



# EMPLOYMENT TRIBUNALS

BETWEEN

**CLAIMANT**

**v**

**RESPONDENT**

Mr J Gonsalves

VSO, Voluntary Services Overseas

**Heard at:** London South  
Employment Tribunal

**On:**

28 April 2022

**Before:** Employment Judge Hyams-Parish (Sitting alone)

**Representation**

**For the Claimant:**

In person

**For the Respondent:**

Ms C Jennings (Counsel)

# JUDGMENT

The Employment Tribunal does not have jurisdiction to hear any of the claims brought by the claimant because he was neither an employee or a worker of the respondent. All of the claims are therefore dismissed

## REASONS

### A. PURPOSE OF HEARING

1. By a claim form presented to the Employment Tribunal on 3 December 2020, the claimant brings the following claims against the respondent:
  - 1.1. Ordinary unfair dismissal
  - 1.2. Automatic unfair dismissal (whistleblowing)
  - 1.3. Wrongful dismissal

- 1.4. Whistleblowing detriment
  - 1.5. Race discrimination
  - 1.6. Unlawful deductions from wages
2. This case was listed before me for an open preliminary hearing to determine whether the claimant was a worker and/or employee of the respondent. That is because it is a pre-requisite of bringing claims before the Employment Tribunal that the claimant was an employee or a worker.

## B. THE LAW

3. Section 230 Employment Rights Act 1996 (“ERA”) provides the following definitions:
- 3.1. An *employee* is someone who has entered into, or works under (or, where the employment has ceased, worked under) a *contract of employment*.
  - 3.2. A *contract of employment* is a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
  - 3.3. A *worker* is someone who has entered into or works under (or, where the employment has ceased, worked under): (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.
4. The starting point for consideration of employee status is the well known case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433** which said that a contract of employment exists if the following three conditions are met:
- 4.1. the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
  - 4.2. he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other his master;
  - 4.3. the other provisions of the contract are consistent with its being a contract of employment.
5. The continuing relevance of these three conditions was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC,**

which said that the question whether someone is an employee, or not, can be boiled down to three questions:

- 5.1. Did the worker agree to provide his or her own work and skill in return for remuneration?
  - 5.2. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
  - 5.3. Were the other provisions of the contract consistent with it being a contract of service?
6. The above test has been amended and supplemented over time. Current best practice is to apply the 'multiple test', which involves weighing up all relevant factors including context, personal service, control, the economic realities of the arrangement, mutuality of obligations and the true intentions of the parties.
  7. It goes without saying that worker status encompasses a wider group of people than employees because it includes those who undertake 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*".
  8. In **South East Sheffield Citizens Advice Bureau v Grayson 2004 ICR 1138, EAT**, the EAT held that in order for a volunteer to be found to be an employee under either a contract of employment or a contract personally to do work, there must be an arrangement under which, in exchange for valuable consideration, the volunteer is contractually obliged to render services to, or work personally for, the employer. The crucial question, said the EAT, was whether the 'volunteer agreement' imposed a contractual obligation on the alleged employer to provide work for the volunteer, and a corresponding obligation on the volunteer personally to do any work so provided.
  9. The EAT held (and the Court of Appeal subsequently confirmed) in **Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229, CA** that, when considering worker status, there is no need for there to be an irreducible minimum of obligation on both parties, i.e. for there to be an obligation on a putative worker to accept and perform some minimum amount of work, and a corresponding obligation on the putative employer to offer some work and/or pay for the same. It held that all that is required for worker status is that:
    - there is a contract for the provision of work or services;
    - under which the individual is obliged to do the work (or provide the services) personally (i.e. do it themselves); and

- the person for whom the work is done (or to whom the services are provided) must not be a client or customer of a business being run by the individual (i.e. they are not in business on their own account).

