Neutral Citation Number: [2022] EAT 148

Case No: EA-2021-000324-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 August 2022

Before:

HIS HONOUR JUDGE MARYTN BARKLEM

- -

Between:

MR LEE RICHARDS **Appellant**

- v -

1) WATERFIELD HOMES LTD
2) UNITY BUILD & REPAIRS LTD **Respondent**

- -
- -

Debbie Grennan (instructed by **Nash & Co Solicitors LLP)** for the **Appellant**
Rad Kohanzad (instructed by **Peninsula Business Services Ltd**) for the **Respondent**

Hearing date: 9 August 2022

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JUDGMENT

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SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

An ET erred in finding that, in a working relationship which had numerous indicators of employment status and only one in favour of self-employment, that the latter should be determinative of the issue. Self-employment (implicit in the use of the CIS scheme to pay the claimant) was only one of the factors to be considered. Looking at the findings as a whole, and consistent with case law, the only proper conclusion open to the ET was that the claimant was indeed an employee. The case was remitted to the ET for a remedy hearing on that basis.

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HIS HONOUR JUDGE MARYTN BARKLEM

Introduction:

1. This is an appeal against the decision of an Employment Tribunal ("the ET/ Tribunal") sitting at Exeter, Employment Judge Smail sitting alone. The purpose of the hearing was to decide the Claimant's employment status. Written Reasons were sent to the Parties on 1st December 2020. In this judgment I shall refer to the Parties as they were below.

2. The case was sent to a full hearing on the sift by Mr Gavin Mansfield QC sitting as a Deputy Judge of the High Court who commented very briefly that the appeal was arguable for the reasons set out in the Notice of Appeal.

3. The Claimant, who brings this appeal, was represented at the original hearing by Ms Grennan, of Counsel who also appeared before me. The Respondent was represented below by Mr Hine, a solicitor, but was represented at the hearing before me by Mr Kohanzad. I see that Mr

4. Wishart is sitting in for him today to make a note of this judgment. I am grateful to each of them for their written skeleton arguments augmented by economical and focussed oral submissions.

5. The Claimant began working (and I use that term in a loose sense) for the Respondent in October 2010. He is a skilled worker, describing himself as a multi-trade carpenter. At the time of his introduction to the Respondent (which is wholly owned by a Mr Conyers) he was in need of work. He was at the time a registered CIS contractor. CIS is a scheme in which (it was agreed by both Counsel at the hearing before me) a sub-contractor can have 20% of his gross earnings deducted by the employer and paid to HMRC on account of income tax and National Insurance. The alternative is to have 30% of earnings deducted. At the end of the year, there is an accounting and, usually, a balance payable by HMRC to the worker. Use of the scheme is inconsistent with being an employee, strictly so-called.

6. In 2018, the Respondent instructed Peninsula Business Services Limited to "regularise" its employment relationships. As a result, the Claimant was switched to an employment contract,

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ostensibly with a different company owned by Mr Conyers but, in reality, with the Respondent. Payments made under that contract were mostly of Statutory Sick Pay as the Claimant was off work sick between shortly after the date of the new contract and his eventual resignation.

7. The ruling by the employment judge is short, running to just four pages. The following key findings from the written reasons may be extracted:

i) Mr Conyers has a diverse workforce of tradesmen working for his companies, none of whom (so far as the Judge could tell) were employees;

ii) Other than an agreement by the Parties to operate the CIS scheme, the relationship was "close to an employment one" – the Claimant worked normal working hours, Monday to Friday, and worked solely for the respondent (see paragraph 5 of the Reasons);

iii) A letter dated 14th February 2014 from the claimant to Mr Conyers was "likely" to have been sent. Mr Conyers had denied this. The letter thanks Mr Conyers for three years of employment and asks for an increase in his hourly rate to enable him to take annual leave, alternatively for a period of paid annual leave, none such having been given to date. There was no response to the letter (see paragraph 8);

iv) From November 2018, the Claimant worked under a contract of employment, Mr Conyers' "employment relationships" having been regularised following the advice from Peninsula. The Claimant objected because the contract with which he was provided said he was an employee from November 2018, when he asserted a start date back in 2010 (paragraphs 9 and 10);

v) The agreement in 2010 was not a "sham" agreement, nor forced upon the Claimant, unlike the position in **Autoclenz Ltd v Belcher** [2011] IRLR 820 SC. In the present case, the Claimant had "insisted" upon working through the CIS scheme.

