



EMPLOYMENT TRIBUNALS

Claimant: Mr H Berlin
Respondent: Clements Agency Limited
Heard at East London Hearing Centre (via CVP)
On: 7 November 2023
Before: Employment Judge Davidson

Representation

Claimant: in person
Respondent: Mrs S Leslie, Director

RESERVED JUDGMENT

The claimant's claim is struck out on the basis that there is no reasonable prospect of him showing that he was an employee of the respondent for the purposes of the Employment Rights Act 1993 or the Equality Act 2010.

REASONS

Issues

1. The purpose of this hearing is to consider whether the claimant's claims should be struck out as having no reasonable prospect of success on grounds of employment status or, alternatively, whether to order a deposit to be paid if the claims have little reasonable prospect of success on grounds of employment status.
2. The test for the tribunal to consider is whether the claimant has reasonable prospects of showing that he was:
 - a. an employee for the purposes of the Employment Rights Act 1993; and/or
 - b. an employee for the purposes of the Equality Act 2010.

3. The claimant withdrew his holiday pay claim and this is dismissed on withdrawal. The issue of 'worker' status is therefore no longer relevant.
4. The claimant claims his employment started in 1995 with Huntcrown Limited (Huntcrown). He alleges that there was a TUPE transfer of his employment from Huntcrown to the respondent in 2014. The tribunal will consider matters in the following order.
 - a. Does the claimant have reasonable prospects of showing that he was an employee at the time that the relationship between the claimant and respondent came to an end (January 2023)?
 - b. If so, when did the employment relationship begin?
 - c. If it goes back to the beginning of the claimant's relationship with the respondent (2014), are there reasonable prospects of showing that there was a prior employment relationship with Huntcrown?
 - d. If so, are there reasonable prospects of showing that there was a TUPE transfer of the claimant from Huntcrown to the respondent?
5. The claimant accepts he was contracted on a self-employed basis but he claims that this was a misclassification in law and that he was, on the legal tests, an employee.

Evidence

6. The tribunal heard evidence from the claimant on his own behalf and from Susan Leslie, Director, on behalf of the respondent. The tribunal had a witness statement in support of the claimant from Ian Charles (formerly Director of Huntcrown), who was unable to attend as he is in Thailand and cannot give evidence from there, and a witness statement in support of the respondent from David Davis (formerly Director of Huntcrown), who was unable to attend due to ill health.
7. The tribunal had a bundle of documents running to 437 pages together with skeleton arguments from both parties.
8. Susan Leslie had understood from the Employment Judge at the case management preliminary hearing that this would be a preliminary hearing on the papers only, with oral submissions and that there would be no cross examination. I explained that this was not my understanding and I could see that 1 hour had been timetabled for the claimant's evidence albeit no time had been given for respondent evidence.
9. I adjourned the hearing for a short time so that I could read the documents and to allow Susan Leslie to prepare some cross examination questions. The claimant and Susan Leslie both gave evidence and were cross examined. Both parties made written and oral submissions and I reserved my decision.

Facts

10. The tribunal found the following facts.
11. The claimant is a Chartered Surveyor. In 1988, he formed a sole trader surveying practice which traded as Howard Berlin Surveyors.
12. David Davis and Ian Charles ran a business (Huntcrown) trading as Hammer Properties, which dealt with business rates valuations.
13. Susan Leslie is the sole director and shareholder of the respondent. She had previously been employed by Huntcrown as office manager and HR officer.
14. David Davis is married to Susan Leslie. David Davis, Susan Leslie and the claimant and the claimant's wife knew each other socially and remained friends until these proceedings were issued.
15. In 1995 the claimant had a conversation with David Davis and Ian Charles about working together. Huntcrown wanted the additional credibility of having the respondent in its marketing literature and the claimant would have the benefit of guaranteed income.
16. Following that conversation, the claimant drafted a letter to record the agreement. He no longer has a copy of that letter but recalls that the arrangement was £500 a week retainer, use of office facilities and a notice period of six months either way. It was specifically agreed that the claimant would be able to continue with his own clients alongside this arrangement. The claimant was not taken on as an employee and contracted on a self-employed basis.
17. While he was working with Huntcrown, he was referred to as 'Howard Berlin, Consultant Surveyor to Hammer Properties'. He introduced himself as Howard Berlin – Hammer Properties when talking to clients and he had a Hammer Properties email address. He also used his own email address in some correspondence.
18. Howard Berlin Surveyors invoiced Huntcrown for the claimant's services and the amount would be the same every week, however many hours the claimant spent on the work and whether or not he was on holiday.
19. He states that he spent more time working on Huntcrown matters and, later on, the respondent's matters than on his own clients. This is not accepted by the respondent. There was no reliable data from which to make a finding but it is accepted by all parties that he worked on his own client matters from the offices of Huntcrown and, later the respondent, as well as on their clients.

