



EMPLOYMENT TRIBUNALS

Claimant: Mr M Denizkhan
Respondent: Newsteam Group Ltd
Heard at: Birmingham (by CVP)
On: 20 March 2023
Before: Employment Judge Meichen (sitting alone)

Appearances

For the claimant: in person
For the respondent: Mr J Kennett, Director

JUDGMENT

The claimant does not fall within the definition of 'employee/worker' contained within s230 Employment Rights Act and does not fall within the definition of 'employment' within s83 Equality Act 2010. The tribunal therefore has no jurisdiction to hear the claim and it is dismissed.

REASONS

Introduction and the issues

1. This preliminary hearing was listed by EJ Hindmarch to determine the following issues:
 - a. For the purposes of his notice pay claim whether the Claimant falls within the definition of 'employee/worker' contained within s230 Employment Rights Act.
 - b. For the purposes of his age discrimination claim whether the Claimant falls within the definition of 'employment' within s83 Equality Act 2010.
2. There was an agreed bundle of 84 pages. Both parties confirmed at the start of the hearing that this contained everything that they wanted to rely on.
3. Mr Kennett represented the company and also provided a detailed witness statement.
4. The claimant had omitted to provide a witness statement. He provided a statement from his wife. I took this into account but it did not really address the issues I had to determine today.

5. Mr Kennett gave evidence. I explained to the claimant the issues which I had to determine today and their importance. I gave him extra time to think about any relevant questions he may have for Mr Kennett and explained it would be important to identify any relevant aspect of Mr Kennett's evidence that he wished to challenge. I also permitted a rather informal approach to the claimant's questioning so that he had the opportunity to air some of his thoughts. I thought this was in accordance with the overriding objective given that the claimant was unrepresented and he had not realised the importance of preparing a statement.
6. As it transpired the claimant did not seek to challenge the key elements of Mr Kennett's evidence which were relevant to the issues I had to determine today. In these circumstances I do not think the claimant was disadvantaged by the fact that he had omitted to prepare a witness statement.

The law

7. Section 230 Employment Rights Act 1996 relevantly provides 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.*
 - (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.
8. Section 83 Equality Act 2010 relevantly provides that "'Employment" means –
 - (a) *employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.*
9. There was a written agreement between the parties. The significance of a written agreement in this sort of context was considered in Autoclenz Ltd v Belcher and ors 2011 ICR 115. Lord Clarke identified that the question is 'what

was the true agreement between the parties?'. He held that, in cases with an employment context, 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.

10. An obligation of 'personal performance' is necessary for the contract to be one of employment, for the claimant to be a 'worker' and for the claimant to meet the expanded definition of 'employee' for the purposes of the Equality Act 2010. In other words for the claimant to be an employee or a worker he must be obliged to perform work for the respondent personally. Determining whether a contract includes an obligation of personal performance is a matter of construction. It is not necessarily dependent on what happens in practice. It does not necessarily follow from the fact that work is done personally that there is an undertaking that it be done personally.
11. The written agreement in this case contained a substitution clause. On the face of it a substitution clause is inconsistent with an obligation to perform services personally. However, the mere presence of a substitution clause in the written contractual documentation is not necessarily determinative. A tribunal may conclude that the substitution clause does not reflect the reality of the working relationship. This is clear from Autoclenz, Consistent Group Ltd v Kalwak and ors 2007 IRLR 560 and Uber BV and ors v Aslam and ors 2021 ICR 657. The presence of a substitution clause in the written contractual documentation is unlikely to prevent a finding of worker status if there is no evidence of such a clause being operated or intended to operate in practice. This is because in those circumstances the purported substitution clause is unlikely to form part of the true agreement.
12. However, whether there is an obligation to do the work personally depends on the terms of the contract, not on whether or how often any substitution right is exercised. This was confirmed in Autoclenz, in particular at paragraphs 19 and 20 of the judgment: *"...If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement... The essential question in each case is what were the terms of the agreement"*.
13. The cases also show that some substitution clauses are compatible with an obligation of personal performance. This occurs where the right to substitute was "fettered". In other words, that it was limited in some way. For example in Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667 carpenters were able to use substitute labour where they were unable to provide the services themselves, but it was subject to the express approval of the contractor. Similarly, in Pimlico Plumbers v Smith [2018] ICR 1511 the substitute had to be another operative of the respondent – i.e. somebody who was already bound by an identical suite of heavy obligations. This was the converse of a situation in which the employer is uninterested in the identity of the substitute, provided only that the work gets done.

14. In summary only a genuine and unfettered right to substitute another person to do the work is inconsistent with an obligation personally to do the work.

