



EMPLOYMENT TRIBUNALS

Claimant:

Mrs V Nation

v

Respondent:

FC Douch & Sons (Funerals) Ltd

Heard at: Bristol (via Video Hearing Service)

On: 12 May 2022

Before: Employment Judge Fredericks

Appearances

For the claimant: Mr C Nevitt (Lay Representative)

For the respondent: Mr D Bansal (Senior Litigator)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The claimant was not an employee or a worker of the respondent, but a self-employed contractor.
2. Consequently, her claims are all dismissed.

REASONS

Introduction

1. The claimant is a professional embalmer. The respondent is a funeral home company with some seven sites. The respondent worked at the respondent's premises for around 17 years until the respondent told her it no longer required her services.
2. The claimant brought claims for unfair dismissal, holiday pay and notice pay on the understanding that she is an employee of the respondent. The respondent says that the claimant is a self-employed contractor, meaning that she has no standing

to bring the claims issued. This hearing was listed to determine the claimant's employment status. I found that the claimant was not an employee and explained reasons for that within the hearing. I reserved the issue as to whether the claimant was a 'worker' as defined by the legislation. These reasons cover the whole decision.

3. The claimant was represented by Mr C Nevitt, a lay representative. The respondent was represented by Mr D Bansal, a senior litigator at RBS & Natwest Mentor Services. The claimant gave evidence in support of her own claim. For the respondent, I heard from Mr N P Douch, the respondent's managing director. I also had access to a bundle of documents which ran to 64 pages. Page references in this document refer to page references in that bundle.

Issues to be decided

4. The issues were set by Employment Judge Dawson in directions issued on 6 December 2021, and were:
 - 4.1. *Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?*
 - 4.2. *Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?*

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.
6. The claimant began working as an embalmer in the year 2000 with Ms G Nevitt. In 2004, the claimant began working for AR Joliffe and Sons as a self employed contractor. This entity was related to the respondent. The claimant would provide services to the respondent on an 'as and when required' basis and would also provide embalming services to other funeral homes in the area.
7. In 2007, the claimant asked the respondent's then managing director, Peter Douch, if she could be paid through PAYE. The letter containing the request was at page 21, and was dated 26 March 2007. The letter outlines a hope to be paid through PAYE, and that the claimant proposed to be paid through PAYE by another funeral home, run by Ian Newman. She also notes that her public liability insurance quote from HSBC is too high and that she hopes for another quote. She finishes the bulk of the letter with: *"I do hope that my going PAYE will be acceptable to you. Nothing else will change in my working times, etc"*.
8. Mr Peter Douch replied on 4 April 2007 (page 22). In it, he says that the claimant's previous letter tells him that the claimant did *"hope to return to being a PAYE employee"*. He goes on to write that if the claimant were to work as an employee, then she will be covered under the respondent's public liability insurance. He notes that the respondent would need to begin paying national insurance for the claimant, but that this should not be an issue. He ends the letter with the words: *"we are quite happy for you to become an employee again"*. Also on 4 April 2007, an

internal email at the respondent referred to the claimant wishing “to become an employee of ours” and so to gather her essential information.

9. I am clear that the claimant had never been an employee of the respondent previously, and so the references to that in the letter are confusing. The claimant relies on this letter as showing an intention for her to be a normal employee. The respondent says that Mr Peter Douch could be naïve when it came to such things and that he was keen to help the claimant’s tax affairs by paying her through PAYE.
10. On 11 July 2007, Mr Peter Douch wrote to the claimant (page 52) to ask her to sign a document called “*Principle Statement of Terms and Conditions – Casual Work*”. The letter also referred to policies and procedures and a staff handbook. The letter ends with the sentence: “*We wish you a long and successful career with our company*”. The statement of terms and conditions was at pages 53 to 54. The document refers to the parties as employer and employee, refers to ‘employment’ as an embalmer, and refers to policies and procedures. By signing, the claimant is expressing agreement to the employment policies and procedures of the respondent. The claimant’s pay was broken down into the fees the claimant set according to the type of case.
11. The claimant did not work set times or hours at the respondent’s premises, but was told of work to be done if she was available and she was not required to do that work unless she agreed to it. This is in line with the contractual documentation, which says that the claimant will “*work on any day required by the employer and agreed by you*”. Where the claimant was not available, the respondent would bring in another embalmer to cover the work. The respondent accepts that the claimant was their preferred embalmer. On occasion, the claimant would not be available and would recommend Ms Nevitt to do the work instead. The claimant is in business with Ms Nevitt and has worked for Ms Nevitt in the past.
12. The claimant would set the fees she charged and invoiced for work completed. An example of the invoice produced with the claimant’s name on it is at page 35. The invoices were then paid through the PAYE system. An example of the claimant setting her fees on 22 March 2010 is at page 23. On a letterhead which says: “*MRS VICTORIA NATION MBIE Professional Embalming Services*”, the claimant advises:

