



EMPLOYMENT TRIBUNALS

Claimant: Mr M Goody

Respondent: Electec Electrical Ltd

Heard at: London South by video

On: 10th June 2022

Before: Employment Judge Reed

Representation

Claimant: Charles Murray, Counsel

Respondent: Anna Johns, Counsel

RESERVED JUDGMENT AT PRELIMINARY HEARING

1. Mr Goody does not have two years' of continuous employment. It follows that his claims for unfair dismissal and a statutory redundancy payment are not well founded and are dismissed.

REASONS

Claims and issues

1. Mr Goody brings claims for unfair dismissal, statutory redundancy payment and unauthorised deductions from wages (in respect of sales commission).
2. To succeed in his claims for unfair dismissal and a statutory redundancy payment Mr Goody must establish that he was an employee, with two years' qualifying service. That is the preliminary issue dealt with at this hearing.
3. Both parties agree that Mr Goody was employed by Electec and that his employment ended on 15th September 2021. Their dispute is over when his employment began. Mr Goody argues he was employed from 1st August 2019

(and therefore has the necessary qualifying service) while Electec say that he was not employed until 15th October (and so does not).

Procedure, documents and evidence

4. I heard evidence from the Mr Goody. From the Respondent I heard evidence from Mr Pritchard, Electec's Managing Director. I was also provided with a signed statement from Lyndsay Scrase, another employee at Electec, but she did not give evidence.
5. I was provided with an agreed bundle of 226 pages and a bundle containing additional documents of 93 pages. Page references in these reasons are to the main bundle unless otherwise indicated.
6. The hearing was conducted by video. There were no significant technical difficulties during the hearing.

Findings of fact

7. On the basis of the above evidence I have reached the following findings of fact on the balance of probabilities.
8. Electec operates in a number of markets: as a general electrical contractor, in renewable energy and in audio-visual installation. For this claim the pertinent area of their business is the audio-visual part where they design and install AV solutions for clients.
9. Mr Goody has substantial experience within the AV industry, where he was worked since 2010.
10. Before his employment Mr Goody had known Mr Prichard for a number of years and they had a friendly relationship. In 2016 Mr Goody recommended Mr Prichard as a contractor to an architect he was working with and he was brought in on that project. In 2017 Mr Prichard asked Mr Goody to assist him in selling a project and the AV work was subsequently done by Mr Goody's then employer. Mr Goody also continued to recommend Electec and, from time to time, put them in touch with potential customers.
11. There is no suggestion by either Mr Pritchard or Mr Goody that these events represented anything like an employment contract. They were part of a friendly and mutually beneficial relationship between two people working in the same industry.
12. In February 2019 Mr Pritchard and Mr Goody met at a trade show. At this time Mr Pritchard made the suggestion that Mr Goody might come to work for him at Electec. He wanted to expand Electec's work in the AV field and felt Mr Goody could help with this. Nothing came of this immediately, because at the time Mr Goody was moving into a new role at Lightplan Works, a division of Haywood Roberts.

13. At Lightplan Mr Goody continued to refer electrical work to Electec. There was therefore continued friendly contact between Mr Goody and Mr Pritchard. They continued to discuss the possibility that Mr Goody might come to work for Electec.

July 2019 lunch meeting

14. Mr Goody and Mr Prichard met for lunch on 31st July 2019.

15. It is from this point that the factual accounts of the parties diverge. In order to set out how I have resolved these divergent accounts it is useful to set out in some detail both accounts chronologically before turning to assess the evidence.

16. Mr Goody says that, at the July meeting, Mr Pritchard offered him a job running Electec's AV work and that he accepted it. From then on, he says, he was employed by Electec.

17. Mr Pritchard's agrees that they met on the 31st July, but says that it was a meeting to discuss possibilities, with no formal offer at that stage. His evidence was that, at that point he wanted Mr Goody to come on board and knew that Mr Goody was interested. He said that he expected to speak to his fellow director and to go through a formal interview process with Mr Goody before anything was finalised.

Mr Goody's work for Electec following July meeting

18. On the 2nd August 2019, Mr Goody sent a WhatsApp message to Mr Prichard as follows:

So just potentially had the go ahead on a 80k upgrade job up in Regent's Park. Shall we treat this as an Electec AV job??