### C. FINDINGS OF FACT

10. During this hearing I heard evidence from the claimant and Kathryn Gordon on behalf of the respondent. Each party had prepared their own bundle for the hearing and I was directed to pages in both of these bundles albeit most were contained in the respondent's bundle.
11. I gave my decision orally at the hearing with reasons. These written reasons are provided at the request of the claimant.
12. I decided all the findings referred to below on the balance of probabilities, having considered the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that I failed to consider it. I have only made those findings of fact necessary for me to determine claims brought by the claimant. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
13. The respondent is an independent international development agency that works to deliver change through volunteers. The respondent has volunteer programmes in over thirty developing countries focusing on delivering sustainable change in education, health and secure livelihoods.
14. The respondent is a charitable company limited by guarantee. The respondent is governed by an international board of 12 trustees which sets the strategic direction of the respondent. The board has a number of committees, one of which is the Audit and Risk Committee (ARC). The day to day operational management of the respondent is conducted by the respondent's Executive Board of employees, or Executive Management Team.
15. The claimant's involvement with the respondent began in early 2013. The claimant said in evidence that he saw an advert for someone with investment knowledge and expertise to work on the investment committee.
16. The agreement was that the claimant would provide his services free of charge. He was able to claim reasonable expenses albeit he never submitted a claim. The only agreement he signed was a Non-Disclosure Agreement ("NDA").
17. The claimant accepted in evidence that he did not consider himself an employee in 2013 but he could not say whether or not he was a worker.
18. Not long after starting, the claimant was invited by the then chair of the ARC to join as an independent member of the committee. I accept that this came

about after a discussion with the chair, albeit I do not accept that this was an interview in the same way as an employee would be interviewed and recruited to the organisation.

19. Other than a change in role, there was no change to the arrangement between the claimant and the respondent. He continued to provide his services on a pro-bono basis and there was no discussion about pay because the respondent wanted people who would provide their time, skill and expertise free of charge. All those sitting on the ARC were volunteers and were not paid for their work.
20. In evidence, the claimant said that the ARC looked at operational and financial risk and had oversight of the internal audit function. It was responsible for the reviewing and approval of the annual report and accounts that needed to be filed each year. What the claimant provided was his financial expertise. I accept that the claimant took his responsibilities seriously and provided a lot of his time to the work of the ARC.
21. By 2017 and beyond, for a number of different reasons, the time the claimant devoted to his responsibilities increased significantly. I have concluded that this additional time was not given at the request of the respondent or because they required him to provide more of his time; rather it was because of the claimant's own sense of duty and professionalism that he gave the time he considered necessary to do the job he considered needed to be done. At the time, whilst the claimant spent some time working for other organisations, he clearly had the time to spend working for the respondent. He was also financially secure and did not need a full time paying job at that time.
22. It is about this time that by virtue of the time he was spending in his role, that the claimant believes that his status became that of an employee. However, as far as the respondent is concerned, there was no change, he was still a volunteer. There is no documentary evidence showing that the agreement between the parties changed.
23. I accept the claimant's evidence that there came a point when he raised his concerns about a number of matters with the respondent. I did not need to make findings about such matters for the purpose of this hearing.
24. There also came a point when the claimant asked to raise a grievance. As the respondent did not consider the claimant to be an employee, he could not raise a grievance but they offered him the opportunity to raise a complaint under the respondent's standard complaints procedure.
25. The claimant's position on the ARC came to an end on 8 September 2020. No process was followed and the claimant was simply told that his services were no longer required. The respondent believed they could do this in the absence of any contract and given the claimant's voluntary status. I have avoided making findings about the reasons for this decision as it is not necessary to

make findings about that for the purposes of this hearing. Such issues are clearly the focus of the claims brought by the claimant.