“With effect from 1st April the following charges will be applied:-

... [CHARGING INFORMATION]

As you know I have discussed price increases with Matthew Newton and also Gaynor Nevitt, and have kept my charges to you at a very competitive rate...”
13. On 13 January 2011, the respondent’s Mr Nick Douch wrote to the claimant (page 24) to ask her to sign a document called “*Statement of Terms of Employment for Casual Work*”. This was said to reflect rationalisation of company structure. In the letter, the respondent is referred to as the ‘employer’ and the document sent is referred to as the ‘contract of employment’. The document itself was at pages 25 to 26 and was signed by the claimant on 14 January 2011. The document refers to

the parties as employer and employee, refers to 'employment' as an embalmer, and refers to policies and procedures. By signing, the claimant is expressing agreement to the employment policies and procedures of the respondent. The claimant's pay was broken down into the fees the claimant set according to the type of case. It is clear to see, with reference to these documents, why the claimant might have assumed that she was an employee in the circumstances.

14. The claimant wrote to the respondent on 18 April 2012 to outline changes to the fees she charged (page 27). She used the same letterhead as outlined above, and advised: *"I did not put in a price increase last year and have kept my charges to you at a very competitive rate"*.
15. On 20 December 2012, the claimant wrote on the same letter-head to the respondent (page 28) to advise that another funeral home had employed a full time embalmer and so would stop using her services. She advised that the respondent would be her only organisation *"to embalm for"*.
16. On 10 April 2015, the claimant was caught in the respondent's pension auto-enrolment processes and she was sent documents relating to the company pension scheme (pages 29 to 33). The claimant relies on this as indication that she was an employee of the respondent. The respondent says that the claimant was caught by virtue of being paid through PAYE, because this made her eligible for the scheme according to the pension administrator.
17. On 14 February 2016, a confidentiality policy produced by the claimant was signed (page 34). Its letterhead is in the same format as the letters sent by the claimant, but also now included *"GAYNOR NEVITT MBIE"* above the claimant's name. The claimant accepts this was a document produced and used by both herself and Ms Nevitt. On 26 February 2016, the claimant wrote on her letterhead to advise of new charges from 1 April 2016 (page 64). She wrote *"I did not put in a price increase last year and have kept my charges to you at a very competitive rate and as such I hope you will find these increases acceptable...."*.
18. Page 36 shows an invoice produced by Ms Nevitt and sent to the respondent. The format of the letterhead and address footer is identical to the documents produced by the claimant. The respondent says that Ms Nevitt attended the respondent to do work that the claimant would ordinarily have done, but that the claimant was unavailable because she was off sick with COVID-19. The claimant accepts that Ms Nevitt would do work if the claimant was unavailable (page 41), but that she would recommend Ms Nevitt rather than instruct her to attend.
19. The respondent's evidence is that the claimant was never entitled to sick pay and was only paid sick pay once in error, during April 2020 when the claimant had COVID-19. The respondent says, and I accept, that Mr Douch was also ill at this time and would not have authorised the payment had he been aware because of the nature of the relationship with the claimant. Mr Douch says that he is not aware of any other times that the claimant had been sick during their working relationship. Upon discovery of the payment, the respondent chose not to pursue repayment.
20. Upon receipt of sick pay, the claimant enquired about whether she should be receiving holiday pay, also. The matter was discussed at a meeting between the

claimant and Mr Douch in July 2020. The meeting is referred to in an e-mail from Mr Douch to the claimant dated 10 June 2021 (pages 40 to 41). The claimant does not dispute Mr Douch's account of the meeting. Mr Douch says he went through features of the relationship with the claimant in her presence, and presented two options, neither of which were accepted by the claimant, to overcome her objection to not receiving holiday pay:

20.1. *"to be placed on an employment contract which would include entitlement to holiday pay with your rate of pay set by the Company. Such a contract would include restrictions on your work with other companies"*.

