



EMPLOYMENT TRIBUNALS

Claimant: Mr A Shaw

Respondent: Bel-Marking Ltd

HELD at Hull (by video)

ON: 21, 22 and 23 November 2022

BEFORE: Employment Judge Miller
Mr A Ali
Mr J Rhodes

REPRESENTATION:

Claimant: In person
Respondent: Ms Afriyie – legal advisor

JUDGMENT having been sent to the parties on 1 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. This case concerns the arrangements between the claimant, Mr Aaron Shaw and the respondent Bel-Marking Ltd which is a company owned and operated by a Mr Michael Bell.
2. The claimant's claim is that he was unfairly dismissed for making a protected disclosure or, in the alternative, that his dismissal if he was a worker rather than an employee was a detriment because he made a protected disclosure and/or that his dismissal was direct disability discrimination in that he was dismissed because of his disability.
3. The respondent agrees that the claimant is and was at all material times disabled by reason of Crohn's Disease.

4. The claimant also claims that he is owed pay for work that he did for the respondent.
5. The first issue that is disputed between the parties is whether the claimant was employed by the respondent either as an employee or as a worker. The claimant says he was engaged as an employee, that he was hired by the respondent as a compliance officer. The respondent says that the claimant was only a customer and a tenant of the respondent and specifically that he rented some space to the claimant for £350 a month and he rented the use of a laser machine for a further £1000 per month.
6. Before setting out our findings of fact we make the following observations. The claimant failed to produce a witness statement that properly addressed the key issues in this case. The document that he produced as his witness statement was in fact copied from his response to a County Court claim brought by the respondent against him. The witness statement denies the existence of the agreement that the respondent said it and the claimant had, but it says that the claimant was owed unpaid wages. It does not set out what the claimant says the actual agreement was and nor does it say anything about the alleged disability discrimination, alleged protected disclosure detriments or unfair dismissal claims. It does refer in passing to unpaid wages.
7. The respondent's evidence being a witness statement from Mr Bell the respondent's director is better but not much. While the content of Mr Bell's statement is relevant, Mr Bell expanded on his evidence substantially in the course of oral evidence. However, the claimant also expanded on his evidence and in fact a great deal of latitude was given to both parties so that the Tribunal would at least have a chance to hear some relevant evidence.
8. The other witness evidence we had was a statement from a Mr Jeremy Daniels on behalf of the claimant. Mr Daniels did not attend to give evidence so we give that statement such weight as is appropriate. It was agreed that Mr Daniels was a mutual acquaintance of the claimant and Mr Bell.
9. We were also provided with an agreed file of documents comprising 1075 pages, significant portions of which were technical documents about lasers.

Findings of fact

10. We make the following findings of fact. We only make such findings as are absolutely necessary to decide the issues in this case. There appears to be ongoing civil proceedings about the alleged rental agreements and we do not wish to make any findings that might inadvertently bind or impact on the findings of another court.
11. In the course of the proceedings, Mr Bell also made allegations of criminal behaviour against the claimant and said that he intended to re-report them to the police. We have also therefore tried to avoid making any findings or comment on any incident that might form the basis of a report to the police. Those incidents appear to be matters which were recorded by the claimant on either video or audio recording devices and they have not been viewed in the Tribunal so it would be unfair for us to comment on anything that might form the basis of an allegation of criminal behaviour that is on those actual

recordings. We do have transcripts of what was said in those recordings which were part of the evidence before the Tribunal and we have referred to those as necessary.