#### D. ANALYSIS AND CONCLUSIONS

##### Was the claimant an employee?

26. When considering the evidence in this case against the above legal principles, I concluded that there were a number of factors which firmly pointed away from employment status, or the claimant being an employee. These are as follows:
    - 26.1. There was no contract of employment between the claimant and the respondent. There were no terms which stipulated the time the claimant was required to devote to his work for the respondent. There was also no agreement or terms relating to any remuneration to be paid to the claimant by the respondent.
    - 26.2. The claimant worked elsewhere during the period when he provided his services to the respondent. He lived off this 'other' income and off his savings.
    - 26.3. The Claimant was not bound by any implied duties of good faith and fidelity. It was because the claimant was not otherwise bound by any implied duties of good faith and fidelity, via a contract of employment or volunteer agreement, that the respondent required the claimant to sign a NDA. Employees of the respondent were not asked to sign this document because the duties contained therein were contained in their contracts of employment. The NDA referred to the Claimant as "*an external member of [the ARC]*" and expressly stated "*Nothing in this agreement is intended to, or shall be deemed to, establish any partnership or joint venture between the parties*".
    - 26.4. The ARC met three times a year for approximately half a day and all members were sent the agenda and relevant documentation in advance (such as budgets and financial statements). There was no obligation upon the claimant to prepare, or to spend a specified amount of time preparing, for meetings. He did not have to attend in person. His attendance was not compulsory and if he was absent, it would simply be minuted. There was no consequence for non-attendance.
    - 26.5. There was little or no control over the claimant's actions. The Claimant was not line managed by anyone and was not subject to any appraisal or performance review. The respondent's only recourse against the claimant was to cease his committee membership. He was not subject to disciplinary procedures and was not permitted to avail himself of the grievance procedure because the respondent considered that it was not applicable to the claimant.
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- 26.6. Whilst the claimant devoted a lot of his time to his work with the respondent from 2017, there was no obligation on him to do so by the respondent. There is nothing that they could have done had the claimant refused to provide those services.
27. The claimant pointed to certain factors which he said pointed to employment status. These included:
- 27.1. The amount of time he was spending doing work for the respondent.
- 27.2. The communications with the respondent, including a large number of emails.
- 27.3. The fact that he was involved in carrying out an interview.
- 27.4. He was invited to awards
- 27.5. A financial value of his services was placed in the statutory accounts.
28. However, in my judgment the problem for the claimant was the absence of two crucial components that one would need to see for there to be an employment relationship. Only personal service was present. There was no mutuality of obligation and there was no control. This was a one directional relationship. The claimant provided his services to the respondent but they were not obliged to (and did not) provide him with anything in return. There was no obligation on the respondent to allow him to be a member of the ARC committee and no corresponding obligation on the claimant to remain a member of that committee. He could have stood down when he wanted. He was not bound to attend meetings, other than out of a sense of a moral and professional duty or loyalty to do so.
29. Looking at the relationship as a whole, it was more akin to being a school governor, where people give up their time, for whatever reason, to an organisation in the charitable sector. In some cases the time one gives to an organisation can be quite substantial, as it became in this case. In my judgment, a relationship does not become a relationship of employment simply because one spends more time in the organisation. The claimant's situation was *wholly inconsistent* with a relationship of employment. Factors which the claimant pointed to, do not convert the relationship in to one of employment, in my judgment, particularly where two components of what has been referred to as the *irreducible minimum* were missing.

**Was the claimant a worker?**

30. This is slightly more difficult in that the definition has been subject to much litigation and case law. However, I have concluded that the claimant was not a worker because in order to be a worker there has to be a contract. For a contract to exist, several conditions must be satisfied. There must be an

agreement (usually consisting of an offer which is then accepted). The agreement must be made with the intention of creating legal relations. Finally, the agreement must be supported by consideration — i.e. something of benefit must pass from each of the parties to the other. I have said that this relationship was one directional; whilst the claimant gave the benefit of his services, nothing was provided by the respondent in return. There was no consideration and no intention to create any sort of legal relations between the parties. The fact of a contract, whether it be in writing or not, is an absolute requirement of worker status. For these reasons, I have concluded that the claimant was not a worker.

31. Given my conclusions, the claimant cannot proceed with any of his claims as he was neither an employee or a worker. Some of the claims require the claimant to be an employee; others, at the very least, require that he was a worker. As he was neither, the Tribunal does not have jurisdiction to hear the claims and therefore they are dismissed. That means that the claim ends here and there will be no need for a final hearing, which can be vacated.

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**Employment Judge Hyams-Parish**  
**26 May 2022**

**Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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