EMPLOYMENT TRIBUNALS

Claimant: Mr K Maloney
Respondent: Horizons Plus Ltd

Heard at: Manchester (by CVP) **On:** 29 September 2022

Before: Employment Judge Rhodes

REPRESENTATION:

Claimant: In person
Respondent: Miss S Lehair (Director)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is dismissed upon withdrawal.

2. The claimant was not an employee or worker of the respondent. The Tribunal therefore does not have jurisdiction to hear his complaints of unauthorised deductions from wages and breach of contract which are hereby dismissed.

REASONS

Introduction and Issues

1. The claimant complained of unauthorised deductions from wages and dismissal in breach of contract (wrongful dismissal). The claimant had also complained of unfair dismissal but, having previously been put on a strike out warning by the Tribunal, accepted at the start of the hearing that he did not have two years' continuous employment with the respondent and withdrew that complaint.

2. The respondent's position was that it did not have a contract with the claimant. Rather, it contracted with a limited company, Pinnacle Support Services Group Limited ("Pinnacle") of which the claimant was a director and shareholder. Alternatively, the claimant was an independent contractor. In either case, therefore, the respondent's position was that the claimant was neither a worker nor an employee of the respondent and he was therefore not entitled to pursue his

complaints at an Employment Tribunal. The case therefore largely turned on the claimant's employment status, in particular:

a. Was the claimant an employee as defined by section 230(1) Employment Rights Act 1996 ("ERA")?

b. If not, was the claimant a worker as defined by section 230(3)(b) ERA?

3. It was agreed that, because only day had been allocated to the hearing and in light of the amount of evidence to hear, the hearing would concentrate solely on the question of employment status.

Evidence and Bundle

4. I heard evidence from the claimant and, on behalf of the respondent, Sarah Leahair (Director) and Hayley Cooke (Independent Safeguarding Consultant). Both parties had exchanged statements of other witnesses who did not attend the hearing and to whose evidence, therefore, I did not attach any weight.

5. I was referred to a 371-page bundle. The pagination in the electronic bundle did not match the pagination on the physical copy. References to page numbers in this judgment are references to page numbers in the physical copy of the bundle.

Law

6. Pursuant to section 13 Employment Rights Act 1996 ("ERA"), a worker has the right not to suffer unauthorised deductions from wages. Section 230(3) defines a worker as:

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; and any reference to a worker's contract shall be construed accordingly."

7. Section 230(2) defines an employee and a contract of employment as follows:

(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.

8. The key tests for the existence of a contract of employment are those set out in ***Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497***, namely that:

a. an agreement exists to provide the servant's own work or skill in the performance of service for the master ("personal service") in return for a wage or remuneration ("mutuality of obligation").

b. in the performance of that service, the master has a sufficient degree of control over the servant ("control").

c. the other provisions are consistent with a contract of service ("other factors").

9. Subsequent decisions (notably ***Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612*** and ***Carmichael v National Power [1999] 1 WLR 2042***) have confirmed that personal service, mutuality of obligation and control are necessary but not sufficient conditions for the existence of a contract of employment. If all three are present, the question of whether there is a contract of employment must be assessed by considering all other relevant factors and weighing up whether they are consistent with a contract of employment.

10. For an individual (A) to be a worker for another (B) pursuant:

a. A must have entered into or work under a contract with B; and

b. A must have agreed to personally perform some work or services for B.

11. However, A is excluded from being a worker if:

a. A carries on a profession or business undertaking; and

b. B is a client or customer of A's by virtue of the contract.

12. On this latter point, the EAT in ***Cotswold Developments Construction Ltd v Mr S J Williams UKEAT/0457/05*** held that there is a distinction between someone who actively markets his or her services to the world at large, on the one hand, and someone who is recruited by a principal to work for that principal as an integral part of its business, on the other hand.

13. The current state of the law on worker status has been recently (and very helpfully) summarised by the Employment Appeal Tribunal in ***Mrs N Sejpal v Rodericks Dental Limited [2022] EAT 91***.

14. An Employment Tribunal has jurisdiction to hear a claim by a former employee (but not a worker) for the recovery of damages for breach of contract by virtue of paragraph 3 of the Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Findings of Fact

15. The respondent provides semi-independent accommodation and support for young people. The claimant and Miss Leahair had known each other since 2014 when they both worked at the same company, Transitional Plus Care Limited.

16. The claimant was appointed as a director of Pinnacle on 15th July 2020. The nature of Pinnacle's business is to provide residential care activities. The claimant

also owned one third of the shares in Pinnacle and had entered into a shareholders' agreement with his fellow shareholders (Nicholas le Court and Deborah Ralph) on 1st July 2020. Under the terms of that agreement, each shareholder agreed that any relevant business interest which came to his or her attention belonged to Pinnacle. The claimant has also held directorships in other companies in a similar line of work.

