

CASE NO: 6000268/2023



EMPLOYMENT TRIBUNALS

Claimant: Gordon Taylor

Respondent: Millie Welburn-Cowell

Record of a Preliminary Hearing by CVP at the Employment Tribunal

Heard at: Nottingham

Heard on: 23 August 2023

Before: Employment Judge Hutchinson (sitting alone)

Appearances:

Claimant: In person

Respondent: In person

Judgment having been sent to the parties on 31 October 2023 and written reasons having been requested in accordance with Rule 63(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. The Claimant presented his claim to the Tribunal on 10 February 2023. He claimed sex discrimination only.
2. He said that he worked as a Life Model in the East Midlands and that in October 2022 he received messages from two people who he worked for that the Respondent was starting a Life Drawing Session in Wirksworth and she was looking for models, particularly male models.
3. He had contacted Miss Welburn-Cowell by email and after a brief exchange of messages was booked for two sessions. He says that he then received a text message saying that she was cancelling his booking because a decision had been made to employ only female models. He said that he texted Miss Welburn-Cowell to ask for reasons but had received no reply.
4. He said that he was a worker as defined on the Government Website. He claimed that he had been engaged by the Respondent on a personal basis.
5. In her response Miss Welburn-Cowell explained that she had been invited to exhibit as part of the Wirksworth Art Festival in September 2022 after she had recently completed her arts degree. The gallery owner had asked her to be her assistant which she agreed to.
6. Her role was to help arrange events to do with arts and crafts and she was asked to book models for Life Drawing classes.
7. Mr Taylor had contacted Miss Welburn-Cowell to offer his services as a model. He was aware the modelling sessions were at the gallery.
8. She obtained some dates when Mr Taylor was available, but the gallery owner later decided it was more appropriate to use a female model for these classes. As a result, Mr Taylor was told that he was no longer required for these classes, but his details would be kept for future reference.
9. The matter came before Employment Judge Michael Butler at a Closed Telephone Preliminary Hearing.
10. Employment Judge Butler noted the Claimant was saying that he was not employed by the Respondent but that he was a worker.
11. Employment Judge Butler told the Claimant that he had some doubts as to whether he was a worker and pointed out that following Mr Taylor's own logic it could be said that he had no status at all until his first sitting but that never happened.

12. He decided to list the matter for a Preliminary Hearing to determine the Claimant's employment status which would then determine whether the Tribunal had jurisdiction to hear the claim and/or whether the claim should be struck out or a deposit order made on the basis that it had no reasonable or little reasonable prospect of success.
13. He then went on to make various case management orders.

The Hearing Today

14. At the hearing today the Claimant said that he was either a worker engaged by the Respondent or that he was employed by her.
15. I heard evidence from the Claimant and from the Respondent and there was an agreed bundle of documents and where I referred to page numbers it is from that bundle.

The Facts

16. The Claimant had been a Life Model now for 11 years. He works mainly in education in Universities, Colleges and Schools and is normally engaged as either a worker or an employee.
17. Miss Welburn-Cowell is a Fine Arts Graduate who exhibited at Wirksworth Art Gallery and became an employee of that gallery working as an assistant to the gallery owner.
18. Her job was to arrange events and one of the events she arranged was some Life Drawing classes. This was the first time that she had done this.
19. Miss Welburn-Cowell contacted an agent called Fred Gambino who could offer the services of Life Models. The messages between the Respondent and the agent are at pages 3 to 5 of the bundle. She was then contacted directly by Mr Taylor on 7 October 2022 who offered his services. He said that he would be "interested in modelling ". That he was extremely busy and "if you would like to give me a go I am sure we will be able to find some dates". He sent a copy of his business card, and his message is at page 6.
20. The Respondent replied on 8 October 2022 and her message is at page 7 of the bundle. She provided him with details about the classes and attached dates that she had that were available and said "maybe some will work for you? Hopefully -but if not we want to get a rota going for the New Year too so I will make that today and maybe we can work that out too! The Respondent used her own personal email account and phone.
21. There were then further exchanges over the next few days between the parties which are at pages 8 to 12 of the bundle. Mr Taylor was aware that the modelling sessions were at the gallery, and he had asked the Respondent for the address at the time of booking. Miss Welburn-Cowell asked the claimant if he could do both the 17th and 29 November and asked him what his hourly charge was. He replied, "whatever you

normally pay will be fine”.