20. In April 2014, the claimant was told by Ian Charles that Huntcrow were in financial difficulties and he would be paid by the respondent from April 2014. The claimant says that he asked if he could be paid through PAYE and was told by Ian Charles that this was not possible and that he should invoice the company at different rates every week to make it look less like regular income. He did this but the invoices averaged out at the then agreed weekly amount of £900. Ian Charles was not acting on behalf of the respondent and Susan Leslie was unaware of this conversation.
21. Susan Leslie approached the claimant to ask him to provide his services to the respondent, which he agreed to do from April 2014. The respondent had been trading for some 2012, working out of the same offices as Huntcrow, and Susan Leslie wanted to expand its business.
22. For the period from April 2014 to August/September 2014, the claimant was providing services both to Huntcrow and to the respondent and was being paid by the respondent.
23. In September 2014, Huntcrow went into Creditors Voluntary Liquidation. All the employees were paid redundancy entitlements from the Redundancy Payments Office. The claimant was not included in this and made no application for a redundancy payment.
24. After the liquidation, the respondent acquired some of Huntcrow's assets from the Liquidators under a Deed of Assignment.
25. The claimant continued to provide his services to the clients of the respondent. He worked from their offices but used his own laptop as well as the respondent's own office equipment. He had an email address with the respondent's name and he was referred to as Howard Berlin, Consultant Chartered Surveyor and was listed with the 'our surveyors' page of the respondent's website.
26. The claimant maintained professional liability insurance for his practice and much of his correspondence was sent from his personal email account.
27. He was not required to request holidays and was able to come and go to the office during working hours without checking in with anybody. He did not have defined hours but was expected to complete the valuation appeals assessments.
28. There were some occasions when the respondent's clients were difficult about their relationship with the respondent. In these cases, the claimant distanced himself from the respondent, explaining that he was not a director or shareholder of the company and that he was self-employed and his role was limited to dealing with the valuation appeal.
29. The way of dealing with rating appeals changed in September 2016 which impacted on the claimant's work. His role changed to producing 'initial

valuations', which were sent to clients who had signed up with the respondent. By this time, the claimant's son, James Berlin, was working with the respondent, on an employed basis and he also had his own business. The claimant and James Berlin worked together on new 'initial valuations' system. By 2017, the James Berlin had experience and expertise to deal with cases and the requirement for the claimant's services reduced.

30. In 2018 the claimant was elected as a councillor for the local authority for a four-year term with special responsibilities. He did not ask the respondent before running for office.
31. In 2019, the claimant was asked to stand as Conservative Party candidate for Ilford North in the General Election. This is a safe Labour seat and the claimant said he had no prospect of winning the seat. He says took two or three days out to campaign but Susan Leslie believes it was more.
32. In March 2020, at the start of the pandemic, the respondent's staff worked from home. Once offices were permitted to re-open, the respondent reopened its offices but the claimant remained working from home.
33. On 2 January 2023, Susan Leslie came to the claimant's house. She told the claimant that the respondent had money problems and needed to cut costs. She told the claimant that his services were no longer required. Both parties agree that they had goodwill toward each other and started discussions to find a way to work together again in future.
34. The claimant submitted tax returns on the basis of self-employed status. I only saw tax returns for the past three years. These show the claimant's earnings from the respondent as his self-employed income. In earlier years this would have also included his income from his practice. The claimant's evidence was that there was very little income from his practice as in the last few years, he had passed many matters to his son. The claimant claimed office and other expenses as deductions in his tax returns. He also claimed the Self-Employment Income Support Grant, designed to support self-employed individuals whose self-employment activities have been adversely affected by COVID.
35. The claimant's tax returns for 2020/21 and 2021/22 show 'employment' income which is the income the claimant received as a local councillor.
36. The figures for the 2021/22 tax return did not appear to be correct. The claimant confirmed that his accountant had sent him the wrong document and that the version in the bundle was a draft which was never submitted and which is incorrect.

Law

37. Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (Employment Tribunals Rules) provides that

a Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success.