17. On 1st July 2020, Pinnacle entered into an agreement with Leesland Ltd relating to the management of a property owned by the latter at 148 Belmont Road, Liverpool ("Belmont Road"). Under this agreement, Pinnacle had to use its reasonable endeavours to let Belmont Road and was obliged to pay a monthly payment to Leesland upon letting two or more bedrooms (£900 upon letting two bedrooms, rising to £2,000 upon letting four or more bedrooms).

18. On 23rd September 2020, the claimant contacted Miss Leahair by text message to seek advice about "my own project" (page 119). He subsequently sent her a document called "Pinnacle Social Worker Package" which Miss Leahair read and provided him feedback on. In particular, she advised him that he could potentially charge more for the package than he was proposing to (page 120). This project was a business undertaking, of which the respondent would soon become a client.

19. At about the same time, the claimant had applied for bank work with the respondent and his only assignment as a bank worker came on 2nd November 2020 when he attended a Police station to act as an appropriate adult for a young person ("YP1"). YP1 had previously been under the care of the respondent but could not return to its care following an altercation with another resident.

20. The Police were unwilling to release YP1 without an address to bail him to and he could not return to the respondent's care, for the reason stated above. The claimant proposed a solution to the respondent, namely that YP1 could be accommodated at Belmont Road. However, Pinnacle was not on the local authority's procurement framework so the respondent agreed to act as the lead provider of the service of accommodating YP1. On the respondent's case, it sub-contracted the service to Pinnacle; on the claimant's case, the respondent engaged him as an employee or worker. Naively, the arrangements were never formalised in a written contract and this omission has led to the current dispute. I find that the respondent sub-contracted the service to Pinnacle and that the respondent was a client of the business undertaking carried on by Pinnacle, for the following reasons.

21. The claimant can only have offered the use of Belmont Road in his capacity as a director and shareholder of Pinnacle. He had no right to use the property in any other capacity.

22. In a text message to Miss Leahair dated 3rd November 2020 (page 125), the claimant states that "rent will only be charged after the 2nd YP arrives". That is clearly a reference to the obligation on Pinnacle to make monthly payments to Leesland Limited upon letting two or more bedrooms in Belmont Road.

23. In the same text message, the claimant offered the respondent a commission payment of £200 per week for every young person it sent to Belmont House.

24. The following day, the claimant provided the respondent with his Pinnacle email address to be used to contact him on. At various times thereafter, the claimant corresponded with the respondent from that email account and, in his email signature, he described himself as either "Operations Director" or "Director/Residential Manager" of Pinnacle.

25. In one such email (dated 11th November 2020 at page 131), the claimant (who signed off the email as Operations Director of Pinnacle) referred to four individuals whom he intended to use as bank staff and told the respondent that all criminal records checks "will be paid for by us so it won't cost [the respondent] a penny". The "us" in that sentence can only have been Pinnacle. It cannot have been the claimant personally (otherwise, he would have used "me") and it clearly was not intended to include the respondent.

26. That email also refers to 'Adam' being onsite at Belmont Road. That is a reference to Adam Ralph, a business associate of the claimant who had an interest in Pinnacle (although the claimant was evasive as to the exact nature of it).

27. Once the necessary arrangements were in place, the respondent paid over the fees for delivering the service which it received from the local authority to a bank account the details of which had been provided by the claimant to the respondent at the same time as he provided the respondent with details of his Pinnacle email address. It later transpired that that was the claimant's personal bank account but, in the light of the surrounding circumstances, it was reasonable of the respondent to assume at the time that that was a Pinnacle business account (which assumption the respondent did make).

28. The fees comprised a payment of £185.71 per young person per day. Those fees were designed to cover the costs of accommodating the young person, staffing the service and providing a number of key worker activities.

29. In March 2021 (by which time a second young person ("YP2") was about to arrive at Belmont House), the claimant and Mr Ralph exchanged a number of messages concerning the service's finances and the prospect of dividends being paid to the claimant in anticipation of Pinnacle generating a profit (pages 154 to 157). In one of those messages, the claimant informed Mr Ralph that YP1 and YP2 "are the kids that are paying the bills".

30. On 30th April 2021, the claimant shared with Miss Leahair copies of an exchange of messages which he had had with Mr Ralph in which the claimant set out the staff rota for April and the hourly rates payable to each, together with expected incomings and outgoings (including the £900 monthly payment payable to Leesland Limited following the arrival of YP2).

31. When questioned, the claimant suggested that the staff rota, as disclosed to Mr Ralph, was not accurate and that he had worked every (or practically every) shift himself. Contradicting himself, the claimant went on to accept that other people did work at Belmont House and that he paid them.

32. There are also numerous examples throughout the bundle of the claimant referring to staff at Belmont House and to time off he had taken. The claimant argued that references to "staff" were just references to himself in the third person but that is

simply not credible. For example, in a text message dated 22nd February 2021 (page 147), the claimant said "*When you get the green light to move [YP2] I will come and get him in my car separate to his possessions. But can you ask your staff to fill up a car with [YP2] possessions and send them down to Belmont staff have money to pay taxi on arrival and will take them up to his room ready for him*." It is abundantly clear from this exchange that the claimant was going to drive in his car to collect YP2 at the same time as YP2's possessions would be sent to Belmont House where other members of staff would be ready receive them. These other members of staff were not engaged by the respondent. They were engaged by the claimant/Pinnacle.

