



EMPLOYMENT TRIBUNALS

Claimant: Mr G Ghanem

Respondent: Ministry of Defence

Heard at: Watford Employment Tribunal via CVP

On: 28 June 2023

Before: Judge Bartlett

Representation

Claimant: in person

Respondent: Mr Paulin

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was not in employment within the meaning of the Equality Act 2010 section 83.
2. The claimant was not a contract worker and the respondent was not a principal within the meaning of the Equality Act 2010 section 41.
3. The claimant's claims are dismissed in their entirety for want of jurisdiction.

Reasons

The Issues

4. Following a case management hearing on 22 November 2022 this preliminary hearing was listed to decide the following two issues:
 - 4.1. was the claimant in employment within the meaning of the Equality Act 2010 section 83;
 - 4.2. was the claimant a contract worker and the respondent a principal, within the meaning of the Equality Act 2010 section 41.

The Hearing

5. The hearing took place via CVP. At one point the claimant dropped out and immediately reconnected. There were no difficulties with communication or connection.
6. I heard oral evidence from the claimant and, for the respondent, Mr Kerr.

The Law

7. Section 41 Equality Act 2010:

Contract workers

(1)A principal must not discriminate against a contract worker—

- (a)as to the terms on which the principal allows the worker to do the work;*
- (b)by not allowing the worker to do, or to continue to do, the work;*
- (c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
- (d)by subjecting the worker to any other detriment.*

(2)A principal must not, in relation to contract work, harass a contract worker.

(3)A principal must not victimise a contract worker—

- (a)as to the terms on which the principal allows the worker to do the work;*
- (b)by not allowing the worker to do, or to continue to do, the work;*
- (c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
- (d)by subjecting the worker to any other detriment.*

(4)A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5)A “principal” is a person who makes work available for an individual who is—

(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

8. Section 83 Equality Act 2010:

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

(b) Crown employment;

(c) employment as a relevant member of the House of Commons staff;

(d) employment as a relevant member of the House of Lords staff.

(3) This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—

(a) references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;

(b) references to associated employers are to be ignored.

(4) A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.

(5) "Relevant member of the House of Commons staff" has the meaning given in section 195 of the Employment Rights Act 1996; and such a member of staff is an employee of—

(a) the person who is the employer of that member under subsection (6) of that section, or

(b) if subsection (7) of that section applies in the case of that member, the person who is the employer of that member under that subsection...

Findings of Fact

9. There was limited dispute about the facts that are relevant to the issues that I have to decide today.

10. My findings of facts relating to the general background are as follows:

10.1. The respondent entered into a contract with Trant Engineering

Services Ltd (“Trant”) to build a new power station on the Falkland Islands;

- 10.2. Trant relied on an employment agency, Fusion People, to procure individuals in order to provide the labour that was required for the power station project;
 - 10.3. the individuals who were required to go to the Falkland Islands for the project were subject to approval from the respondent’s medical officer;
 - 10.4. in July 2021 the claimant was denied medical approval to travel to the Falkland Islands by the respondent’s medical officer because he had type II diabetes;
 - 10.5. the claimant was a scaffolder;
 - 10.6. the claimant had previously worked in the Falkland Islands in relation to this project including for a period of approximately three months around June 2020. Despite having type II diabetes at those times, no issue had been raised by the respondent’s medical officer.
11. There are a number of parties that are involved in the contracting arrangements relating to the project and who worked or provided work for it. In relation to those contractual arrangements, I make the following findings:
- 11.1. as is set out above the respondent had entered into a contract with Trant to build a new power station on the Falkland Islands. Under that contract Trant made arrangements to procure the labour and materials to carry out the project;
 - 11.2. Trant sourced labour for the project, which included individuals such as the claimant, via an employment agency called Fusion People;
 - 11.3. Fusion People required the people it sourced to sign a contract with Simplify Contracting Services Ltd (“Simplify”) when they commenced working/providing services;
 - 11.4. the intention was that the claimant would sign a contract with Simplify (the Simplify Contract which I have identified below) on the first day or within the first few days that he started work in the Falkland Islands on the project. It is not disputed that this contract was never signed. It would have been signed if the claimant had arrived at the Falkland Islands airport on the date he was expected. However, the claimant was not permitted to fly to the Falkland Islands because the medical officer of the respondent refused him. Therefore, no contract was signed;
 - 11.5. the bundle contained a document which is called Contract for the Supply of Construction Industry Services which is between Simplify and the claimant (the “Simplify Contract”). The date has been redacted for some reason I do not understand. Simplify is referred to as the contractor and the claimant is referred to as a subcontractor;

