Reference number(s)
2302000/2021

EMPLOYMENT TRIBUNALS

London South Employment Tribunal on 11th October 2022

Claimant **Between** *Respondent*

&

Mr Tejprakash Matharu

1) Shekinah Consultants Limited
2) Martec Limited

Before
Judge M Aspinall (sitting as an Employment Judge)

Appearances
Ms M Cass (of Counsel) for the Claimant
Mr N Harrison (Director) for first Respondent
Mr T Brennan (Senior Advisor) for second Respondent

FULL MERITS HEARING
Judgment

1. Having heard from the Claimant, witnesses for the first and second Respondents, Counsel for the Claimant, an HR Litigation Advisor for the second Respondent, having considered the issues in the claim, and on reviewing the evidence to which I was referred I find:
    1. That the claim for unfair dismissal against both Respondents is not made out and is dismissed; and
    2. That the claim for holiday pay against the first Respondent is not made out and is dismissed; and
    3. That the claim for holiday pay against the second Respondent is not made out and is dismissed.

Reasons

Procedural history

2. The hearing for this claim commenced, before me, on 22 June 2022 via CVP (video). At that hearing it became clear, after cross examination by the first Respondent, that the Claimant had not disclosed his self-assessment tax returns during the discovery phase of pre-hearing preparation. These, it was argued were necessary evidence as they would form part of the tapestry of evidence related to the employment status of the Claimant at all material times. The Claimant agreed that they ought to be provided and set out the efforts that had been made to do so - and the issues encountered. I paused the hearing for a short time to allow him to provide the disclosure. He was unable to do so due to technical issues. I was satisfied that it was reasonable and in the interests of justice to adjourn the hearing to allow the Claimant time to obtain assistance and to provide the tax returns.

The issues before the Tribunal

3. The Claimant made a claim that he had been unfairly dismissed by both Respondents. He claimed that, despite having been engaged as a self-employed contractor by the first Respondent to work on their behalf on a contract they had with the second Respondent, his engagement was akin to one of employment and that, on the termination of his ‘deemed’ employment he had been unfairly dismissed as no process had been followed. He also claimed that he had been denied holiday pay and that an amount had accrued up to the date of his employment being terminated to which he was entitled.

4. The first Respondent adopted the position that the Claimant was engaged as a self-employed contractor and had been since the outset of his work on behalf of the first Respondent. They argued that the Claimant was not - and had never been - their employee. They additionally, in respect of holiday pay, argued that the rate paid to the Claimant had been adjusted during the life of the engagement in order to account for an uplift in respect of holiday pay and that, to the extent that the Claimant might have a valid claim for holiday pay, it had been paid to the satisfaction of both themselves and the Claimant during the engagement.

5. The second Respondent took a straightforward position that, under no circumstances was the Claimant ever an employee of theirs. They had no contractual connections to him, did not pay him, did not instruct him - other than as would be expected by an end-client to a specialist consultant. In short, the position advanced by the second Respondent was that they were incorrectly joined as a party.

A preliminary view

6. On considering the issues before me, I determined that it was necessary for me to be satisfied - above all - of the actual and lawful employment status of the Claimant at the material times. To address this question, I considered it desirable to hear from the Claimant first in order that I could understand the base from which his argument - that he ought to be deemed to have been employed by one or both Respondents - stemmed. The parties agreed that this was a proper and reasonable course to take. I heard evidence from the Claimant, Nick Harrison for the first Respondent and from Mr Ross Young and Carina Gilshnan for the second Respondent. I also received submissions from counsel for the Claimant, Mr Harrison for the first Respondent and an advocate for the second Respondent.

Background

7. The Claimant was originally engaged by the first Respondent on 25 February 2013 under the provisions of what was headed "Short Form Consultancy Agreement" (pages 82-100 of the agreed bundle). That agreement between the Claimant and the Respondent, subject to agreed amendments made over time, ended on 23 March 2021. The Claimant was, throughout the engagement with the first Respondent under that agreement, working on their behalf with their own client (the second Respondent). There is a further "Short Form Consultancy Agreement" contained in the bundle (pages 101-116) - dated 1 March 2013 - between the first and second Respondents which is in, as far as I can see, the same terms as that between the Claimant and the first Respondent. There is also an undated "Addendum" (page 117) to the agreement between the Respondents which, although undated, refers to its coming into effect from March 2013.

Was the Claimant an employee?

8. This, it appeared to me, was a fundamental question. Indeed, in matters of unfair dismissal, it is the first question to be determined. If the Claimant was an employee, then he might - subject to subsequent conditions related to length of service and, of course, time limits for bringing claims - have a valid claim. If the Claimant was not an employee, he was not entitled to bring a claim for unfair dismissal in the first place.

