EMPLOYMENT TRIBUNALS

Claimant: **Mr R Lingel**

Respondent: **Chelmsford Hotels Limited**

Heard at: **East London Hearing Centre (remotely by video)**

On: **6 June 2023**

Before: **Employment Judge S Shore**

Representation
For the claimant: In Person
For the respondent: Mr S Hayes, Solicitor

OPEN PRELIMINARY HEARING RESERVED JUDGMENT

1. The claimant was not an employee or a worker of the respondent. All his claims are dismissed.

REASONS

History of Case

1. The Claimant began Early Conciliation with ACAS on 16 October 2022 and obtained an Early Conciliation Certificate on 27 November 2022. He presented his claim (ET1 form) [4-15] on 18 December 2022. In his ACAS application and ET1, the claimant named the respondent as "The County Hotel".

2. The claimant alleges that he was an employee of the respondent, Chelmsford Hotels Limited, which trades as The County Hotel. In his ET1, Mr Lingel stated that he was employed as "Events Entertainment" between 1 April 2016 and 17 December 2022. In paragraph 8.2 of the ET1, the claimant alleged he had been unfairly dismissed and was owed arrears of pay. He also indicated claims of "Breach of Contract; Defamation; Bullying/Extortion of Monies/Bribery/Potential Blackmail" (sic).

3. The Tribunal acknowledged the claimant's claim and sent a notice of claim to the respondent on 3 January 2023 [16-19]. The respondent presented its response

(ET3 form) [20-27] and grounds of resistance [28-33] on 31 January 2023. The response was accepted on 6 February 2023 [34-43].

4. In its grounds of resistance, the respondent raised issues of jurisdiction regarding claims raised by the claimant which the respondent submitted that the Tribunal had no jurisdiction (legal authority or ability) to hear claims of defamation; bullying; extortion; bribery; and potential blackmail.

5. It was further submitted that all the claimant's claims that pre-dated 17 July 2022 were out of time.

6. The respondent stated that its proper legal identity was Chelmsford Hotels Limited. The respondent further stated that the claimant was, and never had been, its employee or a worker for it.

7. Having checked the claim and response, Employment Judge Reid wrote to the parties to propose that the correct name of the respondent be amended to "The Chelmsford Hotel t/a The County Hotel" [44-45].

8. The Tribunal listed the claims for a one-day hearing on 6 June 2023. However, on his own initiative, Employment Judge Gardiner converted the final hearing into this open preliminary hearing by an order dated 6 March 2023 [46-49]. The final hearing was relisted for 6 September 2023.

9. EJ Gardiner ordered that today's hearing was to determine whether Mr Lingel was:

    9.1 An employee of the respondent;

    9.2 A worker of the respondent; or

    9.3 Provided his services to the respondent only on a self-employed basis.

10. EJ Gardiner also made the following case management orders:

    10.1 The parties were to exchange documents in their control that related to the matters to be determined at this hearing by 3 April 2023;

    10.2 By 14 April 2023, the claimant was to notify the respondent of the relevant documents that he wanted to be included in the bundle of documents for this hearing;

    10.3 The respondent was to send Mr Lingel a copy of the bundle by 1 May 2023;

    10.4 The respondent was to send a copy of the bundle to the Tribunal by 30 May 2023;

    10.5 Witness statements were to be exchanged by 15 May 2023; and

    10.6 Copies of the witness statements were to be sent to the Tribunal by 30 May 2023.

11. The parties were sent a Notice of Preliminary Hearing [50-53] and a Notice of Hearing [54-55] on 25 March 2023.

12. On 28 March 2023, Mr Lingel wrote to the Tribunal to ask for more time to provide his documents. His request was refused by EJ Gordon Walker on 3 April 2023 [56-57].

Law

13. Section 230(3) of the Employment Rights Act 1996 ("ERA 96") provides in part;
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.

14. In **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, the Supreme Court held that the written agreement is not decisive in determining employment status, and the relative bargaining powers of the parties must be taken into account.

15. In **Uber BV and ors v Aslam and ors** [2021] ICR 657, the Supreme Court held that 'worker' status is a question of statutory, not contractual, interpretation, and it is therefore wrong in principle to treat the written agreement as a starting point. The following are some relevant extracts from of the speech of Lord Leggatt:

> *"38. The effect of these definitions, as Baroness Hale of Richmond observed in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014] 1 WLR 2047, paras 25 and 31, is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to*

those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all "workers".

….

69. Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually 2205827 2022 and 2205828 2022 4 agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

….

75. The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in McCormick v Fasken Martineau DuMoulin LLP 2014 SCC 39 [2014] 2 SCR 108, para 23: "Deciding who is in an employment relationship ... means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. ... The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace ..."