12. The claimant was introduced to the respondent by the mutual acquaintance Jeremy Daniels. The purpose of their introduction was that the claimant wanted to purchase laser marking from the respondent for some of his own products. The claimant has his own company, Shaw LED Limited. The respondent's business is, as far as is relevant to these proceedings, laser marking and the import and sale of laser marking machines.
13. The claimant met Mr Bell in December 2020 with Mr Daniels at the claimant's premises. At this meeting they discussed the services that the claimant wanted to purchase. Mr Bell took his equipment with him to demonstrate the laser marking and engraved a piece of metal by way of demonstration. The respondent says that some time later he had a call from the claimant asking to rent some space in the respondent's workshop for a couple of months. Mr Bell says that the claimant moved in on 4 January 2021. He shortly thereafter agreed to rent a laser for £1000 a month in addition to renting the space.
14. The claimant's case is that at that meeting in December there was a discussion about the regulatory requirements associated with selling electrical equipment and, particularly, that Mr Bell said he found it difficult to keep pace with them. The claimant says that Mr Bell said that he was effectively struggling to meet his regulatory obligations under various EU directives and suggested hiring the claimant as a compliance officer. The respondent says this did not happen.
15. The witness statement of Mr Daniels, who the parties agree was at that meeting, says "during this meeting Michael demonstrated the laser marking he could do by engraving Aaron's company's logo on to a piece of metal and also creating a black aluminium business card for him. Aaron was pleased with this and agreed to use his services in the near future. Aaron then asked Michael how he managed to get the proper safety certifications for electronic equipment being imported into the UK. At this point Michael Bell admitted he needed help in that regard and asked Aaron if he would be willing to join him at Bel-Marking to help him get the required certification". Mr Daniels also said in that statement that at that meeting Mr Bell offered Aaron £1000 per laser sold. Aaron agreed to this and they met the next week at Bel-Marking Ltd address in Trinity Street.
16. As I have mentioned, the claimant does not refer to this meeting in his statement at all. Mr Daniels said the meeting was on 25 January 2021. This is obviously incorrect as the claimant emailed Mr Bell on 7 January 2021. This is obviously incorrect as the claimant emailed Mr Bell on 7 January 2021 referring to the meeting the previous month. In that email the claimant explains his requirements for labelling his products. He does not refer to any discussions about him working for or with the respondent. It is a wholly innocuous unsurprising email about obtaining laser marking services. In evidence the claimant agreed that he had got some dates wrong in his particulars of claim and in his submissions he said that he told Mr Daniels the date of that meeting when Mr Daniels was writing the statement for him.

17. We prefer Mr Bell's evidence about this meeting. Specifically we find that there was no offer to the claimant for him to work as a compliance officer and no discussion about the claimant being paid £1000 per laser sold. It was agreed, whatever other arrangements were disputed, that the claimant was not a sales person for the respondent. The claimant's oral evidence was that the agreement was that he was to be paid £1000 for each laser machine that the respondent sold and that the claimant had done the compliance work on.
18. Mr Bell's evidence about this was that on one occasion the claimant had indicated that he knew someone who wanted to buy a laser machine and that Mr Bell would enter into an arrangement whereby he would sell the machine to the claimant at a discount and the claimant could then mark it up however he wanted and retain the profit. This, he said, was an arrangement he had with a number of people who were effectively part of his distribution network. Mr Bell pointed to a quotation dated 10 March 2021 as evidence of this.
19. Mr Bell's evidence was often difficult to follow. He was not concise and frequently resorted to rhetoric in his answers. Nonetheless, eventually this is what we understood his evidence to be. Mr Bell also explained that the laser machines he buys are produced in Italy and France. At that time the import of those machines was regulated by provisions under European Union Law. We understand that the companies from whom he obtained the machines in Europe certified them as compliant with all relevant regulatory requirements. He said that it was simply not the case, therefore, that the respondent was required to undertake the type of investigation and testing of laser machines that the claimant was claiming was necessary and that the claimant said he had been employed to do.
20. For these reasons therefore, namely the absence of an initial agreement that the claimant would be paid £1000 for each laser sold and the fact that the compliance was not necessary in Mr Bell's view to be carried out, we find there was no agreement between the claimant and Mr Bell that the claimant would be engaged by the respondent to carry out the compliance work.
21. The claimant subsequently moved into the respondent's premises in January 2021. We cannot be more precise than that. The respondent says it was 4 January. The claimant said he started working for the respondent on 29 January but did some early research in preparation for his role from around 21 January 2021. The claimant says that that was when they discussed what his role would require for the business. He points to the email of 7 January 2021 as evidence that he cannot have been in the premises then because in that email he was following up on his request for laser marking.
22. On balance we think the claimant moved into the respondent's premises some time in early January. The exact date is not particularly consequential for our purposes. We also find, however, that in the course of moving into the respondent's premises the claimant brought with him a substantial amount of equipment and products related to his own business. The claimant did not have any other premises from which to operate his business and when the relationship he had to arrange to remove his equipment. We

also refer to part of the WhatsApp conversation where the claimant told Mr Bell that he was going to the workshop because someone was coming in to buy one of his products. It appears that the claimant was in, in addition to anything else he was doing and at least by March 2021 when that WhatsApp conversation was, operating his business from the respondent's premises.