20.2. *"to have a contract for services whereby you would continue to invoice us directly for your services, set your own fees but no longer paid through the payroll"*.

21. On 1 October 2020, the claimant sent the respondent an e-mail about work during the COVID-19 restrictions (pages 38 to 39). The e-mail is written as though the claimant was working in partnership with Ms Nevitt and was offering services to the respondent as it would any other client. The key sentences are:

21.1. *"...Gaynor and I have decided to offer embalming on C19 cases should our funeral homes require it";*

21.2. *"Obviously, we aren't seeking 50 a week, but where a family is absolutely desperate for their Chapel visit, we feel we are now equipped and able to offer it";* and

21.3. *"so a change in our fee may need to reflect this"*.

22. The respondent replied on the following day (page 38) to say that the proposal would be taken under consideration. It is clear to me, at this time at least, that the claimant was pitching to the respondent as though the respondent was a client of the business in partnership. This sort of approach is, in my view, wholly inconsistent with the notion that the claimant was an employed embalmer of the respondent.

23. In April 2021, the respondent was undertaking refurbishment works to the building where the claimant performed services. On 26 April 2021, the respondent informed the claimant that it would not require her services during the time that the refurbishment was being carried out. The claimant says, and I accept, that the respondent would not confirm whether she would be asked to return once the work was complete. The respondent made the claimant a payment in compensation for ending the agreement between them.

24. Having considered the documents disclosed and listened carefully to the live evidence, I find the following features of the relationship between the parties as facts. These are not disputed by the claimant:

24.1. the claimant was able to work for other funeral homes throughout her time working with the respondent and says that 42% of her income in the last three years came from work done for other funeral homes;

- 24.2. the claimant did work for other funeral homes under the same trading name as that on her letterheads sent to the respondent;
- 24.3. the claimant did not request leave from the respondent, but told the respondent when she was unavailable;
- 24.4. the claimant would recommend Ms Nevitt to cover her work if she was unavailable;
- 24.5. the claimant coordinated work with Ms Nevitt and they took a joined approach to key issues such as fees under COVID-19 restrictions;
- 24.6. the claimant set her own fees and informed the respondent of any changes;
- 24.7. the claimant was not subjected to any performance reviews or appraisal processes;
- 24.8. the claimant was not directed in her work;
- 24.9. the claimant supplied her own invoices to the finance team;
- 24.10. the respondent was able to instruct alternative embalmers if it wished;
- 24.11. the respondent was not under any obligation to provide the claimant with work;
- 24.12. the claimant was not required to do the work made available;
- 24.13. the claimant did not have keys to the main branch like employees, only to the part of the site she needed to access;
- 24.14. the claimant was not ordinarily paid sick pay and was never paid holiday pay;
- 24.15. the claimant was not given any badge or indications externally that she was an employee; and
- 24.16. the claimant used equipment provided by the respondent when performing her role.

Relevant law

- 25. The starting point in relation to considering the employment status of an individual is to consider the wording of the relevant statute. Section 230(1) to Section 230(3) Employment Rights Act 1996 provides:

“230 - Employees, workers etc.

(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.

(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.

(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;”