…

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".

….

91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working,

does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working."

16. I also considered the cases of **Clark v Oxfordshire Health Authority** [1998], IRLR 125 CA, **Pimlico Plumbers Ltd v Smith** [2018] UKSC 29, and **Ter-Berg v Simply Smile manor House Ltd and ors** [2023] EAT 2.

Conduct of hearing

17. Prior to the hearing, I was provided with:

17.1 An indexed and paginated bundle of documents consisting of 124 pages;

17.2 The witness statement of Mr Lingel dated 31 May 2023 7 pages and 27 paragraphs; and

17.3 The witness statement of John Mills, Interim General Manager of The County Hotel, whose witness statement dated 31 May 2023 consisted of 4 pages and 19 paragraphs.

18. The Claimant is unrepresented. I reminded him that the Tribunal operates on a set of rules (I have set out a link to those rules below). Rule 2 sets out the overrunning objective of the Rules (their main purpose) which is to deal with cases justly and fairly. It is reproduced here.

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far that is practicable –

(a) Ensuring that the parties are on an equal footing;
(b) Dealing with cases in ways that are proportionate to the complex that are importance to the issues;
(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) Avoiding delay so far as compatible with proper consideration and the issues, and
(e) Saving expense.

The Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."

19. I reminded the parties of the purpose of the hearing as ordered by EJ Gardiner. I indicated that once I had decided that matter, I would then make any Case Management Orders that may be necessary after I determined the employee and worker status points.

20. The burden of proof is on the claimant to show that they are a worker or employee, so Mr Lingel was asked to give evidence first. Mr Lingel gave his name and gave the affirmation to tell the truth at 10:25am.

21. Mr Lingel then asked to make an opening statement. I said that opening statements were not usually allowed. Mr Lingel said that he wanted to speak about what his expectations were at his interview with the respondent. I advised him that what he expected to relationship to be was not something that was relevant to my decision about his status. I was mindful of the tight timescale we had for the hearing and did not want to use up time and expense hearing evidence that was not relevant to the issues I had to determine.

22. I added that a contract was defined as an offer by one party, acceptance by the other and then both provided consideration – in an employment contract, this was usually the employee providing the work and the employer paying them for it.

23. Mr Hayes suggested that the claimant could reference pages in the bundle that were contradictory to his belief of the agreement between the parties.

24. At this point (at 10:28, Mr Lingel disappeared from the screen). There was a loud crash. A few seconds later, Mr Lingel reappeared with a cut above his left eyebrow. Mr Lingel indicated that he was fit to continue, but I was not prepared to allow him to do so immediately, as the cut above his eyebrow was still bleeding and he indicated that he may have lost consciousness for a moment.

25. Mr Lingel said he was alone in his house, so I took his mobile number and the address of the house. I asked him to assess how he felt and to call a friend or relative, his GP, an ambulance or 111 as he saw fit. Mr Lingel left the screen at 10:40am.

26. He reappeared at 10:45 and said he had stopped the bleeding from the cut on his head. He insisted that he was fit to continue and said he had to continue. I considered Mr Lingel's request and agreed to hear his evidence.

27. I also allowed Mr Lingel to make an opening statement, in which he spoke about his expectations when he was interviewed for the role with the respondent. He relied on his witness statement and was asked questions by Mr Hayes. I asked him a few questions.

28. We took a break at 11:56am for 10 minutes. We took a second break at 12:38pm for 10 minutes. Mr Lingel finished his evidence at 13:00pm and we took lunch until 14:00pm.

29. Mr Mills gave evidence on affirmation and relied on his witness statement. I asked him a few questions. He finished his evidence at 14:30pm.

30. I then heard closing submissions from Mr Hayes and Mr Lingel that ended at 15:00pm.

31. I decided to reserve my decision, as I could not guarantee that I would be able to make a decision and deliver it in the time left in the day.

32. I offer my sincere apologies to the parties for the delay in producing this reserved decision. Shortly after the date of the hearing, I had a number of personal issues to deal with that kept me away from work. On my return, I have faced a backlog of decisions that needed to be completed, including this one.

33. I very much regret the fact that the final hearing on 6 September had to be postponed, but given my decision in this hearing, that final hearing would not have taken place in any event if this judgment had been delivered on time.

Findings of Fact

34. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I have set out the reasons why I have decided to prefer one party's case over the other. If there is no dispute over matter, I simply record the finding or make no comment as to the reason the finding was made. I have not dealt with every single matter that was raised in evidence or on the documents. I have only dealt with matters that I found relevant to the issues that I had to determine. No application was made by either side to adjourn this hearing to complete disclosure, to obtain more documents or call more evidence, so I have dealt with the case based on the documents and evidence produced to me.

