incidental characteristics of an employment arrangement were not present. There was in fact relatively little structure. There was no job description. There was no agreement about working hours, days, working from home or in the office, expenses, pension, holidays, or a form of procedure for disciplinary or grievance points.

29. In evidence and submission the parties used different phrases to describe this arrangement. My phrase, not used by either party, was that it was a supportive work environment. Those are three separate words and each captures part of the arrangement: that it had a therapeutic and supportive element; that it involved working tasks, and that it involved activity in a dedicated office, which was a separate environment from either the claimant's home or the Bobroff family home.

30. I now turn to the payment arrangement. The arrangement was that a third company, not the respondent, but one which was also under the control of Mr Bobroff, made the claimant what were called 'loans'. (I use parentheses once in these reasons, and once only: their absence from here on does not imply any decision that the sums were or were not in fact loans). The amount of the loans was intended to meeting the claimant's financial needs, as estimated by Mr Bobroff and/or the claimant. Setting the amount of loans was very different from wage agreement in the conventional employment relationship situation. No regard was paid to a market rate for the job, or the claimant's previous salary, or a predecessor's income, or comparability with other employees. In the conventional setting an employee budgets expenses according to income. In this situation, the respondent estimated the claimant's personal budget, and set the income accordingly (whether or not the claimant always agreed it).

31. There was agreement that over the course of this arrangement, some 31 payments were made (Mr Bobroff WS 94). All payments were made in round figures, and on an irregular pattern. There was no set monthly day which was pay day, and there was no pattern of one payment per month. On the paying company's bank account, each payment was designated as a loan. To give one example: four 'loan' payments were made in the second half of the calendar year 2019 (1153). They were respectively sums of £2,500 (5 July); £5,000 (9 September); £5,500 (12 November) and £3,750 (3 December).

32. The sums were paid in full to the claimant's bank account; there was no deduction for PAYE. The sums were received in full by the claimant, and, he said, were not reported or returned to HMRC by him. Payslips were not issued; there were no P60's and there was no P45 when the arrangement ended.

33. There was no evidence of any written agreement about repayment of any loan or any aspect of terms of repayment: eg when, in which circumstances, whether interest might arise and at what rate.

34. The arrangement ran for three years, by which time the total of the loan sums was around £100,000. After termination of the arrangement, and for the first time in writing, the claimant wrote (938) to say that his understanding was that when a major transaction on which he had worked with Mr Bobroff for the respondent, bore fruit, then he, the claimant, would be entitled to commission, from which the respondent would deduct in full the loans which it had made. Mr Bobroff denied that there was any such agreement, or that the claimant had any entitlement to commission, and this was one of the points on which the parties asked me to make no finding. I respect their joint wish, save to say that there was no evidence of any commission agreement before 12 August 2020 (938); and that in the email on that day the claimant did not set out any details of for example how commission would be calculated or at what percentage.

35. Mr Bobroff's evidence was that the loans had "nothing to do" with the claimant's work. I cannot go so far as to agree. I accept that this was a generous, supportive arrangement based on family relationships, and a sense of what both parties called charity (without the condescension which that word sometimes implies). At the same time, Mr Bobroff was not a soft touch. When he entered into the arrangement, he knew that the claimant's work record was unreliable, and he knew about the claimant's disability, and his troubled personal history. He had a powerful belief in work as such, not just in the material reward which might accompany it.

36. In my judgement, Mr Bobroff understood that guaranteeing an income to the claimant would not incentivise the claimant to develop the attributes which he wanted him to develop. Mr Bobroff wanted to give money to the claimant to help him, but he wanted strings attached. I do not find that he wanted strings because he wanted to exercise power over the claimant for its own sake; but because he believed in the strings as part of the overall scheme. One string was an expectation that the claimant would engage with Mr Bobroff's objective of learning work ethic; the other was that the word loan, whether used accurately or not, conveyed the meaning of a reserved liability to repay.

37. At this hearing, Mr Oakland laid considerable weight on two emails (178, 880) in which Mr Bobroff reproached the claimant for failing to carry out tasks, failing to engage with him, and failing to deliver on the arrangement between them. Mr Oakland submitted that that was the language of an employer exercising authority. In my judgment, the language of the emails

reads consistently with my description of Mr Bobroff's expectations of the claimant.