26. There is no single set of guidance provided by case law about how to determine a person’s employment status. Each case falls to be determined on its own particular facts and often there are factors pointing in each direction which complicate the determination. The usual approach requires all aspects of the relationship to be considered and then I should ask the question whether the claimant was carrying on a business on their own account (O’Kelly v Trusthouse Forte plc [1983] IRLR 369 CA).
27. Naturally, this means that the wording in any document and the assumptions made by the parties will only be part of the matters to be considered when making a determination. The test is not ‘what was the claimant called’ or ‘what do the documents label the parties’ or ‘what did the claimant think they were’. I may be required to look behind the contractual documentation to consider how the relationship operated in reality to determine the employment status of the claimant (Autoclenz Ltd v Belcher [2011] UKSC 41; Uber BV v Aslam & others [2019] UKSC 29).
28. In relation to whether someone is an ‘employee’ for the purposes of s230(1)(a), case law has found that a person will not be an employee without the mutual contractual obligation for the employer to provide work and the employee to do that work which is provided (Carmichael v National Power Plc [1999] IRLR 43, HL). This is often referred to in cases as the ‘irreducible minimum of obligation’. Employees who have a contract of employment containing the irreducible minimum of obligation will also be ‘workers’ by operation of s230(3)(a). Such workers are often referred to in cases as ‘limb (a) workers’.
29. A person might however be a ‘worker’ even in the absence of such an irreducible minimum of obligation – the obligations on each party is just part of the discussion about whether someone might be a ‘worker’ (National Midwifery Council v Somerville [2022] EWCA Civ 229). These workers may be caught by the definition outlined in s230(3)(b), and are often known in cases as ‘limb (b) workers’. Where I

find that a person is not an employee, it is possible that they could be a 'limb (b) worker' if they meet the relevant requirements.

30. Those requirements are set out in the legislation itself: (1) there is a contract between the individual and the employer; (2) the individual must be required to work personally for the employer; and (3) the individual must not be working for someone who is in reality their customer or client. This last part is important because it is common for people to provide services under a contract to customers or clients without them benefitting from the protections offered by a 'worker' status. If all three elements are present, then it does not matter if the person is operating their own business (*Hospital Medical Group Ltd v Westwood* [2012] IRLR 834 CA).
31. Part (1) of the legislation is self-explanatory. In the usual way, the contract may be written or may be found to have been agreed orally with terms found through the conduct of the parties. Part (2) requires the contract to not allow the person claiming to be a worker the ability to substitute with someone else who would complete the work. An employer-worker relationship is a personal one. If there is a right of substitution, then it tends towards the person not being a limb (b) worker. If that right of substitution is in reality forbidden or excessively curtailed in some way, then it is possible that the person might still be found to be a worker (*Pimlico Plumbers and another v Smith* [2018] UKSC 29).
32. Part (3) of the legislation is one of central issue in this case and it is often determinative of the question whether a person is a worker or not. The determination of whether or not a person offers services to a client or customer includes consideration of other sources of income (*Johnson v Transcopo UK Ltd* [2022] ICR 691 EAT). The level of integration is also important. Where a person is held out externally as belonging to an organisation, it is more likely that they will be considered a 'worker' and not someone providing services to a client (*Hospital Medical Group Limited v Westwood* [2013] ICR 415 CA).
33. Where a person is unable to market their services independently of the proposed 'employer', then it is more likely that they are a 'worker' and, conversely, if they can market independently and secure the same work elsewhere under the same name, then they are more likely to be someone providing services to a client or customer (per Lady Hale in *Clyde & Co LLP and another v Bates van Winkelhof* [2014] UKSC 32. In *Bates van Winkelhof*, The purpose of the arrangement is also relevant. Where a person is specifically 'recruited' to perform some central function of the 'employer', then they may be a limb (b) worker, but not where they remain largely free to market to do the same service elsewhere (*Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181).

Discussion and conclusions

Was the claimant an employee of the respondent?

34. The claimant argues that she is an employee. Her argument is founded on (1) her understanding that she was to be an employee, (2) that she had been given a statement of terms and conditions referring to her as an employee, (3) that she was in the respondent's occupational pension scheme, and (4) she received sick pay in 2020. The claimant did not seek to argue particularly that she was a worker in the

alternative, but I consider that argument anyway. The claimant contends that any misunderstanding about her employment status should be construed in her favour because it is an employer's responsibility to make sure an employment status is correct and clear.

35. As outlined by the authorities above, the definition of an 'employee' comes from statute and is not consequential to what documents say or what the parties believe. When considering whether the claimant was an employee, I am required to look beyond what is written on the face of the documents and consider instead the actual day to day reality of the working relationship between the parties. I have made findings of fact about that relationship in the paragraphs above and, once the legal tests are applied, my conclusion on this question is not difficult to find.
36. I have great sympathy with the claimant. The documents mistakenly refer to her as an employee throughout, partly through misunderstanding and partly because the claimant did get caught up with the respondent's actual employees by virtue of automatic processes flowing from her being paid, at her request, through PAYE. However, the claimant herself accepts that the respondent was never bound to offer her work regularly or at all and, if she was requested, she was able to and did on occasion say she was unavailable so that the work was done by someone else.
37. In short, the respondent was not obligated to use the claimant's embalming services, and the claimant was not obligated to do the work if offered. There was no irreducible minimum of obligation. Consequently, I find that the claimant was not an employee of the respondent.