19. Mr Prichard replied with a smiley face emoji and went on:

Shall we meet and have sober chat next week

20. Mr Goody's evidence was that at this time he remained working with Lightplan but was at the same time working for Electec as an employee.

21. On the 23rd August 2019 Mr Prichard sent a WhatsApp message asking if Mr Goody would be free to come in and see him and Sam. Mr Goody replied:

Of course, my week may turn pretty hectic but we'll see

22. In cross-examination it was suggested to Mr Goody that this suggested that, at this stage, it was his decision whether to come in and that Electec could not have required him to attend. He agreed that this was his understanding at the time.

23. It is common ground that during this time Mr Goody did some work for Electec and, in particular, was involved in pricing work and providing quotes to clients. I have been taken to various pieces of correspondence demonstrating this. In addition, Mr Murry has suggested on behalf of Mr Goody that there is a detectable difference in tone after 31st July 2019, which supports the case that Mr Goody became an employee. He suggests that there is a more imperative tone, compared with earlier correspondence, consistent with the suggestion that Mr Goody was an employee.
24. I agree that there is a change of tone in the messages. There is an apparent expectation in the messages that Mr Goody will be available and willing to do the work that is being suggested, rather than a more tentative tone in earlier messages. There is, however, nothing conclusive of employment status in these messages.
25. It is common ground that Mr Goody was paid for some of this work, submitting invoices to Electec that refer to payments as a consultant.

Interview and contract

26. Both parties agree that, in early September 2019, Mr Goody attended an interview with Electec.
27. On 10th September 2019, Mr Tilley, emailed Mr Goody (page 74). He thanked him for attending the interview and went on to say that he was pleased to offer him the role of AV Sales Manager at Electec. An employment offer letter was attached to that email. In relation to the start of employment the offer letter said 'Your start date is to be agreed, but we anticipate a start date in early October.'
28. It was put to Mr Goody in cross-examination that he did not challenge this start date at the time or suggest that he was already employed. He said that he regarded the process as a formality.
29. In the WhatsApp messages between Mr Goody and Mr Prichard on the 12th September 2019 Mr Prichard messages: 'Just wanted to say massive welcome to team electec and very much looking forward to a new chapter in October'. Mr Goody replied with a picture of a thumbs up. It was suggested in cross-examination that this implied agreement, which he denied.
30. There is also an email sent by Mr Goody on 12th September 2019 referring to a consultancy invoice (p89). In it he refers to sorting out the reminder after his start date. In cross-examination Mr Goody said that he was referring to his start date in the office, rather than the start date of his employment.
31. There are similar references to Mr Goody's start date in the WhatsApp messages between him and Mr Prichard (p56). On the 27th September 2019 Mr Prichard asks what start date they should aim for, to which Mr Goody replies as soon as possible once an ongoing project is wrapped up. Again, Mr Goody says that these references are to him starting in the office, rather than the start date of his employment.

32. On the 7th October 2019 Mr Tilley emailed Mr Goody a copy of his contract, (page 152). It is common ground that this was not signed by Mr Goody.

Holiday

33. Mr Goody was on holiday between 21st September 2019 and the 4th October 2019. This was arranged before July 2019.

Leaving Lightplan and working in the Electec office

34. It is common ground that, from 15th October 2019 Mr Goody worked out of the Electec office. He also resigned from Lightplan on the 15th.

35. Mr Goody accepted that the first payslip he received from Electec was dated 25th October 2019 (page 169). It referred to a join date of 15th October 2019 and calculated his salary on that basis (meaning that he received 13 days pay). This was the first salary he had received from Electec. In his evidence Mr Goody said that he thought that this was correct. He had expected to be paid a salary from when he began in the office, but not before.

36. In his evidence Mr Goody accepted that a number of changes took place at this point in his relationship with Electec. He said that from this point he was required to work a 40 hour week, while previously nobody from Electec had told him what hours to work. He accepted that he had not been required to ask permission to take his holiday in September / October or to book leave with Electec. Similarly, he said that, had he been ill prior to 15th October he would not have had to inform Electec.

Factual conclusions

37. I have concluded that Mr Goody and Mr Prichard did discuss him working for Electec at their meeting on 31st July 2019. Mr Prichard did not, however, go so far as to offer him a job or enter into a contract from that date.

38. Rather, I find that what was expressed at that meeting was an intention that they move towards an employment relationship. An expression of desire or intention, however, is not the same thing as a contractual agreement.