38. In my judgment, Mr Bobroff had no intention to enter into a legally enforceable employment arrangement. He had no intention to enter into a contract. However, that is not sufficient of itself to avoid the creation of a contractual relationship. I do not find that the respondent paid the claimant in consideration of the tasks which he undertook for it. I find that the sums were paid in accordance with the arrangements which I have described above.

39. I now turn to the four questions summarised by Mr Oakland arising out of Ready Mix Concrete 1968 2 QB 497.

40. On the first question, did the claimant provide work or services in return for pay? My answer is that that is not my finding. I repeat the finding made above.

41. On the second question, was the claimant within the respondent's control? I find that he carried out activities within the respondent's corporate requirements. They include specific matters assigned to him by Mr Bobroff, and matters which he had some autonomy to investigate on behalf of the respondent.

42. Was there thirdly mutuality? I accept that as part of the supportive framework which I have described, the claimant was to do the tasks which Mr Bobroff gave him. I do not accept that there was mutual obligation between those tasks and the sums paid to the claimant in accordance with the above arrangement.

43. Finally, when I come to consistency, there is considerable evidence that the arrangement was not consistent with a contract of employment. I must remind myself to focus on the terms of the agreement, and not on the entire history. I refer in particular to the following points.

44. First, I was referred to authority on the predominant purpose, and in particular to paragraphs 59 to 66 in Varnish v British Cycling Federation UK EAT/0022/20. I find that the predominant purpose of the contract in this case was not personal service, nor was it economic development of the respondent. It was support to the claimant.

45. Secondly, I note the absence of structure and ground rules, which I have referred to above. That is a point to approach with great caution, for fear of opening the door to the respondent who deliberately avoids written obligations so as to deprive an employee of rights. In the unusual circumstances of this case and accepting that Mr Bobroff could have avoided a lot of dispute by a little writing, I find that the complete absence of written structure is not consistent with the employment relationship for which the claimant argues.

46. Thirdly I refer to the payment systems; payments were irregular in time, irregular in sum, and paid in gross round figures. They were described only as loans. Neither party appears to have involved HMRC in any aspect of their arrangements at any stage. I appreciate that in other settings this arrangement might have the appearance of tax evasion. All I need say in this setting is that it was an agreed arrangement which I find to be inconsistent with employment status.

47. The fourth matter is one which in giving judgment I called tolerance but perhaps forbearance would be a better word. Although the email trial showed indications of Mr Bobroff becoming irritated and frustrated with the claimant, there was no evidence of performance management, standard setting, or management of conduct. The respondent failed to apply to the claimant anything of the structure and (in the widest sense) discipline which are part of the world of work.

48. In that context (not uncommon in a small family-led business) it seemed to me that paragraphs 131 to 141 of Mr Bobroff's witness statement were significant. They describe a workplace incident in October 2017, of which the factual basis was not in dispute (as evidenced in the claimant's email at 100). It involved, adopting the claimant's words, dropping his trousers at work as a joke, in the (mistaken) belief that Mr Bobroff was not there. I agree that in the vast majority of work situations, the claimant's actions, even allowing for his explanation and apology, would constitute gross misconduct, leading to summary dismissal.

49. What seems to me significant is that Mr Bobroff's evidence was not just that he did not take any formal process, but that his reasons for not doing so were entirely personal, emotional and family related. He found the incident distressing and embarrassing; he shied away from confronting the claimant about it; and he realised that if he terminated the arrangement with the claimant as a result (which had then only been in place for a few months) he would have to explain his decision and describe the incident to family members. He therefore did nothing about it, and his witness statement indicated that he did not tell anyone else about it until nearly three years later. I accept all that evidence, which I take to be strong indication of the non-economic elements in this relationship.

50. I have considered as an alternative whether it could be said that the claimant was under a contract personally to perform the services of carrying out the individual assignments given to him by Mr Bobroff. The point was not raised, but in view of my other findings I do not think they make any difference.

51. The point of law can be shortly stated. The tribunal's jurisdiction depends on the claimant having been in a relationship with the respondent to which any of s.230 Employment Rights Act 1996 or s.83 Equality Act 2010 applied. The short, common factor to all such definitions is the existence of a contract between the parties. In my judgment, it has not been shown that there was an agreement for the provision of work or services in consideration of remuneration, and that being so, I have found that the

claimant was neither employee nor worker, the tribunal has accordingly no jurisdiction to hear any claims, and the claim is struck out.

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Employment Judge R Lewis

Date: 21 April 2022……..

Sent to the parties on:.....

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For the Tribunal Office