



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms F MacDonald

v

Alpha Property Management and Services Ltd

Heard at:

Watford

On: 8 June 2023

Before:

Employment Judge Quill

Appearances:

For the Claimant: In person

For the Respondent: No appearance or representation

JUDGMENT having been sent to the parties on 14 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The definitions of employee and worker appear in s.230 of the Employment Rights Act 1996. (“ERA”)

230.— Employees, workers etc.

(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.

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

2. Section 83 of the Equality Act 2010 (“EQA” also defines employment for the

purposes of that Act.

(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.

(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.

3. In EQA "employment" includes employment under a contract of employment which is a definition also used in s.230 ERA. Thus, for both acts, there does have to be a contract between the parties. If there is no contract between the parties then the claimant cannot be an employee.
4. However, where there is a contract then there are a number of tests to apply in order to determine whether that is, on the one hand, a contract of service, (to use the old terminology), or an contract of employment , to use the more modern terminology, or, on the other hand, some other type of contract.
5. Making the decision includes taking account of the following factors. Where some of these factors point in opposite directions, then it is necessary to weigh them up and assess their relative importance.
 - a. There has to be sufficient control by the respondent (the alleged employer).
 - b. There has to be a mutuality of obligation
 - c. There has to be n agreement by the claimant to do the work personally.
6. The degree of control which must be exercised by the respondent over the claimant in order for there to be a decision that the contract in question is a "contract of employment" is discussed in Ready Mixed Concrete v Ministry of Pensions and National Insurance [1968]. The factors relevant to mutuality of obligation are discussed in Carmichael v National Power.
7. Outside the field of employment law the ability of the courts to look behind the a written express contract is limited to situations where the partis have a common intention to mislead a third party as to the true nature of the arrangement and that is called a sham in that sense but in the field of employment law, that is modified by the leading cases of Autoclenz and Uber v Aslam. A tribunal that is faced with an allegation that a written contract is not what it appears to be must consider whether or not the words in the written contract represent the true intentions or expectations of the parties. In doing so, it is relevant to take into account that the purpose of employment legislation (including ERA and EQA) is to provide protection, including to

those who do not have equal bargaining power with the alleged employer.

The facts

8. The claimant saw an advert on Facebook and applied. She was expecting to be an employee, if successful, based on the wording of the advert. During the discussions she was told that there were a number of applicants. The claimant does operate a business as a self-employed music teacher, but this post was not for music teaching. This post was to be a personal assistant. There was no discussion that the respondent planned to receive music teaching services, or to be a customer of the claimant's business.
9. She was told her application was successful. On 3 May 2021 she received an email from the director of the respondent which said, "Hope you are well please find attached the welcome letter and employment contract". It then went on to say, "It's best I hire you self-employed to save me tons of paperwork 😊" and then it said, "after six months we can review and take things from there".
10. An attachment sent to the claimant was headed Terms and Conditions of Self-Employment. Amongst other things, it included:
 - 11.1 Clause 1 referred to terms and conditions including the particulars the company is required to provide in accordance with the Employment Rights Act, Employment Act 2002 and Working Time Regulations.
 - 11.2 Clause 2 talked about a period of continuous self-employment.
 - 11.3 Clause 3 started "You are employed as a self-employed contractor". It went on to describe the duties of the post including "The company may require you to perform duties normally undertaken by others or to take on different or additional duties". It said, "You are required to comply with the Company's rules, regulations and policies for its employees from time to time in force".
 - 11.4 Hours of work were specified under Clause 4 which included amongst other things "You may be required to work additional hours and days including weekends as and when requested or when the proper performance of your work so requires." It is stated that there is no entitlement to be paid extra remuneration. It said that "Due to the nature of the property business you will be available 24/7 on call."
 - 11.5 Place of work was specified in Clause 5.
 - 11.6 The suggestion made by the company was that the claimant would have to provide an invoice and that is in Clause 6. The claimant agreed to this clause feeling that she had no choice. She did not use the business name for her music teaching business in relation to the only invoice that she did supply in May 2021.
 - 11.7 Clause 8 referred to holidays.
 - 11.8 Clause 9 referred to exclusivity of service.

- 11.9 Clause 13 said that the claimant was expected to maintain a good standard of work performance and conduct at all times and if the standards fell below reasonable expectations then she would be liable to disciplinary action which could ultimately result in dismissal.
- 11.10 Clause 14 was headed Termination of Employment and said that “The notice period required by either party to this contract to terminate your employment will be one month” and added “Nothing in this contract prevents us from terminating your employment summarily.”
- 11.11 In Clause 15 under the heading “Severability” refers to, “These terms and conditions of employment”.
- 12 My analysis is that the claimant was required by this written document to be under the control of the respondent on a day-to-day basis and that is what in fact happened once she started work for the respondent.
- 13 The phrases in the written contract sometimes referred to self-employment but other types referred to employment. My finding that actually where they refer to employment, that is accurate, and the words “self-employment” were not genuinely agreed. In fact, for this contract, the claimant was not in business on her own account, and she was an employee of the respondent. That is the true nature of the agreement, and the attempt to present it as “self-employment” is a failed attempt to present the agreement as a relationship that fell outside the definition of “contract of employment”.
- 14 Given that there was the necessary degree of control (as well as mutuality of obligation) to show that this is a contract of employment, it is not necessary for me to address whether it would have been an “other” contract within the definition of worker for section 230(3)(b) ERA. However, as mentioned, the contract was one which required her to work personally, and the respondent was not a client or customer of her business. Therefore, the contract would have fallen within “Limb B” of section 230(3), but for the fact that it actually fell within “Limb A”. Similarly, the contract would have fallen within section 83(2) as “a contract personally to do work”, even had I not decided that it fell within that section as a contract of employment.

EMPLOYMENT JUDGE QUILL

Date: 7 July 2023

Judgment sent to the parties on

7 July 2023

For the Tribunal office