39. In large part I base these conclusions on the subsequent actions of both Mr Goody, Mr Prichard and Mr Tilley.

40. In my view, if Mr Prichard had offered Mr Goody a job on the 31st July, there would have been no good reason to go through an interview process approximately six weeks later. Mr Goody suggests that this was an empty formality, but I do not find this plausible. There is no sensible reason to carry out an ostensible serious interview process if employment had already been agreed. I find that it is particularly implausible for this to occur not immediately after the suggested agreement, but rather weeks later – and for the email communication to then also be spread over a period of weeks.

41. The contemporaneous documentation and its timings is far more suggestive of a genuine process. In certain circumstances it might be a determined (and relatively sophisticated) sham, with an interview being conducted, correspondence sent and even informal WhatsApp communications produced, in order to give the impression of a recruitment process and to produce a plausible documentary record to support that.
42. But this is not a situation where there is any apparent motive to carry out such an elaborate exercise or produce misleading evidence. This was not, for example, a situation in which Mr Prichard was subordinate to a higher level of management who expected him to carry out a more open recruitment process or where there was an alternative candidate who had to be mollified.
43. The informal communications between Mr Prichard and Mr Goody also suggest an agreement being reached later. They are friendly and informal in tone, as well as being separate to the more official communication about the contract. There is no reason, if a rather empty formal process was being conducted, that this would be also reflected in the informal communication. In particular Mr Prichard's message on the 12th September 2019 welcoming Mr Goody to Electec and looking forward to 'a new chapter' in October has every appearance of a serious message and appears to be taken in that matter by Mr Goody.
44. A further factor is that Mr Goody's continued to work for Lightplan and to be paid by them until 15th October 2019. Although I accept it is possible to be employed by multiple employers at the same time, continuing an apparently full time job is incongruous with taking on employment elsewhere
45. I also have regard to the point raised by Ms Johns during her cross-examination that Mr Goody does not mention in his original claim form the meeting on the 31st July. Instead he says that 'The precise start date of the Claimant's employment is ambiguous since he was friends with Simon Prichard, prior to his employment and the two would refer work to each other. However, from August 2019, the Claimant was conducting work on behalf of the Respondent as an employee'. Ms John's asked why, given his evidence to the Tribunal, Mr Goody did not refer to the meeting in his claim. He replied that it was 'only when you go through documents you remember these things'.
46. This type of argument should be treated with caution. It would be wrong to conclude without further thought that if a particular part of a party's case has not been referred to in their claim form it is less likely to be true. The Tribunal is an informal jurisdiction. Experience suggests that it is not uncommon for pleadings to omit important facts for no easily established reason (or for reasons unrelated to the reliability of a witnesses' evidence).
47. Here, however, I do think that it is a factor to consider for two reasons. First, this is not a simple omission, but a disparity between the account in the claim form and account given in evidence. The claim form indicated that there was no clear event to delineate the point at which Mr Goody became an employee. This is incompatible with the evidence Mr Goody gave to me, that there was a definite meeting on the 31st July in which he was offered a job and accepted it – an obvious delineating event. Second, I find that the sequence of events that Mr Goody relies on to be an implausible one. He suggests that there was a

clear agreement, which he then forgot or overlooked when his claim was drafted, but later recalled when considering the documentary material – although the documentary material does not include any clear indication of such an agreement. This is, of course, possible, but in my view it is unlikely. It is a further factor in making Mr Goody's account an implausible one.

48. Finally, I have regard to Mr Goody's agreement, during cross-examination, that there was a material change in his relationship with the Respondent from the 15th October 2019. In particular, he accepted that it was only from that point that he a) expected to be paid a salary and b) to have set hours of work with the Respondent (including a requirement to arrange holiday with Mr Prichard). Again, this is all incongruous with having entered into a contract of employment from 31st July 2019.
49. I do conclude that there was a deepening relationship between Mr Goody and Electec following the meeting on the 31st July 2019. As I note above, both parties had discussed Mr Goody being an employee and wanted this to happen. That common purpose was reflected in their actions. On his part Mr Prichard arranged the September interview and discussed Mr Goody coming on board with his fellow director. Later, on the 12th September, Mr Tilley introduced Mr Goody to a potential client as the new head of AV. Mr Goody took on work for Electec on a more consistent basis than he had done previously and was working in the expectation that this was leading onto his employment.
50. This culminated in the transition from the 15th October when Mr Goody left Lightplan, began working full time from the Electec office and was paid a salary. From that point he also accepted Electec's authority over his hours and work to a significantly greater degree.