23. As stated above, the claimant said that he started working substantively for the respondent from 29 January 2021 undertaking the role of compliance officer.
24. It is appropriate to discuss briefly the compliance work that the claimant said he did for the respondent. As we understand it the machines that the respondent sells are required to meet particular standards and we were referred to the 'Low Voltage Directive' amongst other things. It is not necessary for us to explore those regulatory requirements. However, relevant devices must carry a mark such as the CE mark confirming that they are safe and meet certain standards. It was the claimant's case that his role at the respondent was to check that the machines the respondent sold met the appropriate standards. It was unclear exactly what the claimant said this involved. However the claimant referred to documentary evidence that he said showed that he had created or adapted documents to the respondent's business in order to demonstrate compliance. This included risk assessments and compiling technical files and associated documents.
25. There was a great deal of dispute about these documents, who created them and what they were for. The claimant said that he produced these documents for the respondent's at its request. Mr Bell said that these documents were produced by the claimant for his own benefit. Mr Bell said that the claimant wanted, in fact, to build his own laser and was using the respondent's documents and expertise to both learn how to build lasers and then incorporate them into his own business in some way. The claimant said that it was absurd to suggest that he would want to learn how to build a laser by reverse engineering one of the respondent's machines.
26. The emails in the file of agreed documents do demonstrate, in our view, that the claimant sent the respondent documents. They also showed that there was ongoing communication about these various technical documents between the parties. We find that the claimant did do some work on the various documents and that this included adapting some documents that the respondent already had. Our lack of clarity about these documents is a reflection of the confusing oral evidence from the parties and the lack of useful written evidence.
27. We were unable to establish any end to a document trail or any completed paperwork produced by the claimant to show the outputs of what he had done for the respondents. However, we find that the claimant was undertaking work on the respondent's documents from late January or early February 2021 and we also find on the balance of probabilities that the respondent was aware of this and agreed to it. There clearly was a degree of co-operation between the parties.
28. We also find that the claimant was given a Google email address which included the respondent's business name and that the claimant was given access to the respondent's Google Drive where documents were stored and

the claimant was given access to Google's analytics data about the respondent. In effect, the claimant was given access to a significant amount of the respondent's business information.

29. Chronologically the next incident is in February 2021. The claimant said that he re-negotiated his agreement with the respondents saying that rather than being commission on sales of laser machines he would be paid £35 per hour by the respondent for three hours a day, five days a week. Mr Bell said this never happened.
30. On balance we prefer the evidence of Mr Bell. There is no contemporaneous evidence of this and an alleged agreement is not referred to by the claimant at any point in any message or transcript. In any event, even if there was such a discussion it did not result in the parties reaching an agreement about the claimant being paid £35 per hour.
31. Another contentious but relevant issue relates to an application and audit for ISO 90001. This is a quality management system that companies can obtain to demonstrate that they comply with certain quality standards. It is not specific to lasers or electrical goods generally and is not a mandatory requirement for either of the respondent's or the claimant's businesses.
32. The claimant said that he was progressing this accreditation for the respondent. There was a meeting scheduled on 11 May 2021 about this. The respondent attended the meeting and the claimant said, at short notice, that he could not attend because he was unwell. Specifically he said and I am quoting from the WhatsApp exchange – "I told you for the last 2 weeks I can't do early because of my stomach. I can't help it, I don't know why you keep arranging early morning things. I can do a little later." Mr Bell responded "Aaron forget it, it's not working. I needed you here, you've been putting off too long I'll do it by myself." The claimant replied "I've been running myself ragged doing it all for you." Mr Bell said "it was for us". The claimant said "I can't help being ill but I've told you many many times, I cannot do mornings and you don't take any notice."
33. The respondent's case was that this meeting was for the claimant's benefit. We do not accept that. It is clear from the WhatsApp messages in which this is discussed that the meeting was not solely for the respondent's benefit. Mr Bell refers to the meeting being for *our* benefit. This suggests that there was a degree of co-operation or working together between the parties. We also find that in saying "forget it, it's not working" Mr Bell was expressing frustration at the way his and the claimant's business relationship was working out. We find that he is expressing an intention to end their business relationship, about which we will say more in due course, because of his perception of how the claimant was working.
34. In the event the relationship did not end then as Mr Bell messaged the claimant later in the day to update him about the progress of the ISO 90001 audit. The next day, 12 May 2021, Mr Bell messaged the claimant again to say "I should be at yours for 9.30. Can you check if you know where my Bosch drill is." We find therefore that the relationship was continuing at this point.
35. The claimant relies on this conversation as evidence that he disclosed to Mr Bell his Crohn's disease or at the very least that the context of the