11.6. the Simplify Contract contains a number of terms to which I was referred this includes but is not limited to the following:

2. **Background**
 - 2.1. The Subcontractor is registered with HMRC under CIS and will be providing the services of Scaffolder.
 - 2.2. Simplify engages the services of CIS Subcontractors, in order to provide those services to Main Contractors, either *via* Agencies, or directly.
 - 2.3. The Subcontractor represents to Simplify that:
 - 2.3.1. the Subcontractor is an independent skilled tradesperson, registered as above under the Construction Industry Scheme ('CIS')
 - 2.3.2. the Subcontractor is capable of working on Assignments and providing Services without requiring supervision, direction or control as to the manner in which such Services are provided, and
3. **Nature of this Agreement**
 - 3.1. This is a Master Agreement, and defines the terms under which the Subcontractor will carry out Assignments, as agreed between the parties from time to time in Assignment Schedules.
 - 3.2. Entering this Agreement does not of itself oblige the Subcontractor to provide any Services, and does not of itself oblige Simplify to offer any work to Subcontractor, or to pay other than for Services actually performed pursuant to Assignment Schedules.
4. **Subcontractor Responsibilities**
 - 4.1. The Subcontractor
 - 4.1.1. shall provide Services for the Main Contractor as specified in the Assignment Schedule and in this Agreement, with reasonable skill and care, and so far as is reasonably practicable within any timescale required by the Main Contractor
 - 4.1.2. shall not require (or be subject to the right of) supervision direction or control as to the manner of performance of its Services
 - 4.1.3. in the course of providing the Services, shall comply with site-specific requirements applicable to independent contractors at the Work Location, as notified by the Agency (where applicable) and/or the Main Contractor from time to time
 - 4.1.4. shall provide all Services to the Main Contractor's reasonable satisfaction and in accordance with the Main Contractor's required quality standards, and to the extent not so provided must be corrected in the Subcontractor's own time and at the Subcontractor's own cost
 - 4.1.5. shall be responsible for the performance of the Services, and may perform them himself, or arrange for their performance, in full compliance with this Agreement and the applicable Assignment Schedule, by a substitute with any necessary skills, experience, and (where applicable) security clearance, and equally capable of providing the Services without requiring supervision direction or control as to the manner of performance of its Services, and whose full name, address (including postcode) and NI number are first notified in writing to Simplify
7. **Status**
 - 7.1. The relationship governed by this Agreement and an Assignment Schedule is neither that of agent-principal, nor that of employer-employee; no individual providing Services will be the employee of the Main Contractor, or of the Agency (where applicable), or of Simplify.
 - 7.2. The Subcontractor warrants and represents that
 - 7.2.1. he is self-employed,
 - 7.2.2. he is in business on his own account,
 - 7.2.3. the status of the Main Contractor and/or the Agency (where applicable) and/or Simplify is that of customers of the Subcontractor's own business,
 - 7.2.4. the manner in which the Subcontractor provides the Services shall not be subject to (or to the right of) supervision, direction or control by any person,
13. **Liability**
 - 13.1. The Subcontractor is engaged to perform the Services as specified in the Assignment Schedule as an independent contractor, and neither the Subcontractor nor any person engaged by it on the provision of Services is under the control of Simplify or the Agency (where applicable) or the Main Contractor; and therefore
 - 13.1.1. the Subcontractor accepts responsibility for any wrongful negligent or unlawful acts defaults or omissions of itself and of any such person in relation to an Assignment; and
 - 13.1.2. Simplify shall not be liable for the Services provided by the Subcontractor, for working conditions or other arrangements at the Site / Work Location or for any act, default or omission of the Agency (where applicable) or the Main Contractor (or any of its personnel) in relation to the Services and/or the Site / Work Location.

11.7. there was no dispute that these terms did not differ from the terms on which the claimant had previously provided services;

11.8. the proposed arrangement was that the claimant's services were to be supplied to Trant via a company called SMP Support Services Ltd trading as Simplify. The result is that Trant would have paid Simplify and

Simplify would have paid the claimant. He was paid through CIS arrangements. The claimant confirmed that this is what had happened previously and he had a contract with Simplify. He needed to engage in this arrangement to be paid. I accept the claimant's evidence in this regard.