The law

51. The requirement for two years' qualifying period in order to bring a claim for unfair dismissal is found at s108 of the Employment Rights Act 1996:

108 Qualifying period of employment

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

52. Although the remaining subsections of s108 go on to provide for various exceptions to the requirement of two years' service, the parties agree that none apply in this case.
53. The equivalent requirement in relation to a statutory redundancy payment can be found at s155 Employment Rights Act 1996.
54. The legal concept of continuous employment is a statutory one, defined within ss210-219 of the Employment Rights Act 1996. In this case there is no dispute in relation to the end of the continuous period (both parties agree that it was 15th September 2021) and no suggestion that employment, once it began, was not continuous. The sole dispute relates to the start of the employment contract.

55. In considering this issue, I bear in mind s211(1) which provides that continuous employment 'begins with the day on which the employee starts work'. There is guidance, in *General of the Salvation Army v Dewsbury* [1984] IRLR 222, that confirms that this refers to the beginning of engagement under a relevant contract of employment, rather than the date on which an employee first undertakes the full-time duties of employment.
56. I have also considered the principles laid down in *O'Sullivan v DSM Demolition Ltd* [2020] IRLR 840. It confirmed that the important task for a tribunal where an individual may have done work that is in some way related to a contract of employment, but appears to pre-date it, is to distinguish between work that is done under a contract of employment and work that is not done under that contract. The start date stated on a contract is not determinative of the start of the period of continuous employment.
57. In this case, an important part of this test is determining at what point Mr Goody began working under a contract of employment, rather than some other form of arrangement. The Employment Rights Act 1996 at s230(2) defines a contract of employment by reference to the common law concept of a contract of service.
58. A useful starting point in approaching the question of employment status is the test set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433. There, Mr Justice McKenna, set out a three part test. First, that an employee is someone who exchange for a wage or other remuneration, provides his work and skill in the performance of service for his employer. Second, the employee agrees that he will be subject to the employer's control. Third, that there is no other element of the contract that is inconsistent with their being an employment relationship.
59. Subsequent cases have elaborated on this test and the current approach is often referred to as the multiple test, because it involves considering myriad different factors. These include the obligation on an individual to perform work personally; the extent of obligation on the part of the individual to perform work for the engager and of obligation on the engager to provide work and the degree of control over the individual by the engager.

Conclusions

60. On the basis of the factual findings above, I have concluded that Mr Goody was not employed by Electec until 15th October 2019.
61. I have rejected Mr Goody's evidence that Mr Prichard agreed to employ him on 31st July 2019. Instead, both parties agreed on a direction of travel. They both intended that Mr Goody would become an employee, but neither was committed at that stage.
62. The direction of travel was then reflected in the deepening relationship between Mr Goody and Electec, with him taking on more work for them and, by 12th September 2019, being introduced to a client as their new head of AV.

63. It was, however, not until the 15th October 2019 that the relationship crystallised into a contract of employment. It was at that stage that important components of such a contract came into effect, in particular the far more substantial obligations that Mr Goody work set hours during the week and that Electec pay him for those hours, together with significantly greater control by Electec over Mr Goody's work.
64. I have considered whether I should regard all work done, once Mr Goody and Electec had his ultimate employment in mind as a distinct possibility, as being work under that contract of employment. I have concluded that I should not.
65. In my view it is a matter of taking, as suggested by the EAT in *O'Sullivan*, a common sense view of where the line is to be draw. There will be cases where work done in the expectation of employment will cross over the line into being work done under an employment contract.
66. But in this case there are a number factors against this. First, the clear distinction, apparent in Mr Goody's evidence, between the legal obligations between the parties before and after 15th October. Second, the fact that Mr Goody was employed elsewhere until that date. Third, the previous consultancy type arrangements means that it is sensible to regard the work done prior to 15th October as falling within that arrangement, rather than under the later contract of employment.
67. It follows from this conclusion that Mr Goody lacks the necessary qualifying employment to succeed in his claims for unfair dismissal and statutory redundancy pay. They must therefore be dismissed.

Employment Judge Reed

Date: 31st October 2022