conversation made it clear that Mr Bell was already aware of the claimant having Crohn's disease because there was no further enquiry from Mr Bell about it or about what the claimant was referring to. It is not strictly necessary for us to make a finding about that for reasons which will become apparent, but in the event that we are wrong about worker status, we find that on the balance of probabilities Mr Bell was aware that the claimant suffered with Crohn's disease. The claimant's evidence was that they talked in the workshop and he said he was aware of Mr Bell's diabetes.

36. We also note the reference in the messages exchanged to the claimant telling the respondent for two weeks that he would struggle with mornings. It seems more likely than not that this would have come up in conversation in the workshop and we prefer the claimant's evidence about this.
37. The next relevant date is 14 May 2021. Mr Bell messaged the claimant to say that he was out all day and the claimant responded "no worries". The claimant said that he then went to the workshop to remove his property. He was surprised when he got there, that Mr Bell was there and he said part way through the conversation that he started recording it. He said he was not expecting Mr Bell to be at the premiss which is why he didn't have his body camera on and that is why part of the conversation is missing.
38. In that conversation Mr Bell agreed that he said he would give the claimant "a grand machine". In the course of that conversation, which was really more of an argument, there was a discussion about payment. The claimant asserted that he had been working for the respondent and the respondent talked about payment on commission. This appears inconsistent with our findings about the first meeting. However the key part of this conversation in our view is the following which we now quote from.
39. Mr Bell said "no I think Aaron you've seen something like a cash cow". The claimant said "no I don't think so because I'm not bothered. If you don't want to carry on I just want paying for what I've done". Mr Bell said "that's fine". The claimant said "so you tell me what you think you should pay because that what's the services are worth. If you wanna make me an offer make me an offer on it". Mr Bell said "I've not really thought about it but I will certainly think about it definitely". The claimant said "but you can't just have people work for you mate and not pay them". Mr Bell said "no because the intention was that we were going to set up between 4" and Mr Shaw interrupts him to say "into a business. The business is not a viable business mate because its legally in so much hot water. I don't know how you don't realise how bad it is what you've got hanging over you". Mr Bell replied "right so on that note seriously there is no point in you being involved with it". Mr Shaw said "well there isn't". Mr Bell said "we'll call it a day. I'll work out something to pay you for the work that you've done" and the claimant replied "okay that's all I want. Its just to end things amicably and we can just forget about it".
40. In our view, in that conversation both the claimant and Mr Bell agreed that they intended to set up in business together, possibly with others, that it was no longer working out and they agreed, on this date at the end of that conversation, that their arrangement is at an end. The only coherent explanation for the conflicting evidence between the parties is that they are

working together in an informal and ad hoc way with a view to creating a business together at some point whether with some other people or not.