8. I cite the following final passages from the judgment in full:

"14. I do not invoke <u>Young and Woods Ltd v West</u> [1980] IRLR 211 (CA) so as to

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undo that agreement; that would not be just on the facts of the case. In that case an employee expressly wanted to be a sub-contractor, self-employed. The employer agreed but the Tribunal found on the true analysis, he was an employee. That case seems to be the high watermark of the Courts intervening with what the parties had actually agreed.

15. The CIS Scheme is a well-recognised industry-wide scheme in relation to which registrants know they are to be treated as self-employed and they expect that to be the case. That is not however inconsistent, as conceded by all sides before me, with the entitlement to be paid holiday pay. It seems to me that the analysis in <u>Autoclenz</u> has moved on somewhat since <u>Young and Woods Ltd</u>.

16. The question for me is what was the true intention between the parties? They might have agreed employment but they did not; and that was a position equally arrived at by the Claimant and by Mr Conyers. Here the parties agreed that the legal basis of the engagement of the Claimant was through the CIS Scheme as a self-employed contractor. The Claimant entered that agreement with sufficient bargaining power to make it a genuine arrangement. That, however, does not contradict the right to claim holiday pay and other rights of workers under the employment legislation. The substantive hearing will go on to examine some of those. (original emphasis)"

9. There are 5 grounds of appeal although, as Ms Grennan made clear, Ground 1 is the main one, and the others are, to an extent, arguing the same point. The Ground is that the ET erred in law in treating the question of tax status as determinative. The label attached to the relationship should have been only one of the factors which the ET ought objectively to have balanced.

10. In the course of her submissions, I was taken to a number of authorities dealing, essentially, with the issue of how the label applied by the parties to a relationship is to be treated by the Courts. The case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 Vol 2 QB 497 is a convenient starting point. At pages 512 to 513 of the report Mr Justice MacKenna said:

'It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master

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> and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights or duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and in fixing them in the sense required to give effect to that intention.'

11. At pg. 515, it set out what is now the classic description of a contract of employment, and it reads:

> "A contract of service exists if these three conditions are fulfilled. (i) 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. (ii) 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 master. (iii) The other provisions of the contract are consistent with its being a contract of service. "

12. There are of course other factors such as a right of substitution, and an irreducible minimum or obligation, but these are not in issue in the present case.

13. I need not go through each of the cases to which I was taken; the point is essentially the same. However, given the comments of the employment judge in paragraph 15 it is important to look briefly at **Young and Woods Ltd v West** [1980] IRLR 201 and **Autoclenz**, cited above.

14. Mr West was given the option of working as a sheet metal worker on a contract of employment or as a self-employed person. He chose the latter. When his work was terminated, he brought a claim of unfair dismissal. The Court of Appeal held that the obligation of a Tribunal is to determine whether the label of self-employment was a true description or a false description by looking beneath the description to the reality of the facts. Lord Justice Ackner (as he then was) pointed out that it was now well settled that the label which the parties choose to use to describe their relationship cannot alter or decide their true relationship; but, in deciding what that relationship is, the expression by them of the true intention is relevant but not conclusive. Its importance may vary according to the facts of the case.

15. I stress that the word "false" is not the same as "sham". Nobody is saying that there was a sham contract in the present case, not least because there was nothing in writing.

16. In **Autoclenz**, however, there was held to be a sham contract, purporting to designate car

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valeters as self-employed sub-contractors. The ET's finding that the claimants were employees was eventually upheld by the Supreme Court. EJ Foxwell's findings, to be found at paragraph 36 of the Supreme Court's ruling dealing with the relevant facts, were cited in full. They negated entirely the assertions set out in the contract.

17. Ms Grennan accepted that, in borderline cases, the label which the parties apply may be determinative of the issue, in the sense that it can tip the balance.