9. From his own evidence, the Claimant agreed that the question of his employment status had not been an issue until the first Respondent conducted a Check Employment Status for Tax tool test (CEST) at around the time when the IR35 rules related to off-payroll working were due to come into effect in the private sector (pages 167-170). The evidence from the first Respondent was that this test was inconclusive so that it had been necessary to ask further questions of the Claimant. The Claimant told me that he had then completed the CEST check himself and that this had resulted in the outcome (pages 163-166) that he was "Employed for tax purposes for this work".

10. Details about the off-payroll rules (IR35) can be found here: https://www.gov.uk/guidance/understanding-off-payroll-working-ir35

11. Neither party directly addressed me on the question of whether an IR35 CEST determination was, in fact, determinative of whether a person was an employee, a worker or entirely self-employed. I find that on the evidence before me - not least the express words contained in the determination of the CEST tool (page 163) that the Claimant was "Employed *for tax purposes* for this work" (my *emphasis*) - I cannot conclude that IR35 is determinative of actual employment status rather than, as it expressly sets out, a determination for tax liability. I do not find that the IR35 tests, such as they are, assist me in deciding whether the Claimant was employed by one or more of the Respondents.

12. I find that the proper approach to determine the issue of whether the Claimant was an employee is to consider:

1. The written contract(s) between the Claimant and the Respondents, whether they were genuine and reliable indicators of the real-world intentions and actions of the parties;
2. The conduct of the parties in the period during which any relationship existed between them.

In short, it is necessary - and right - that I consider the reality of the position and look beyond, so far as is possible and proper, what is in writing.

13. *Section 230 of the Employment Rights Act 1996* (ERA96) provides the legislative position in relation to employees and workers:

(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;

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

Both Respondents argued that the Claimant was not, at any stage, an employee of either - whether expressly or by implication. He was, the first Respondent argued, a self-employed consultant in quality management systems. The second Respondent put it more simply - there was never any contract (express or implied) at all between them and the Claimant. The Claimant argued, to the contrary, that the nature of his engagement with the first Respondent was that he was controlled and directed by them and that he was also under the control and direction of the second Respondent too.

14. Although from the field of Employer's Liability, it is possible to derive a starting point for our journey in Munkman on Employer's Liability, 17th ed., para 4.14 (edited by Daniel Bennett):
"*...an employee is someone who works under a contract **<u>of</u>** service, in contrast to an independent contractor who works under a contract **<u>for</u>** service...Those requirements were concisely stated by Stable J in one sentence, in Chadwick v Pioneer Private Telephone Co Ltd [1941] 1 All ER 522 at 523D: '`A contract **<u>of</u>** service implies an obligation to serve, and it comprises some degree of control by the master"* (my ***<u>emphasis</u>***).

15. Whilst Munkman is a useful starting point, it is still necessary for me to look at whether the Claimant was placing himself into the service *of* either Respondent or whether he was, in the alternative, offering to utilise his specialist skills as an independent expert *for* either Respondent.

16. Denning LJ in *Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 CA* held that:
"*111 ...under a contract **<u>of</u>** service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract **<u>for</u>** services, his work, although done for the business, is not integrated into it but is only accessory to it"* (my ***<u>emphasis</u>***).

In this claim, the Claimant has given evidence that he was an integral part of the quality management function (indeed, that he was the quality management function) and that this was an integrated part of the second Respondents' business. He says that the work he performed was essential to the operation of the business, the successful management of relationships with existing and potential customers and, to any relevant extent, with any regulatory or legislative obligations. The second Respondent has argued that, to the contrary, he and Mr Harrison (for the first Respondent) were providing their expertise and independent specialist skills to benefit the second Respondent in terms of assuring and insuring quality but, they argue, he was not an employee but an adjunct to the business. The first Respondent, through Mr Harrison, made similar arguments to those advanced by the second Respondent. In any event, whilst the citation from Denning LJ is useful it is hardly conclusive, and it is necessary for me to consider other factors too.

17. Stable J said, in *Chadwick v Pioneer Private Telephone Co Ltd [1941] 1 All ER 522*:
"*523D A contract of service implies an obligation to serve, and it comprises some degree of control by the master".*

This was a theme that was further advanced and elucidated by MacKenna J in *Ready Mixed Concrete (SE) Ltd v Minister of Pension and National Insurance [1968] 2 QB 497*:
"*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"*.

The language used in both cases is firmly of its time. However, the principles that emerge can be modernised:
i) that the employee ('servant') provides their own labour to the employer ('master'); and
ii) that the employee agrees to do as they are told by the employer.

More simply still, was it open to the employer to tell the employee how they should behave, how they should undertake their work and when? In the case before me, was it the case that either Respondent (or both) were able to direct the work of the Claimant, his location, his patterns of work, how he did what was expected of him?