41. The most likely arrangement between the parties that there was an informal agreement which involved working together with some common aim. This explains or is consistent with the ISO 90001 project, the shared access to resources and the work the claimant did on various documents. Particularly, it is consistent with Mr Bell's obvious frustration at the claimant not attending the ISO 90001 meeting. There was no formal agreement for one party to provide services to the other and there was no one person in charge of the other. That arrangement did not change throughout the five months from December 2020 to May 2021 when the claimant's and the respondent's business relationship ended on 14 May 2021.
42. The final incident which we will address briefly occurred on 17 May 2021 when the claimant attended the workshop again to collect his belongings. As we have said we intend to make no findings about the conduct of the parties on this date except in so far as is absolutely necessary for the purposes of our decision. The claimant attended the premises with his father to collect his belongings. It takes some time to remove them and Mr Bell is at the premises and there is another argument about payment by Mr Bell, a dispute about some of the equipment and a suggestion of involving the police. The claimant threatened to take Mr Bell to court and he and the claimant continued to make various threats and allegations against each other.
43. There is no need to set it out in detail, but in the course of that conversation the claimant said "look mate, don't worry about the machines cos I'll be on the phone to Trading Standards before the night's finished because what you're doing with those machines is illegal. I've tried to help you be right, but you're not bothered, you're putting people in danger." Later on he says "I'm going to phone the serious fraud office, Trading Standards, solicitors and the lot". The claimant said in fact he subsequently reported the respondent to the HSE rather than Trading Standards. He had just inadvertently referred to the wrong regulator.
44. We find that the claimant did threaten to report the respondent in the course of this conversation. We also find on the balance of probabilities that he believed, at the time, that it was in the public interest to do so even if he was also doing it out of anger, frustration or revenge. This is reflected in the claimant's assertion at the time that he believed the respondent's machines were putting people at risk. We also find, however, that the claimant had not contacted any of Trading Standards, the serious fraud office or a solicitor about the respondent at that time on 17 May.

Law and conclusions

45. The first issue in this case is whether the claimant was an employee for the purposes of the unfair dismissal claim or a worker for the other claims. The relevant statutory provisions are section 230 of the Employment Rights Act 1996 for all of the claims except for the disability discrimination claim. Section 230 says as far is relevant:

In this Act "employee" means an individual who has entered into or works under (or worked under) a contract of employment.

A “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

“Worker” means an individual who has entered into or works under (or worked under) a contract of employment, or 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;

46. Section 83 of the Equality Act which applies to the disability discrimination claims says:

“Employment” means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.
47. Although the provisions are worded differently it has been held that to all intents and purposes they are to be interpreted the same and there is certainly no material difference to the provisions for the purposes of this claim.
48. In both cases the starting point is the contract under which the claimant was engaged. Whether for the purposes of being a worker or an employee there must be a contract for the claimant to perform services. This applies before even considering the question of whether they might be an employee or a worker. There must be a mutual obligation between the parties to do work and to provide work on some occasions.
49. We have found that there was not. In our judgment there was no agreement between the parties for the claimant to undertake any services for the respondent. The exact nature of the relationship is unclear but we think it likely it was something like a joint venture, but in any event the claimant has not discharged the burden of proving that there was a contract between him and the respondent for the claimant to provide any services.
50. We have considered whether an employment or worker relationship arose over the course of the parties’ dealings regardless of what was agreed or not at the outset and we find that it did not. The relationship continued in the same way as evidenced by the conversations at the end of the relationship to which we have just referred.
51. It is not necessary or even really possible to consider in any detail the various tests of status. However, in so far as it is relevant there was no control by Mr Bell over the work the claimant did. There was no obligation from Mr Bell to provide any work and there are no other terms that are appropriate for contract of employment or for service. We have found that the claimant used the respondent’s premises to run his own business as well as any work he did with, rather than for, Mr Bell. While not conclusive this is not indicative of a worker or employee relationship.
52. For these reasons we find that the claimant was not a worker or employee of the respondent and his claims therefore fail and are dismissed.

53. We do address very briefly the substance of the claims in so far as we can. In terms of the protected disclosure, even if the claimant did make a protected disclosure on 17 May 2021, or even if he threatened one this was after the relationship had ended on 14 May 2021 so cannot in any event been the reason for any detriment or dismissal. In respect of the disability discrimination claim section 13 of the Equality Act 2010 requires that a person is treated less favourably than a person without their protected characteristic because of their disability if their claim was to succeed.
54. In our judgment, the reason that the relationship was brought to an end was not because of the claimant's disability but because the relationship was not working out. To the extent that it was triggered by the claimant not attending the ISO 90001 meeting, this was because the claimant failed to attend the meeting, not because of his disability. In our view, Mr Bell was uninterested in the reason why the claimant could not attend, whether reasonably or not. It follows therefore that this was not because of the claimant's disability.
55. Finally in respect of the claim for unpaid wages, an employer is not permitted to make deductions from a worker's wages except in limited circumstances. However there must be an obligation on the respondent to pay those wages before a claimant can make a claim that he has suffered a deduction from them and we have found there was no such obligation.

Employment Judge Miller

Date 6 January 2023

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