Case Number: 3334608/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr Mark Ter-Berg	**v**	(1) Simply Smile Manor House Ltd (in voluntary liquidation) (2) - (3) Mr Parul Malde (4) Dr Colin Hancock

Heard at: Bury St Edmunds (by CVP) **On:** 30 October 2023

Before: Employment Judge K J Palmer (sitting alone)

Appearances

For the Claimant: Mr Jamie Jenkins (Counsel)

For the Respondent: (1) No representation
(2) Celine Heinz (Solicitor)
(3) Mr S Butler (Counsel)
(4) Mr S Butler (Counsel)

RESERVED JUDGMENT
Pursuant to a Public Preliminary Hearing

1. It is the judgment of this Tribunal that the Claimant is not a worker under s.230 of the Employment Rights Act 1996. The Claimant's claims fall away and the seven day Full Merits Hearing, listed to take place before a full Tribunal at the Norwich Employment Tribunal on 19-27 September 2024, is vacated.

RESERVED REASONS

1. This is a reserved judgment pursuant to a Public Preliminary Hearing heard by CVP in the Bury St Edmunds Employment Tribunal.

2. This matter has a long history.

3. I am grateful to Counsel for the Claimant and Counsel for the third and fourth Respondent, setting out in writing, skeleton arguments which were before me.

4. The task before me today is as set out in the Order of Judge Michell, sitting alone on 27 September 2023. That is, whether the Claimant in these proceedings, had worker status. A one day time estimate was given.

History of this matter

5. It is necessary that I set out in brief, what has been an extensive history in relation to this matter. The Claimant originally presented his claim to the Tribunal on 5 November 2018. In it he pursued various claims dependant upon his status as being that of an employee and/or worker.

6. Initially he pursued an injunctive claim for interim relief, which was successful until a Preliminary Hearing before EJ Ord determined that the Claimant was not an employee and the Interim Relief Order was dismissed.

7. Judge Ord's Judgment that the Claimant was not an employee was appealed to the Employment Appeal Tribunal. EJ Ord's judgment was dated 26 February 2020. On 4 October 2022 the Judgment of HHJ Aeurbach was handed down, overturning the decision of EJ Ord and referring the matter back to the Tribunal to reconsider the question of employee status.

8. That referred question came before me and in February 2023 I gave various directions for a Preliminary Hearing to take place to determine the issues remitted by the EAT. Those issues were aired before me on 15 and 16 March and a Judgment was sent to the parties on 19 April 2023. I determined to restore EJ Ord's Judgment that the Claimant was not an employee.

9. Further, at that time, all claims against the second Respondent were struck out and the second Respondent was removed as a Respondent in the proceedings.

10. At no point in the process to that point in time had the Claimant's status been examined as to whether he was a worker, merely, whether he was or was not an employee.

11. I determined that he was not an employee. That judgment was not appealed.

12. Subsequently, Judge Michell has listed this hearing before me to determine whether the Claimant was or was not a worker. The issue as to whether he was an employee, having already been determined.

13. Judge Michell has also made further Directions including listing this matter for a Full Merits Hearing on 19-27 September 2024.

14. If my conclusion in this hearing is that the Claimant is not a worker, then the remainder of his claims will fall away and will be dismissed and the Full Merits Hearing can be vacated.

15. Both the Claimant and the third and fourth Respondent are represented by Counsel at this hearing and I am grateful to them for their written submissions and their further oral submissions before me.

16. My Judgment, pursuant to the hearing on 15 and 16 March 2023, determined that the Claimant was not an employee.

17. I do not propose to repeat the contents of that judgment here. However, in essence, I agreed with HHJ Aeurbach's conclusion that EJ Ord's interpretation of a substitution clause in the contract entered into between the Claimant and the first Respondent was not a clause which granted an unfettered right of substitution. However, I determined that this did not affect the outcome of the determination of the Claimant's status as an employee and I found that he was not an employee.