Findings of fact

15. The respondent is a UK wide newspaper and magazine delivery company which provides early morning deliveries to over 85,000 addresses across the UK including individual customers and small businesses. It engages approximately 900 self-employed delivery contractors and 70 employed deliverers to fulfil its deliveries.
16. The claimant worked for the respondent, as a delivery driver, from 13 January 2022 until 24 February 2022. The claimant was engaged by the respondent to work in the early hours of the morning delivering newspapers and magazines.
17. The claimant entered into a written agreement with the respondent. By the agreement the claimant was identified as an independent contractor and he was granted the right to perform services for others and send a substitute to perform the services for the respondent.
18. The claimant presented his claim on 10 March 2022. The claim is about notice pay and age discrimination.
19. In their response to the claim the respondent raised that the claimant was a self-employed contractor and not an employee or worker. That led to this hearing being listed.
20. In his witness statement Mr Kennett explained that the respondent's terms of engagement and working practices for employees and self-employed contractors such as the claimant are materially different for the following reasons:
- a. The claimant's status as an independent contractor was made clear in the written agreement and all previous correspondence with the claimant prior to his engagement.
 - b. The respondent did not provide any equipment to the Claimant apart from the free "PaperRound" app. The Claimant had to provide his own vehicle and mobile phone and pay for his fuel usage and other expenses such as insurance.
 - c. The claimant was not integrated into the respondent's workforce but rather carried out the delivery round which he had agreed to undertake in accordance with the orders recorded on the app.
 - d. The claimant had an express and unfettered right to provide a substitute to carry out the round if he was unable or unwilling to do so.
 - e. The claimant was free to undertake work for other organisations, including making deliveries, during his engagement.

- f. The claimant was not under the supervision or control of the respondent when carrying out the delivery round.
 - g. The Claimant was permitted to amend the default route for the delivery set by the app or use a substitute/helper, thus improving the convenience and profitability of the delivery route. The only obligations that were set in relation to his work were those integral to the performance of the subject matter of the agreement between the claimant and the respondent, namely the delivery of papers and magazines, to the correct destinations, before a set time each morning.
21. On the crucial issue of substitution Mr Kennett explained how this worked in practice. Mr Kennett gave evidence that the respondent allows people in the claimant's position to use a substitute and it does not seek to limit or control that in any way. He provided examples of text messages showing a widespread use of substitutes. He explained that the respondent had set up its systems so that the use of a substitute was "frictionless". If a contractor such as the claimant wished to use a substitute all they had to do was provide them with log in details and the substitute could download and use the app for free and then carry out the deliveries. There is no requirement to inform the respondent of the substitution and the respondent does not pay the substitute directly.
22. I found that Mr Kennett was a reliable witness and I accepted his evidence as summarised above.
23. The claimant only sought to challenge two aspects of Mr Kennett's evidence. The first related to a suggestion that the claimant had been assisted by his wife. The claimant explained that in fact his wife did not have a drivers licence and so could not assist him to make deliveries. He explained that she would just sit next to him in the car as he made the deliveries. I accept that explanation but I don't think it affects the decision I have to make today.
24. The second point the claimant challenged was about not being under supervision when making deliveries. He suggested he was supervised. Mr Kennett disputed that and explained the way of working was based around the respondent's app. The claimant just had to log in and then he was able to make the deliveries as he saw fit. I accepted Mr Kennett's evidence on this matter.
25. At my instigation the claimant focused on whether he challenged Mr Kennett's suggestion that he had a genuine and unfettered right of substitution. In short, the claimant did not dispute that there was a genuine and unfettered right to substitute. His issue was that he had not initially been aware of the right and on the one occasion when he had wanted to use a substitute, he had not been able to. This related to an occasion when the claimant's car wouldn't start but as it was 3.30 am it was impractical for the claimant to get a substitute. I accept the claimant's point that it would be difficult for him to arrange a substitute in the circumstances in which he found himself on that occasion but it does not change the fact that the claimant had, by the terms of the agreement between the parties, a genuine and unfettered right of substitution.

26. Mr Kennett's evidence about the right of substitution was cogent and credible and remained so after testing questions by myself and the claimant. His evidence was supported by documents clearly showing a widespread use of substitution. I accepted Mr Kennett's evidence to the effect that there was a genuine and unfettered right of substitution. The claimant did not in fact dispute that this was the reality, he just pointed to practical issues he had with appointing a substitute when he had wanted to. This does not lead me to consider that the right of substitution might not be genuine or unfettered.
27. In this case the written agreement reflected the reality of the situation and the claimant was genuinely engaged by the respondent as a self-employed independent contractor. In reality this really was the type of scenario in which the respondent was uninterested in who performed the services: any substitute could be used as long as the papers got delivered.

Conclusion

28. The claimant had a genuine and unfettered right of substitution. He was not obliged to perform services personally. I therefore find that the claimant was neither an employee nor a worker and the tribunal does not have jurisdiction to hear this claim.

Employment Judge Meichen

23 March 2023

Sent to the parties on: