EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Abayomi	**v**	**College of Policing Limited**

Heard at: Watford Employment Tribunal **On**: 7 September 2023

Before: Employment Judge Coll (by CVP)

Appearances
for claimant: self-representing
for respondent: Mr. Coyle, TLT LLP Solicitors

JUDGMENT having been sent to the parties on 19 September 2023 and the following reasons having been requested in accordance with Rule 62 (3) of the Rules of Procedure 2013 are provided:

REASONS

THE HEARING

1. This judgment and reasons were requested by the claimant, oral judgement having been given at the preliminary hearing. I heard oral submissions from the claimant and Mr. Coyle.

BACKGROUND

2. The claimant in his ET1 made a number of claims, some of which relied on his being an employee (unfair dismissal, automatic unfair dismissal and wrongful dismissal).

3. I was provided with a digital bundle of 63 pages before the preliminary hearing. During the preliminary hearing, Mr. Coyle emailed a copy of the Associates' Terms and Conditions and the Associates Policy and the claimant emailed a screenshot of a pay slip. The claimant emailed the following documents in the late afternoon of the day before the hearing which were forwarded to me shortly after the start of the hearing:

   3.1 Letter from the Chair of the Associates Governance Group of the respondent dated 11 March 2022 concerning the claimant's expense claims.

   3.2 Letter from the Chair of the Associates Governance Group of the respondent dated 8 August 2022 concerning the intention to hold an

Associate Review Panel in response to the claimant's email dated 1 August 2022 and outlining the issues to be considered.

3.3 Email from the claimant to the College Associates of the respondent dated 22 August 2022 making representations about the issues outlined in the letter dated 8 August 2022, in particular about expenses and timing of payment for assignments.

3.4 Letter from the Chair of the Associates Governance Group of the respondent dated 29 September 2022 concerning the outcome of the Associate Review Panel to "remove" the claimant "as an associate with the College of Policing SA33 On-line Recruit pool.

LAW APPLICABLE TO THE ISSUE IN DISPUTE – THE CLAIMANT'S STATUS

4. It is fundamental to the analysis of status whether a contract of service (i.e. a contract of employment) existed. A contract of employment cannot exist without a sufficient degree of control and the irreducible minimum mutuality of obligation (including an obligation to perform the work personally)— *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*; *Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA*; *Carmichael and anor v National Power plc 1999 ICR 1226, HL*; and *Montgomery v Johnson Underwood Ltd 2001 ICR 819, CA*. The *Ready Mixed Concrete* case also sets down a third condition: that the other provisions of the contract are consistent with it being a contract of employment.

5. When considering whether the company has "control", it is not a question of whether there is any control but rather the degree of control. A tribunal could look at various questions. For example, could the company require the worker to work at particular times or during particular periods?

6. The 'irreducible minimum' of obligation on each side will usually consist of an obligation on the company to provide work and to pay a wage or salary, and a corresponding obligation on the individual to accept and perform the work offered.

7. Where the requirement for control and the irreducible minimum is satisfied, other factors are potentially very important - *Kickabout Productions Ltd v Revenue and Customs Commissioners 2022 EWCA Civ 502, CA*. This confirmed that the court's task, having assessed these factors, is to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists. At this final stage, financial factors such as whether the company made deductions for income tax and national insurance and monetary benefits such as holiday pay and sick pay were relevant.

8. In *Uber BV & ors v Aslam & ors 2021 UKSC 5,* the Supreme Court gave guidance on the status that a written agreement had to deciding worker status. Lord Leggatt stated at paragraph 76:

> "Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would

> reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it".

9. The Supreme Court held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining employment status. The focus is on the true nature of the relationship between the individual and the company. Lord Leggat observed, however, that this did not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence might show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other.

10. In *Ter-berg v Simply Smile Manor House Ltd and ors 2023 EAT 2*, the EAT explained further. The Supreme Court's decision in *Uber BV* did not mean that the written terms are, in every case, irrelevant or could not ever accurately convey the true agreement of the parties. The approach will be influenced by whether the true intent of the parties was in dispute.

11. *Uber BV* did not displace or materially modify the approach in an earlier case, *Autoclenz v Belcher & ors 2011 UKSC 41*. At paragraph 84, Lord Legatt quoted paragraph 35 of *Autoclenz:*

> "The true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only part".

12. Although *Uber BV* concerned worker status, it is relevant to employee status determinations because the written agreement between the individual and company should be analysed in the same way, and the true agreement gleaned from all the circumstances.

APPLICATION OF THE LAW TO THE EVIDENCE AND SUBMISSIONS

Approach

13. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities.

14. I took account of the evidence presented to me in the bundle and by email. I also took account of the submissions of both parties.

15. I do not record all of the evidence or submissions in these reasons, but only my principal findings of fact, those necessary to enable me to reach conclusions on the issue before me.

Findings and reasons

16. The claimant is found to have been a worker and not to have had employee status with the respondent. My reasons are as follows:

17. In the ET1, the claimant wrote [PDF 9] (author's underlining):

> "As a recruitment Assessor for the College of Policing, I am a 'worker' . I receive payslips from the College of Policing and my taxes are calculated by them. I am contracted for engagement and my time to complete work for the College of Policing assessing candidates who apply for mostly Policing Constable roles from different police forces. I am not an employee. I and other assessors receive 12.07% Holiday pay on top of our expenses fee (£150 a day) - usually 3 or 4 working days per assignment allocation. Assignments are allocated on name alphabetic basis by the College of Policing."