35. I find that the claimant was not an employee of or a worker for the respondent. I make that finding because:

    35.1 The claimant had no written agreement with the respondent that set out the terms of their contractual relationship. There was no document that described the claimant as an employee or worker.

    35.2 This is not a case where I had to look at a contract, so the approach to contractual documents set out in **Autoclenz** and **confirmed** by Uber is not relevant.

    35.3 The analysis I had to apply was to the facts of the relationship between the claimant and the respondent.

    35.4 I find that the claimant's evidence about the start of his working relationship with the respondent bears all the hallmarks of having been written with the benefit of hindsight in a way that sought to bolster his case. In paragraph 1 of his witness statement, the claimant says he applied for "the position of resident DJ events at the County Hotel" and, in the next sentence, says he attended an interview for the rile of "Sole Resident DJ". The two sentences are inconsistent. Neither assertion is supported by any contemporaneous documentary corroboration. Both seek to give the impression that the claimant was applying for a job.

    35.5 In the same paragraph of his witness statement, the claimant says that he had started off as self-employed in his previous position and was then offered full employee status. He says that "It was made clear this is what **I** (my emphasis) expected to happen in this position."

    35.6 I find, therefore, that the height of the claimant's claim is that he started his working relationship with the respondent as a self-employed person, as he had done with his previous employer.

35.7 I find that the claimant cannot succeed in a claim that he became an employee (or worker), simply because he had expressed an expectation that it would happen.

35.8 The claimant's claim (paragraph 2 of his witness statement) that his LinkedIn site corroborated his claim to be the respondent's "Sole Resident DJ since 2016" is not corroboration because it was created by the claimant. I note that his description of himself is "Musician/Film Scorer/DJ" and makes no reference to his being an employee.

35.9 I find the claimant's claim that his rate of pay for the work done for the respondent was not linked to the rate of inflation and that, therefore, the respondent had the intention to evolve into an employee role was mere speculation and made no logical sense.

35.10 The claimant said that he cleared his diary and turned down other work in favour of the respondent (paragraph 5). I find that this is not evidence of a relationship of employee or worker with the respondent. It is evidence of the claimant exercising his right to choose which work he wanted to do. My finding is corroborated by looking at the entirety of the claimant's email of 11 August 2016 [70] in which he writes "I continue to have my diary cleared and making sure I turn down all work in favour of the County Hotel…" but then goes on to contradict this by saying, ",,,although I will look to get some work in privately until September…"

35.11 The claimant accepted that he provided his services as a DJ and invoiced the respondent for the services provided. He agreed that he was responsible for his own tax and NI and was never on the respondent's payroll. He accepted that he enjoyed the advantages of self-employed status in respect of his tax arrangements.

35.12 The claimant agreed that he provided his own equipment and did not have to wear a uniform. He did say that he would dress in accordance with the theme of the event.

35.13 The claimant said he was subjected to disciplinary proceedings, but in answer to cross-examination questions, he admitted that the "disciplinary proceedings" consisted of him being criticised for making mistakes. He accepted there were no disciplinary repercussions.

35.14 The claimant's claim that he was not allowed to provide a substitute if he was unable to fulfil an engagement with the respondent (paragraph 8) was based entirely on his assertion that this was the case. He provided no documentary corroboration that he had informed a nightclub owner that he was not permitted to provide a substitute for his work with the respondent. That evidence was completely undermined by the claimant's statement in answer to cross-examination question that he did have the right to substitute.

35.15 The claimant accepted that he was able to work elsewhere if he chose to do so. It was his choice to prioritise the respondent.

35.16 He accepted that the respondent used other DJs. I find that there was no obligation on the respondent to offer the claimant work, or for the claimant to accept the work offered. I find that the claimant had full control over the work he chose to do. There was no mutuality of obligation between the claimant and the respondent.

35.17 The claimant cited the fact that he was trained on the respondent's lighting system as evidence that he did not have the freedom to operate independently. I find that this is not evidence of a lack of autonomy, merely evidence of the claimant getting used to the systems of the respondent as he continued to DJ at the venue.

35.18 The claimant had no records of any work done for the respondent in 2017.

35.19 The claimant's submission that his claim should proceed because of the principle of promissory estoppel had no legal or factual merit.

Conclusion

36. I find that there was no agreement between the respondent and claimant that can be interpreted as a contract of employment or a contract as a worker.

37. I find that all the evidence points to the claimant being a self-employed contractor on the findings of fact above.

38. The Tribunal therefore has no jurisdiction to hear any of the claimant's claims that require him to be an employee or a worker.

39. All the claimant's claims are dismissed.

Employment Judge S Shore
Date: 11 September 2023