18. In *Autoclenz Limited v Belcher and others [2011] UKSC 41*, the Supreme Court looked again at the three conditions espoused in *Ready Mixed Concrete*, relied on and further expanded upon them:
"19 i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 at 623*, "There must ... be an irreducible minimum of obligation on each side to create a contract of service".
ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton [1999] ICR 693*, per Peter Gibson LJ at p 699G.
iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used" (Lord Clarke SCJ).

19. *Stevedoring & Haulage Services Ltd v Fuller [2011] IRLR 627* described the *irreducible minimum of obligation* as
"*6 ...a 'mutual obligation'...to offer work, on the employer's side and to accept it, on the employee's*".

In the case before me, the work was originally offered to the Claimant by the first Respondent on the instructions of the second Respondent. The Claimant accepted that work and continued to do that work, with some adjustments for several years. It was accepted by all parties that during the existence of the relationships between the parties, the Claimant had been instrumental in shaping the nature of the work he undertook. He had (alongside Mr Harrison for the first Respondent) used his skill, expertise and experience to create and develop the quality management systems used by the second Respondent. He had been instrumental in enhancing the quality standards of the second Respondent and had instigated and led many activities and audits on their behalf.

20. It was also clear, from the evidence presented to me and confirmed in oral testimony, that the first Respondent had on at least one occasion offered additional work to the Claimant which he, the Claimant, had declined.

21. The question of whether the Claimant was an employee under a contract of employment is a question of fact not law (*Carmichael v National Power [1999] ICR 1226*, a decision of the House of Lords). It is necessary to look at the reality of the situation on the ground and for me to establish - to my satisfaction, on the evidence - what facts there are to assist me.

The contract between the Claimant and the first Respondent

22. This is a relatively standard document of its time. It contains recitals, definitions, and interpretation and 18 clauses (running to sub-clause 18.2). It was signed by both Mr Harrison and the Claimant (for the first Respondent and in person respectively) on 25 February 2013. It details the engagement and sets out the specific services to be delivered (clause 3 (page 87)).

23. *Clause 3.1* expressly states that the services to be provided by the Claimant to the first Respondent (and through them to the second), would be ad-hoc in nature. I find that this was not, in fact, the case. The services continued to be provided on a routine basis for the next 8 years. The Collins English Dictionary defines ad-hoc as “an ad hoc activity or organization is done or formed only because a situation has made it necessary and is not planned in advance”. There was some flexibility as to how and when (and, latterly due to the pandemic, where) the Claimant was to provide his services but to describe such detailed and continual services as ad-hoc would be to stretch that term beyond its reasonable meaning. I do not find, however, that the removal of the word ‘ad-hoc’ would necessarily determine the employment status of the Claimant apropos either Respondent.

24. *Clause 3.3* provides, explicitly and clearly, that the Claimant was to neither, without consent, incur costs for either Respondent (3.3.1) or to hold himself out to others as being authorised to bind either Respondent (3.3.2). Again, both sub-clauses may tend, as averred by the first Respondent, that the Claimant was not an employee. However, it is not unusual - indeed, it is common - for employees to be enjoined to neither bind their employer nor to make incur unauthorised expenditure on their behalf. This clause takes us no further than that.

25. *Clause 3.4* provides the first real, and solid, contractual evidence that the parties did not intend this to be an employment relationship. It says in clear terms that the Claimant is neither a consultant, employee or worker of the first Respondent or it’s clients (in this case the second Respondent) and that nothing in the agreement shall render that to be otherwise. It sets out that it was the intention of the parties that the Claimant was, and would be, an independent contractor with responsibility for his own employment related liabilities. I find that this paragraph demonstrates a clear intention that the Claimant would not be an employee or worker of either Respondent. Whether that intention survives an encounter with reality is something that remains to be considered.

26. Clause 4 sets out how the Claimant was to be paid. It fixes the process as requiring him to provide invoices for the agreed fees and any approved expenses which the first Respondent would then pay within a fixed period after receipt (clause 4.2 specifies fortnightly in arrears within thirty (14) days of the date of receipt of the invoice). I am not required to unravel the obvious error in drafting, so I do not do so. I am satisfied that the intention was that the Claimant would issue an invoice which the first Respondent would then pay providing that the invoice complied with the remaining conditions in clause 4.2.

In fact, this is what happened throughout the relationship. I was referred to the invoices contained in the bundle (for example at pages 200, 233, 234). It is not suggested that the first Respondent did not pay those invoices, so I find that the process as set out in clause 4 of the agreement was being operated by the parties in accordance with its own terms.

27. *Clause 6* places indemnification obligations on the Claimant. He is, by the express terms, required to indemnify the first Respondent and its’ clients (the second Respondent) against all manner of claims, losses, and liabilities. This would be an unusual obligation in a contract of employment since an employee is not usually required to indemnify their employer in this way.