22. There was no agreement ever reached in respect of any fee and they simply agreed two dates when Mr Taylor was available. Having agreed these dates, shortly after, Miss Welburn-Cowell was instructed by the owner of the gallery to cancel the sessions. She explained that the Tutor had requested women models and said, “ultimately it is up to her on whom she has, and no longer my decision”. She thanked him for his interest and said that he would be updated if there were any other dates in the future for models. The message is on page 13.
23. The claimant asked for an explanation saying that “it is usual to have both male and female models in order to give the artists the opportunity to draw the full range of human characteristics”. This is also at page 13. The claimant was instructed by the gallery owner not to respond to him.
24. Mr Taylor then wrote to Miss Welburn-Cowell on 18 November threatening legal action and received a response from Maria Padilla, the gallery owner, on 22 November 2022 which is at page 14 repudiating the claim and saying that it was misguided. That the gallery employed both male and female models for their life drawing classes but, on this occasion, female models were required.

The Law

25. Section 230 of the Employment Rights Act 1996 (ERA) provides as follows:

“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.

(5) In this Act “employment”—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and “employed” shall be construed accordingly.”

26. I have referred myself to a number of the well-known cases in this areas of law and in particular:

- **Autoclenz v Belcher [2011] ICR1157**
- **Uber BV & Others v Aslam & Others [2021] ICR657 SC**
- **Readmixed Concrete Ltd v Minister of Pensions and National Insurance [1968] 1ALL ER433**
- **Pimlico Plumbers Ltd v Smith [2018] UKSC 29**

27. It is important in these cases to look at the true nature of any agreement between the parties and sometimes it is easy to see that a particular Claimant is an employee or is a worker and in some cases it is not.

28. As was said by Mr Justice McKenna in the Readymix Concrete case:

“A contract of service exists if these three conditions are fulfilled:

- i) A servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of subservice for his master.*
- ii) He agrees expressly or impliedly that in performance of that service he will be subject to his control in a sufficient degree to make that other master.*
- iii) The other provisions of the contract are consistent with it being a contract of service.”*

My Conclusions

29. In this case I am satisfied that the Claimant was not engaged in anyway by the Respondent either as an employee or as a worker.

30. The Claimant contacted the Respondent to offer his services as a Life Model. I am satisfied that he knew that if he was going to enter any arrangement at all it would be with the gallery or the gallery owner and not the Respondent who simply worked as an assistant at the Gallery.
31. At no stage did they do anything other than agree two dates when the Claimant was available to be a Life Model for the gallery.
32. There was no discussion about what fee he would receive or who he would receive that fee from.
33. Subsequently Miss Welburn-Cowell simply acted on instructions by cancelling the arrangement because the gallery owner wanted to have a class whereby female Life Models would be used.
34. It can be seen from all this that there was never any agreement either orally or in writing that in consideration of any remuneration Mr Taylor would provide his own work and skill in the performance of his duties for Miss Welburn-Cowell.
35. Nor was there ever any agreement that he would at any stage be under the control of Miss Welburn-Cowell. The Claimant always knew that if he did undertake work it would be for the gallery not the respondent.
36. There was in fact no contractual arrangement between them at all. The Employment Tribunal therefore does not have any jurisdiction to deal with this complaint.
37. I am satisfied that this is a claim that is misconceived as the Claimant was neither an employee or a worker for the Respondent in this case and his claim fails and is dismissed.

Employment Judge Hutchinson
Date: 7 December 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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