Decision

Section 83 Equality Act 2010

12. I find that to satisfy the definition of employment set down in section 83 of the Equality Act 2010 the claimant's relationship with the respondent must be that he was under a contract to personally do work.
13. The claimant was not under a contract personally do work for the respondent. The only contract that was proposed and would have existed was the Simplify Contract which was between the claimant and Simplify. Even if the respondent had been some sort of end user there was still not a contract between the respondent and the claimant to personally do work.
14. I find that the claimant was not employed within the meaning of section 83 of the Equality Act 2010.

Section 41 Equality Act 2010

15. Section 41 is designed to apply the Equality Act 2010 to an individual who is part of somebody else's business, rather than somebody who is carrying on a business on their own account, in furtherance of a contract of which the principal is a party. The fact that there is more than one person in the chain of supply between the individual and the principal does not prevent somebody becoming a contract worker as long as the line of contracts is unbroken. The principal, who is the end user, is somebody that can have obligations under the Equality Act 2010.
16. I find that the claimant is not a contract worker and the respondent is not a principle within the meaning of section 41 of the Equality Act 2010 because the claimant is not an employee of anybody. The claimant is self-employed and he has a contract of services with Simplify. If the contract of services with Simplify was a contract for him to do the work personally, the claimant would have been a contract worker however, in this situation I have found that the claimant did not have a contract with Simplify for him to do the work personally.
17. I find that the claimant did not have a contract to do the work personally for Simplify for the reasons set out below:
 - 17.1. On the face of it the terms of the Simplify Contract do not create a relationship under which the claimant was contracted personally to do work. This is evident from the terms I have set out above. They provide, for example that the appellant is self-employed and in business on his own account, he must be able to work without supervision or direction, he is responsible for his own negligent acts, Simplify is not liable for the services provided by the subcontractor and at 4.1.5 the claimant is expressly permitted to provide a substitute. However, I have also considered the

situation as a whole after applying the guidance from case law such as Ready Mix Concrete v Minister of Pensions [1968] 2QB 497. I have given consideration to the Supreme Court judgement in Uber v Aslam [2021] UKSC 5 and its rejection of Uber's argument that the applicable written agreements are the starting point. I consider that this point is well-established from case law such as Autoclenz Ltd v Belcher [2011] UKSC 41. At para 87 the Supreme Court stated the following:

"87. In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"."

17.2. In addition to the Simplify Contract, I heard evidence from Mr Kerr that the contract was not signed until the first day or shortly after because sometimes individuals did not turn up, sometimes they provided a substitute for reasons such as having another commitment or being able to obtain a higher rate of pay somewhere else. Mr Kerr's evidence about how the relationship operated was consistent with the terms of the Simplify Contract. In cross examination, the claimant also accepted that it was up to him to do the scaffolding work properly and he was not under anybody else's control. He did not dispute Mr Kerr's evidence about substitutions.

17.3. I was not provided with any evidence from either side about the level of control, if any, the respondent operated in respect of individuals such as the claimant. Obviously, as a result of the basis of the claimant's case the respondent did operate some control because it effectively vetoed the claimant working or providing services to the project. However, there was no other evidence that the respondent operated any control on a day-to-day basis about work the claimant had done in the past on the project or was intended to do if he had been allowed to in 2021.

18.I recognise that my conclusions indicate that the claimant would have no protection against theoretical discrimination by the end user, I find that this is consistent with case law such as Muschett v HM Prison Service and Brook Street (UK) Ltd, EAT [2010] UKEAT/0132/08/LA where the agency worker's discrimination claims failed against both the employment business and the end-user client (akin to the respondent on these facts). In that case it was held that:

18.1. The worker was not "employed" by the employment business for discrimination purposes, as there was no mutuality of obligation between him and the employment business and his contract did not oblige him to perform work personally for that business. This is similar to this case.

- 18.2. As he was not employed by the employment business, the worker did not fall within the definition of a "contract worker" of the end-user. This is similar to this case.
- 18.3. Further, the worker was not employed by the end-user. This is similar to this case.
19. Therefore, as I have found that even if the claimant had signed the Simplify Contract, which he did not, he was not a contract worker, the fact that he did not sign the Simplify Contract further means that he cannot benefit from the protections of s41 of the Equality Act 2010.
20. The claimant's claims are dismissed for want of jurisdiction.

____ *J Bartlett* _____

Employment Judge Bartlett

Date **29 June 2023**

JUDGMENT SENT TO THE PARTIES ON

4 July 2023

GDJ
FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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