28. Clause 8 defines how the agreement would be terminated. It does not appear that the Claimant had any rights to terminate the agreement and that the first Respondent had a range of specific rights to terminate (set out at 8.2.1 - 8.2.7 of the agreement) in specified circumstances. It is also clear that although the phrase “*may immediately terminate this Agreement…on giving the [Claimant] written notice…*” is used, this relates to the service of a termination notice in writing and not to a defined period of notice which must be given (by either party) to terminate the contract. I find that, in an employment contract, this nature of termination clause would be unusual as it confers a termination right on only one party and does not provide for notice periods to be given.

29. <<The actions of the Claimant>> Throughout the relationship between the parties, the Claimant believed himself to be self-employed. This continued until a relatively short time prior to the relationship ending. I am satisfied that the Claimant held this view because he, always, was registered with Her Majesty’s Revenue and Customs (as it then was) as being self-employed. I have, in evidence, his complete tax returns for the period from 2014 to 2021 and in all of those, his income derived from the first Respondent is declared as being from self-employment. He also, I note, offsets considerable and diverse business expenses against that income before declaring the net balance for tax liability purposes.

30. I also find, from the evidence, that the Claimant knew and held himself out to be an independent contractor during the period of the relationship. I find that the email on 27 January 2020 (page 215-216) from the Claimant to Mr Harrison of the first Respondent, supports this finding:
"Hi Nick, I think it is worth mentioning that I have been performing my duties diligently over the entire period of over five years on a contractual basis in my capacity as a Senior Consultant..."; and "...**Please note**: That I am not a Martec Employee. I am self employed on a contractual basis as a Senior Consultant" (original **emphasis**)

31. I was also referred to other documents throughout the bundle which indicate that the first Respondent would ask the Claimant to be flexible in attending on site for certain reasons and purposes. I was satisfied that these were requests which it was properly open to the Claimant to refuse. Indeed, I received evidence that he had occasionally had to do so because of other commitments or due to other things already being planned.

32. In terms of the relationship between the Claimant and the second Respondent, I am satisfied that there was no contractual obligation between them at all - either express in writing or implied through conduct. There were, certainly occasions, when the second Respondent asked the Claimant to be at a certain place or to undertake specific tasks. However, it is also clear that the Claimant was (and knew himself to be) neither employed by the second Respondent nor under their real control. In fact, it was apparent that it was the Claimant who held the 'whip-hand' being, as he undoubtedly was, the preeminent expert in his field working with the second Respondent – he, in fact, directed them in terms of quality management and assurance. It was his function to use his skill and expert skill to guide and support them; much as Counsel, Solicitor or Accountant might use their expertise, skill, and knowledge to guide a client whilst undertaking specific and requested tasks for that client. In addition, I note that, after it was clear that the relationship with the first Respondent was coming to an end, the Claimant offered his services directly to the second Respondent - something that would have been entirely unnecessary for him to do if he had been, already, their employee.

Conclusion

33. Based on all the evidence to which I was directed, I find that although the Claimant was providing his own work and skill, there was no irreducible minimum obligation between the Claimant and the first Respondent. There was not a 'master' and 'servant' relationship between the first Respondent and the Claimant. It was a coming together of experts to provide services for a client. I find that there was insufficient control exercised by the first Respondent over the performance of such service as was provided by the Claimant and that the nature of the control exercised by the first Respondent was, in fact, limited only to providing the broadest direction related to the Claimant's work with the second Respondent and to paying the invoices properly raised by the Claimant for that work.

34. I find that the remaining provisions of the agreement between the parties, not least those obligating the Claimant to manage his own tax liabilities, to maintain appropriate business insurance, to provide invoices (including any applicable VAT) for his efforts are all inconsistent with it being a contract of employment (a contract of service). Additionally, the clear and express terms, used by the Claimant in emails, to confirm his status as a self-employed quality consultant reinforce my finding that he did not, genuinely, believe himself to be anything else.

35. I find that the Claimant became distracted by the IR35 CEST tool assessment and incorrectly read across its' determination for tax liability into the issue of whether he was an employee or self-employed. He was and believed himself to be, clearly and from almost every angle, self-employed.

36. From what I have found above, it follows that I find that - at all material times - the Claimant was a self-employed expert in his field, in business on his own account and undertaking work for his client(s). He was an employee of neither Respondent at any time. It emerges from this that he was not an employee for the purposes of s.230 ERA96.

37. As the Claimant was self-employed on his own account and did not, based on the nature and scope of his work, fall into the category of self-employed people envisaged by Baroness Hale in Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730 (SC) who can be most readily described as 'gig economy' workers (see Uber and others), he was not a 'worker' either (again for the purpose of s.230 ERA96).

38. Therefore, as a self-employed person who was neither an employee or worker, he was not entitled to claim unfair dismissal (as an employee) or for holiday pay (as a worker). All his claims fail.

Judge M Aspinall on Tuesday, 18th November 2022

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