38. Rule 39(1) of the Employment Tribunal Rules provides that a Tribunal may make a deposit order if it considers that any allegation or argument in a claim has little reasonable prospect of success.
39. For the purpose of determining employment status, the relevant definitions are as follows:
 - a. Section 230(2) of the Employment Rights Act 1996 defines an employee as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*'.
 - b. A contract of employment is a '*contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*'.
 - c. Section 83(2) of the Equality Act 2010 gives protection from discrimination to those who are, or were, in '*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*'.
40. The tribunal will look at the substance of the relationship, rather than the legal form or any labels that the parties have given to the relationship. In order for an employment contract to exist. There are a number of authorities which deal with the issue, starting with *Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance* [1968] QB 497, which advocated a multiple test as follows:
 - a. the individual must provide his own skill and work in return for pay (personal service);
 - b. there must be a sufficient degree of control of the individual's activities (control);
 - c. the other provisions in the contract must be consistent with it being a contract of employment (other factors); and
 - d. there must be mutuality of obligation (mutuality of obligation).
41. These factors are the 'irreducible minimum' requirements for an employment contract (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612). If any one of these factors are not established, there can be no employment contract. However, the tribunal must examine all relevant factors, both consistent and inconsistent with employment and determine, as a matter of overall assessment, whether an employment relationship exists.

42. In *Carmichael v National Power Plc* [1999] ICR 1226, the House of Lords ruled that where both parties understood the terms of their agreement, this is a relevant factor.
43. Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applies to transfer the contracts of employment of employees where there is a relevant transfer. This includes the transfer of a business or undertaking where there is a transfer of an economic entity that retains its identity.

Submissions

44. The respondent made the following submissions to show that the claimant was a self-employed contractor:
 - a. express terms of the (oral) agreement, in particular that the claimant would provide professional services under a retainer agreement;
 - b. the claimant dictated the terms of the agreement;
 - c. no provision for holiday entitlement, sick pay, working hours or disciplinary procedures;
 - d. mutual intention to create self-employment;
 - e. the claimant providing the same services to the respondent as he did to his other clients;
 - f. invoices received from Howard Berlin Surveyors;
 - g. no indication during the long relationship that the claimant was disaffected with the self-employment classification;
 - h. the claimant appearing as 'Consultant Surveyor' on company letterhead;
 - i. in applying to stand for parliament, he said that his 'employment' was Chartered Surveyor with Howard Berlin Chartered Surveyors;
 - j. the tax treatment of income, to the benefit of the claimant, including claiming allowances only available to self-employed people and claiming government grants only available to self-employed people;
 - k. use of his own laptop;
 - l. presumed use of his own office equipment based on the expenses claimed for office costs on his tax return;
 - m. there was nothing to prevent the claimant using a substitute, as long as the person was a professional RIC registered Chartered Surveyor.
45. The claimant relies on the following facts to show that his status with Hunt Crown was employee:
 - a. he was referred to by Hunt Crown as Howard Berlin Consultant Surveyor to Hammer Properties;
 - b. he introduced himself as Howard Berlin – Hammer Properties when talking to clients;
 - c. he was provided with office facilities;
 - d. he had an email address on the respondent's system;
 - e. he was paid a regular amount every week from 1995 to 2023;

- f. he had no financial risk;
- g. he did not send a substitute;
- h. it is for the employer to get the employment status correct and not the employee.

Determination of the Issues

- 46. I find that the claimant has no reasonable prospect of showing that he was an employee for the purposes of either the Employment Rights Act or the Equality Act.
- 47. The claimant accepts that both parties proceeded on the basis that he was a self-employed consultant and that he never questioned this until after the arrangement with him had been terminated by the respondent. This was a mutually agreed arrangement and is not a case of the respondent (or Huntcrow) imposing an arrangement on the claimant against his will or without his understanding.
- 48. There was no imbalance of bargaining power. If anything, the bargaining power was with the claimant who dictated the terms of the agreement. Following the decision in *Carmichael*, the parties' understanding of the arrangement is relevant and I find that both parties understood the claimant to be self-employed.
- 49. The claimant seeks retrospectively to reclassify his arrangement as one of employment, relying on the fact he provided personal service under the control of the respondent in keeping with an employment relationship and that the features of an employment relationship were present.
- 50. As a result of this position, evidence such as the way the claimant was referred to in correspondence, or how his pay was treated for tax are less significant than might be the case in other claims as all parties worked on the basis that the relationship as one of self-employment and documentary evidence bears this out.
- 51. There is no suggestion that the respondent had deliberately misclassified the relationship or that the way the arrangement was implemented was a sham.
- 52. I therefore need to look at the way the relationship worked in practice to determine if the claimant is likely to be able to show that the relationship has been misclassified and that he was, in fact, an employee.