18. In the ET1, the claimant also wrote [PDF 13]:

> "Assessors, who are workers, seem not to be given much consideration for work completed and have to wait 1 months or 2 months after assignments are completed to be paid . This is unreasonable. I am sure employed staff with the College of Policing are paid in the same month for work completed. This will avoid strange payments like the £6.10 I received in June."
>
> We are not just numbers. We are people. As workers we do have some employment rights. From all legal final and financial advice I have received, Assessors are workers currently NOT self- employed which is what I have been told before my admin staff".

19. The underlined words above show that in the claimant's own opinion, he was a worker. This could not be said to be a clerical error by the claimant since he mentions this three times and contrasts his position with that of "employees/employed staff" on two occasions.

20. On his own admission, he regarded assessors as workers not employees. Initially, in his oral submission, he made the further admission that "*the consensus was that I was a worker".* The claimant, however, also sought to distance himself from admissions in his ET1 and his oral admission. He said that:

    20.1 he felt like an employee

    20.2 he was treated like an employee. The claimant did not give any details as to how he was "treated like an employee".

21. These oral statements did not add to the claimant's case legally. They do not amount to his being an employee.

22. The claimant agreed that the terms and conditions document governed his work with the respondent. The terms and conditions make a number of references which undermine the claimant's argument that he was an employee and point to his being a worker:

    22.1 The document describes assessors as "suppliers" and "associates". There is no reference to their being "employees".

    22.2 At paragraph 10, the claimant is required to provide his own insurance.

    22.3 At paragraph 14, the claimant could be terminated with immediate effect. In other words, there was no set notice period. The claimant also had the right to end the engagement without giving notice himself.

22.4 At paragraph 6.3, there is no sick pay.

23. The policy document states that it expresses the underlying principles of the terms and conditions document. The policy is therefore also relevant to an analysis of whether the claimant was or was not an employee. The policy states: "*whilst not employees, college associates are highly valued and flexible resources*". At paragraph 1.2, college associates are said "*to complement the skills and knowledge of our permanent, contracted and seconded staff*".

24. I concluded that the terms and conditions under which the claimant was engaged and the policy underlying it confirmed that he was not an employee.

25. Whilst working for the respondent, the claimant worked for another company, Open Reach BT "*in the beginning and middle of 2022*". I am aware of this from the claimant and from the correspondence from the Chair of the Associates Governance Group in which the respondent investigated and made findings about the claimant's expense claims. The respondent found that some of his claimed expenses were incurred on behalf of BT and not the respondent. The claimant admitted at the preliminary hearing that the respondent told him that these expenses were erroneous and that he should not be engaged with other activities whilst with the respondent.

26. Mr. Coyle listed a number of areas in which he said the claimant's situation failed to come within that of an employee and which I have not discussed above.

27. For example, Mr. Coyle highlighted that there was no obligation on the respondent to provide work and no guarantee that the claimant would be offered work in any set period. Since the claimant had not covered this in his submission, I asked the claimant about this. He did not answer me directly. He said: "*All I can say I was either encouraged or told like at least 25 days' commitments a year*". I asked him again. He was evasive, stating: "*I cannot confirm or deny that that was said or not said*". I concluded from the claimant's answer and the lack of any documentary evidence to contradict the terms and conditions and policy, that the claimant was not guaranteed any work.

28. In addition, the claimant had the opportunity to refuse any work and had exercised that right during his engagement with the respondent.

29. The respondent was responsible for the deduction of income tax and national insurance and granted holiday pay in the form of a percentage of pay.

The claimant's counter-arguments

30. The claimant referred to *Uber BV* (and other cases without naming them) which he said illustrated his status as an employee. He stated "*even though officially I was not an employee and at least a worker, I have to point to the recent gaining of unfair dismissal by zero hours workers".* He did not explain how these cases applied to the facts of his situation beyond the analysis I have undertaken in the section on the law.

31. In the alternative, the claimant submitted that he was a worker and as such had the right not to be unfairly dismissed. He did not provide me with any law to enable me to go beyond the law that I know concerning entitlement to bring unfair dismissal and wrongful dismissal cases.

Conclusions

32. I bear in mind that my decision should not rest entirely on how the respondent described the claimant's status in the terms and conditions or policy. I have not made these the starting point but given that the true intent of the parties has never been alleged by the claimant to have been in dispute, these documents can form an important part of my consideration.

33. The claimant presented no evidence (written or oral) and made no submissions that the work carried out by him or the circumstances in which he did it conflicted with the claimant's original description of his status, the terms and conditions or policy.

34. Taking account of my findings above, which relied on the terms and conditions and policy, both parties' submissions and the claimant's written and oral factual admissions, I find that the requirement for control and the irreducible minimum of mutuality of obligation are not satisfied. Since the tests for these factors are not met, I remind myself that the arrangements for deductions by the respondent and the existence of holiday pay cannot on their own be sufficient. I therefore find that there was no contract of employment between the claimant and the respondent.

35. From all the circumstances, I glean that the true agreement between the claimant and respondent was for the claimant to be a worker. For these reasons, the claimant is found to have been a worker and not to have had employee status with the respondent.

36. The claimant's claims for unfair dismissal, automatic unfair dismissal and wrongful dismissal are accordingly dismissed.

Employment Judge Coll

Date: 4 January 2024

Judgment sent to the parties on

5 January 2024

For the Tribunal office