EMPLOYMENT TRIBUNALS

Claimant: Mr Ventis Brown

Respondent: Wainwright and Cummins LLP

Before: Employment Judge Fowell

JUDGMENT ON RECONSIDERATION

1. The application for reconsideration is refused on the grounds that there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. At the preliminary hearing on 11 September 2023 I concluded that the claimant:

   (a) was not an employee for the purposes of the Employment Rights Act 1996, but

   (b) was a worker for the purposes of that Act and (given what is essentially the same definition) an employee for the purposes of the Equality Act 2010.

2. For convenience I will refer to these two issues as employee status and worker status respectively. The respondent has now applied for a reconsideration of the decision on worker status.

3. It may help to summarise the reasons given are the last occasion:

   (a) at paragraphs 2 to 13 I set out why I decided to continue the claimant's absence and explained that in his absence I would proceed on the basis of the evidence presented by the respondent's witnesses;

   (b) at paragraphs 14 to 32 I set out the findings of fact;

   (c) at paragraphs 33 to 42 I set out the applicable law, which has not been challenged;

   (d) in sections 43 to 45 I set out my conclusions on the question of employment status under the Employment Rights Act 1996;

(e) from paragraphs 46 to 70 I set up my conclusions on the question of worker status.

4. On the question of employee status I concluded in short that:

(a) there was a contract between the parties;

(b) it described the claimant as self-employed; and

(c) it was operated in practice in accordance with that contract, with the claimant being paid on a per case basis and providing invoices.

5. On that basis I was satisfied that the claimant was not an employee and that conclusion has not been challenged.

6. On the question of worker status the essential conclusions were as follows:

(a) a valid right to provide a substitute is inconsistent with personal service and hence with worker status;

(b) applying the guidance in **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51, particularly the third principle quoted, a right of substitution *only where the contractor is unable to carry out work* will, subject to any exceptional facts, be consistent with personal performance, i.e. with worker status;

(c) the contract relied on by the respondent states on this point, "*If he is not able to undertake the work*, an agreed substitute between the parties will be nominated to provide all or any of the Services";

(d) hence, the third principle applies and subject to any exceptional facts the claimant must be regarded as providing work personally.

7. No such exceptional facts have been suggested and that conclusion therefore rests squarely on the documentary evidence which the respondent put forward.

8. The second aspect of worker status is a negative condition, namely that the putative worker was not providing those services "for another party to the contract whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual." This distinction was further illustrated by the passage from **Byrne Brothers Ltd v Baird & others** [2002] IRLR 96 (EAT) quoted paragraph 42. The essential point is at the end of that section:

> "Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

9. That question was considered at paragraphs 53 onwards of the judgment and various factors were considered on the question of dependency.

10. Turning to the application for reconsideration, I will respond to the points in order they are made.

11. I decided proceed in the absence of the claimant rather than to exercise the power under rule 47 to strike out the claim in his absence since, as I noted, that is a draconian power. More generally, such powers have to be exercised in accordance with the overriding objective of deciding cases fairly and justly and it seemed a disproportionate response to do so given that the question of employment status could be resolved on the evidence available. That involved accepting the evidence presented in the respondent's witness statement although I noted that I would have regard to the claimant's witness statement, that that did not mean that the claimant's evidence would be preferred to that of the respondent's, but it might of course address points not covered in those statements, such as the fact that he appeared on the respondent's website as part of the organisation.

12. It is suggested at paragraph 5 that there was a disadvantage and prejudice to the respondent if certain parts of the claimant's witness statement could not be challenged. It would be rare in practice for the outcome to turn on a point which was only covered in the claimant's witness statement, but that could have been cured by an application for an adjournment to ensure the claimant's attendance on a future occasion or to allow the respondent further opportunity to provide evidence on the point in question. There was no such application.

13. The application invites me to conclude that there was a right to provide a substitute. That was indeed an agreed position between the parties but it does not resolve the question of whether it was a valid or unfettered right. Given the terms of the contract in question and the guidance in **Pimlico Plumbers**, I concluded that it was fettered, for the reasons set out above. That conclusion did not depend to any extent on the claimant's witness statement.

14. It is true that the judgment also looked at additional points, such as the fact that the right in question was never exercised, but that does not affect the fundamental conclusion.

15. The next section relates the findings at paragraphs 56 and 64, namely:

    (a) that the requirement to do at least 14 hours legally aided work per week and while subject to the relevant supervision and reporting requirements was inconsistent with a genuinely casual contract;

    (b) my description of this obligation as 'quite substantial'; and

(c) the fact (on the other side of the balance) that the claimant was not prevented under the contract from providing his services to another law firm.

16. In response to these points:

(a) The obligation to do 14 hours legally aided work per week was also a feature of the contract was not disputed, whether or not in practice the claimant always met this obligation.

(b) The question of whether it was quite substantial is not a matter of fact, for which witness evidence was required, it is an inference drawn from the agreed facts about this obligation. I see no reason to revise that conclusion.

(c) The statement "I have no information to suggest that, for example, he provided his services through other law firms" was not intended to suggest that the respondent was required or expected to demonstrate that he was. The point here is that the contract did not prevent him from doing so. That is accepted, and it is a factor which indicates that he may have been genuinely arm's-length or self-employed. However, for the reasons set out later in the decision, that point was outweighed by other considerations, particularly the 14 hour weekly obligation and the fact that he appeared on the firm's website.

17. Finally, the point is made that the example put forward at paragraph 67, that the claimant would otherwise have no protection against racial comments made at a team meeting, is hypothetical and irrelevant. However, the Supreme Court in **Uber BV v Aslam** [2021] UKSC5, as quoted at paragraph 53 of the judgment, made clear that ultimately the primary question is one of statutory interpretation, i.e. is this a situation where Parliament wanted or expected the Equality Act to apply? It was therefore put forward in that context, to help illustrate the contrast with the genuinely self-employed.

18. Accordingly, and after a careful consideration of the points raised, there seems no reasonable prospect of the original outcome being varied following a further hearing and so the application is refused.

Employment Judge Fowell

Date 12 December 2023