Control

- 53. I find that the claimant was not under the control of the respondent, as would be required for an employment relationship. The claimant accepts that he had control over where and when he did his work. He was not required to request holiday leave and had no set holiday entitlement. He was free to

work as a Local Councillor and to stand for parliament without making any request or reference to the respondent.

54. The claimant set out the terms of his initial engagement in 1995 and the respondent (or Huntcrown) did not impose their terms on him. The claimant was not subject to disciplinary or other internal procedures. He was not required to work from the respondent's office and it was up to him where he worked. While in the respondent's premises, he was free to work on his own clients or the respondent's work, as he wished.
55. In terms of the claimant's work, he provided the expertise, which the respondent did not itself have, and therefore was able to control how the service was provided. He worked when it suited him and ran his own practice alongside his work for the respondent.

Pay arrangement

56. The claimant provided his services to the respondent in return for a weekly retainer fee. The fee did not vary according to the amount of work done. The claimant submitted invoices for amounts which varied slightly but the average remained constant. He said he did this at the suggestion of Ian Charles at the time he started being paid by the respondent. Ian Charles was not acting on behalf of the respondent at the time so it is hard to see why he suggested this way of doing the invoices. In any event, it was the claimant who decided to put whatever amount in the invoice he wanted. I accept that this was not done at the request of the respondent, who simply paid the invoices presented by the claimant.
57. Notwithstanding the minor variations in the invoices, I find that the claimant received a constant amount, which he had negotiated with the respondent and, earlier, with Huntcrown. This amount was calculated on the basis that it was self-employed income and that the claimant would account for his own tax.

Personal service

58. The claimant provided his expertise and, to that extent, he provided personal service. It appears that, in later years, he shared much of the workload with his son, who was an employee of the respondent but who also had his own business. In reality, neither party gave thought to the possibility of the claimant using a substitute and there are no written terms between the parties dealing with the issue. The respondent required someone with the claimant's expertise to perform a role in dealing with client appeals. There would be nothing in the arrangement which would prevent the claimant asking a suitably qualified substitute to do some of that work.

Mutuality of obligation

59. I find that there was mutuality of obligation in that the respondent paid the claimant each week and expected him to carry out the services he was being paid to provide, which he did. Apart from the fact that the claimant was given space in the respondent's premises to do his work for them and his work for other clients, I do not find that this arrangement was very different from most 'retainer' fee arrangements where the professional is obliged to provide the services he has been paid to provide.
60. In addition, the claimant was free to be present or absent, as he chose, and (after the valuation process changed in 2016) was able to pass tasks to his son.

Other factors

61. The factors which tend to show that the claimant would be able to argue that he was an employee are as follows:
- a. he used some of the respondent's tools and equipment (but also his own);
 - b. he took no financial risk;
 - c. his pay was fixed;
 - d. he received the same pay if he was on holiday or sick;
 - e. he had been with the respondent and Huntcrow for a long time.
62. The factors which tend to show that the claimant would not be able to argue that he was an employee are as follows:
- a. he was not involved in the management of the business, despite being a senior professional;
 - b. he had no set holiday entitlement;
 - c. he was not integrated into the business;
 - d. he was free to provide services to others, and did so;
 - e. he received no benefits
 - f. he carried his own insurance.

Conclusion

63. For the reasons set out above, I find that it is unlikely that the claimant will be able to show that he was subject to the control of the respondent. In addition, I find that the factors which might tend to show that there was an employment relationship between the claimant and the respondent are far outweighed by the factors that tend to show a self-employment relationship. On this basis I find that there are no reasonable prospects of the claimant being able to show that he was an employee of the respondent, either for the purposes of the Employment Rights Act 1993 or the Equality Act 2010.
64. Having found that the claimant has no reasonable prospect of showing he was employed by the respondent, I do not need to consider whether he was employed by Huntcrow or if there was a TUPE transfer in 2014.

65. If I were to consider those issues, my conclusions in relation to those issues are that there is no reasonable prospect of the claimant showing he was an employee of Huntcrown (for similar reasons as applied to the respondent) or that there was a TUPE transfer. The fact that a different company pays the retainer fee is insufficient evidence to indicate a TUPE transfer, particularly as the claimant was supplying his services to both Huntcrown and the respondent at the time and he was not an employee.
66. The claim is therefore struck out as having no reasonable prospect of success pursuant to Rule 37(1)(a) of the Employment Tribunals Rules.

**Employment Judge Davidson
Dated: 10 November 2023**