Was the claimant a worker of the respondent?

38. The respondent notes that the claimant has not pleaded an alternative case that she was a worker, and queries whether the tribunal has jurisdiction to determine that the claimant was a worker in the absence of such a pleading. In my view, the tribunal plainly does have that power. First, the determination of an employment status is an exercise of applying law flowing directly from factual findings about the employment relationship. It would not make sense to explore the relationship between the parties factually to decide that the claimant was not an employee, and then neglect to find that the claimant was a worker in the alternative if those same facts plainly support the conclusion that she was. Secondly, and more tritely, the employment tribunal gave a direction that this preliminary hearing would be held to determine, in part, whether the claimant was a 'worker', and the respondent has at no stage objected to or applied to vary that direction before the hearing itself. I shall therefore consider the issue as it has been directed to be considered.
39. It is accepted that there was a contract in place between the parties and that the claimant provided, at the least, 'services' to the respondent in exchange for remuneration. The respondent contends that the claimant was not a worker because, effectively, she does not meet the tests described above as parts (2) and (3) from the relevant legislation.
40. In relation to part (2), the respondent notes that the claimant was able to 'substitute' Mr Nevitt for herself when required, particularly when ill. This, it is said, shows that the contract did not require the claimant to perform a 'personal' service

to the respondent. I disagree. It is true that Ms Nevitt would cover work that the claimant would ordinarily have competed, but I find that the contract between the parties was nevertheless a personal one. This is because the wording of the contract does not allow for substitution. There are two parties to the written documents and no mention of anyone else. Further, looking at the mechanism for the work being done, it is clear that, on those occasions where Ms Nevitt covered work, the work was not done in place of the claimant on the claimant's account. Instead, as the claimant said and as I accept, the claimant merely recommended Ms Nevitt in case the work needed to be done, and then, as Mr Douch accepted, the respondent liaised with Ms Nevitt separately.

41. Consequently, the question as to whether the claimant was a 'limb (b) worker' stands or falls on the question about whether or not she engaged with the respondent on the basis that the respondent was her customer or client. In my judgment, she did, and so she cannot be found to have been a worker of the respondent. I make this determination for the following principal reasons:-

- 41.1. the claimant set the rates that she was charging the respondent in the form of professional fees for her services;
- 41.2. the claimant produced professional documentation on her own letterhead and expressed herself as if separate to the respondent business;
- 41.3. the claimant was responsible for her own tax returns;
- 41.4. the claimant was free and able to market her services to other funeral homes and did engage with them on largely the same basis as with the respondent and provided identical services;
- 41.5. the claimant made significant money from other sources of business where she offered the same services;
- 41.6. the claimant was not integrated into the respondent business – she did not have site keys or an e-mail address or anything signifying to the outside world that she was attached to the business; and
- 41.7. other than telling the claimant what work was there to be done on the day, and requiring the claimant to follow health and safety guidance as any visitor would, the respondent exercised no real control over the claimant and her work.

42. In my view, all of these point to the claimant operating her own business and supplying services into the respondent on the basis that the respondent was her client. I accept that some points tend in the other direction, such as her being paid through PAYE and what is written on the documents. However, for the reasons outlined in the paragraph above, I consider that there is more evidence pointing to the claimant being a self-employed contractor. These factors relating to pay and control go right to the heart of the relationship between the parties, and with both of them the claimant retained complete freedom to charge as she wished and work as much or as little as she wished. When she did not work, the respondent merely chose to engage another embalmer on a contracted services basis.

Disposal

43. Having found that the claimant was neither an employee or a worker, the claimant's claims fall to be dismissed because the tribunal has no jurisdiction to hear them.

Employment Judge Fredericks

31 May 2022

Sent to the parties on:

30 June 2022

By Mr J McCormick

For the Tribunal Office