33. By October 2021, the respondent became aware of tension between the claimant and Mr Ralph, both of whom separately requested information from Miss Leahair about payments from the respondent. The claimant informed Miss Leahair about a meeting that he was due to have with Mr Ralph and Mr le Court on 25th October 2021 and expressed concern that all they cared about was making money.

34. After the meeting, the claimant told Miss Leahair that it had gone well and that there was a business analyst at the meeting who expressed an interest in investing in Pinnacle's business.

35. By January 2022, relations between the claimant and had business partners had deteriorated further and the claimant formed a new company, Pro-Active Living Solutions Limited, on 25th January 2022, and offered Miss Leahair the opportunity to take shares in it (which she declined). The claimant told Miss Leahair of his intention to resign from Pinnacle.

36. On 28th January 2022, Mr Ralph texted Miss Leahair to say that he was "*trying to put together a package that I hope [the claimant] will find valuable and be happy with to stay on board*" (page 239).

37. At about the same time Mr Ralph and/or Mr le Court informed Miss Leahair that the respondent's payments had been going into the claimant's personal bank account and that they must in future be paid into Pinnacle's account. Thereafter, no further payments were made into what the respondent now knew to be the claimant's own account. This appears to have been the catalyst for the claimant to set up a new business.

38. On 6th February 2022, the claimant texted Miss Leahair to ask for a meeting (page 248). They met briefly on 9th February 2022 and the claimant sought advice on his new business venture to assist with a tender submission he was preparing. During the course of that meeting, the claimant asked why he had not received any money from the respondent. Miss Leahair told him that she had been told to pay the fees into the Pinnacle account. He asked her not to and to resume making payments to him which she refused. She did, however, offer to help resolve his dispute with Pinnacle and then spoke to Mr Ralph on the claimant's behalf. The following day, the claimant texted Miss Leahair to tell her that Mr Ralph had offered to pay him £2,000 which he had turned down (page 250).

39. On 10th February 2022, Mr Ralph texted Miss Leahair to inform her that the claimant had told him that he would be leaving at 8am the following morning. Mr Ralph asked her if the respondent could provide alternative staff. The claimant

subsequently agreed to stay on for a few more days with the respondent taking over responsibility for staffing Belmont Road from 14th February 2022.

40. At around the same time, the local authority brought to the respondent's attention concerns about the claimant which led to an investigation which the respondent conducted on behalf of the council. This was not, however, an internal disciplinary investigation. There was no evidence to support the most serious allegations against the claimant but there were found to have been some breaches of policy which, if the claimant had been an employee of the respondent, may have resulted in the termination of his employment.

41. In April 2022, Miss Leahair agreed to assist the claimant with the drafting of a letter to his Pinnacle business partners about the money which he claimed they owed to him. Miss Leahair went away to celebrate her birthday before having the opportunity to do so.

42. Upon her return, Miss Leahair received notification that the claimant had commenced Acas early conciliation in respect of a prospective claim against the respondent. This came as a surprise to her as she had always been of the view (reasonably) that his dispute was with Pinnacle. The respondent has subsequently been caught in the crossfire of that dispute.

Discussion and Conclusions

Was the claimant an employee as defined by section 230(1) ERA?

43. No. As per my findings at paragraphs 21 to 42 above, the claimant was not a party to the contract between the respondent and Pinnacle. He had no contractual relationship with the respondent. He was therefore not an individual who had entered into or worked under *any* contract with the respondent.

44. Even if I am wrong about that and there was a contract in place between the claimant and the respondent, it was not a contract of employment as it did not meet the ***Ready Mixed Concrete*** criteria. There was no requirement for personal service. The claimant controlled how much time he spent working in the service and could and did arrange for other staff to cover for his absences. The claimant (via Pinnacle) provided the premises at which the service was delivered, he controlled how the service was delivered and he hired and paid staff to work in it. He had the opportunity to profit from the service by delivering it in the most efficient way and discharged all the overheads associated with running it. These are all factors which are inconsistent with the existence of a contract of employment.

Was the claimant a worker as defined by section 230(3)(b) ERA?

45. No, apart from the sole bank shift in November 2020 which is of only background relevance to subsequent events. In all his subsequent dealings with the respondent, the claimant was acting in his capacity as an agent for Pinnacle and was not a party to the contract between the respondent and Pinnacle for the reasons previously stated.

46. Even if I am wrong about that and there was a contract in place between the claimant and the respondent, it did not meet the criteria of section 230(3)(b). It was

not a contract to perform work personally for the respondent and, even if it was, the respondent's status was that of a client of the business undertaking carried on by the claimant on his own account or in concert with his business partners, for the reasons previously stated.

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Employment Judge Rhodes

Date: 2nd November 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 November 2022

FOR THE TRIBUNAL OFFICE