18. Mr Kohanzad accepted that, had the employment tribunal treated the tax issue as determinative, that would be have been an error of law. He argued that there were many factors which were before the judge, and which he must have had in contemplation, albeit not referred to in the judgment. He took me to witness statements which were before the judge dealing with other issues such as (and I am very much abridging the submission) the Claimant's ownership of his van, telephone and tools, and the way in which work was allocated. The difficulty I had with that submission is that the hearing took two days, with cross-examination of witnesses, and I am not able to say what the final state of the evidence was. Certainly there are no specific findings in relation to these matters.

19. Ms Grennan told me that, so far as the final submissions at the hearing from both sides were concerned, the only factor not pointing to employment status was the question of the method of payment. That is consistent with the comment at paragraph 7 of the Reasons:

> "Although the parties agreed engagement under the CIS Scheme, the relationship was close to an employment one." …

20. No other factor pointing away from an employment relationship has been cited by the Judge. Mr Kohanzad concedes that the judge may have given more weight than other judges might have to the intention of the Parties, but that is something which is within the discretion of an employment tribunal, and not something with which I should interfere.

21. Ground 2 asserts that the Tribunal erred in law by misunderstanding or giving undue weight

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to the use of the CIS Scheme.

22. In my judgment it adds little to the point made in Ground 1. My understanding of the scheme (with which, as mentioned above, the parties agreed) is that it enables deductions of 20% rather than 30% which applies to those outside the scheme. It is not possible for such a sub-contractor to be paid "gross" without the agreement of HMRC. In employment law terms, there is nothing that opting for the scheme confers beyond self-employed status, taking us squarely back to the territory which is the subject of the authorities cited above.

23. Ground 3 asserts that the Tribunal erred in law in failing to apply the principle that a person can be an employee for tax purposes (and to be considered as such by HMRC) yet be considered an employee under employment law principles. This is not something which the ET dealt with in the reasons, and Mr Kohanzad simply repeats that the tax issue was determinative, in any event.

24. Ground 4 asserts that the Tribunal erred in finding that there was equality of bargaining power – see paragraph 16 of the Reasons. Ms Grennan points to the fact that the Claimant was out of work at the time he started and this was the method used to pay all staff.

25. Mr Kohanzad responds that there was no suggestion of "equality" – and in few employment scenarios could there ever be – merely that the Claimant had "sufficient" bargaining power; that is, that he was not forced into it against his will.

26. Ground 5 asserts that the Tribunal failed to have regard to the position after 2018; that is, that the Respondent unilaterally placed its staff onto contracts of employment. What, Ms Grennan asks, had changed, other than the method of payment? Had the ET asked itself what had changed in 2018 to make the status unequivocally one of employment, she argues, it would have been bound to conclude that it was in error in characterising the first 8 years as self-employment. Mr Kohanzad's response, in effect, is that the issue is, again, one of weight, which was a matter exclusively for the Tribunal.

27. In my judgment the issues raised by the five grounds are largely intertwined. The judge made

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reference to the CIS Scheme being "what was agreed" at paragraphs 12, 13, 15 and 16. He gives no explanation for his comment that **Young and Woods** was the "high watermark of the Courts intervening with what the parties had actually agreed". He also gives no explanation as to how he considered "the analysis in **Autoclenz** [which was a very different case] has moved on somewhat since **Young and Woods**".

28. In my judgment, the Tribunal did fall into error by the judge's focus on what he considered to be an agreement between the Parties, despite this being only one factor to be taken into account. On any view of the facts as set out by the judge, the description between the parties was manifestly "false" as a description of the relationship between them over a sustained period. The fact that other tradesmen were engaged on a similar basis and that, following a "regularisation" in 2018, there was a unilateral decision by Mr Conyers to make the Claimant an employee points inexorably in that direction. This was not a finely balanced case in which the description of the relationship by the Parties could be regarded as a tipping point

29. In my judgment, on the facts as found by the employment judge, there is only one conclusion which he could legitimately have reached by refence to long-established authority and, pursuant to **Jaffri v Lincoln College** [2014] EWCA Civ 449, I therefore substitute such a finding; namely, that the Claimant was an employee throughout the time in question.

30. The matter is remitted to the Tribunal for a substantive hearing to take place, the judgment of the preliminary hearing being substituted as set out above.

31. I direct that a transcript be made of this judgment and sent to the Parties in due course.

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