18. As directed and ordered by HHJ Aeurbach in his Order pursuant to the appeal, I made it clear in that judgment that I was only dealing with a very narrow issue which was that remitted back to the Tribunal by the learned Judge in the EAT. I made it clear in that judgment that I was bound by findings of EJ Ord, save in respect of his findings on the correct construction and meaning of the words of Clause 36 in the Agreement entered into by the Claimant with the first Respondent. It is worth pointing out that the first Respondent is in voluntary liquidation and has chosen not to be represented. The third and fourth Respondents are those who are represented.

19. It is important to realise that the findings of EJ Ord, save for his finding as to the construction of Clause 36, stand and it is on the basis of those findings (save for that relating to his interpretation of clause 36) that I reached my judgment on the Claimant's status as an employee.

20. I set out some of those findings which are of relevance and importance at paragraph 50 of my judgment of 15 and 16 March 2023 and I repeat them here:

    20.1 Prior to the 1 April 2013 the Claimant had been the Principal of two dental surgeries, operating as a single practice. He purchased them

in 1992. He also set up an additional NHS practice in Brundall. Those business interests were sold to the first Respondent in 2013.

20.2 Whilst he was the Principal of the practices, the Claimant issued to those dentists working in the practice with him, the standard form of British Dental Association Associate Contracts. He then entered into a contract as an associate dentist with the first Respondent on 1 April 2013 on those terms.

20.3 An example of the associate agreement as issued by the Claimant whilst he was Principal, does not differ in any material way from that which he entered into on 1 April 2013.

20.4 The Claimant accepted in his Evidence in Chief, that when he was initially engaged by the first Respondent he was engaged as a self-employed contractor. His case was that matters changed over time so he:

> "realised that the employment relationship was not one of a self-employed contractor but more of an employer/employee"

20.5 Importantly, the Claimant accepted that when he entered into the agreement, which was not changed in any material way (other than the Claimant giving up his role as clinical lead, which was an addendum annexed to the agreement in any event). During the course of his engagement with the first Respondent he was contracted as, and intending to be, and was being engaged by the first Respondent, as a self-employed contractor.

20.6 The intension of the parties when they entered into the agreement therefore was, as the parties both agreed, the Claimant would not be an employee of the first Respondent.

20.7 When asked by me during the course of closing submissions, what had changed in the agreement in terms of its implementation or the parties intentions during the currency of the agreement, Counsel for the Claimant relied solely upon the fact that the substitution/locum clause (clause 36) had never been used. He had accepted, on the Claimant's behalf, that it was a genuine clause. The Claimant referred in his evidence to it being "untenable". When asked to explain this, the issue related not to the efficacy of practicality of the implementation of the clause but to the financial implications to him (i.e. that if he used a locum to carry out work, his net income would be substantially reduced).

21. Those are the extracts from Judge Ord's Judgment which I repeated in my March Judgment which I indicated in that Judgment I am bound by. I repeat that I am bound by those.

22. I refer to paragraphs 23 and 24 of my March Judgment where I referred to submissions made to me by Mr Butler, who was before me at the March hearing.

23. What he drew to my attention was that it was very clearly the intention of both parties that the Claimant entered into the agreement as a self-employed contractor. He repeats these submissions before me in this hearing, which is a hearing to determine worker status. Paragraph 14 of his submissions he reminds me that the Claimant always confirmed in his evidence to Judge Ord that it was always his intention to be a self-employed contractor. The Claimant sent numerous emails to the first Respondent confirming that this was the case.

24. At paragraph 56 of my March Judgment I also indicate that I am bound by EJ Ord's conclusions at paragraph 98 of his Judgment. I set those out in four paragraphs. They are as follow:

    24.1 The agreement between the parties sets out that no relationship with employer/employees created by it.

    24.2 That was the intention of the parties at the time and the parties were content to proceed on that basis.

    24.3 The Claimant asserted his position as a self-employed contractor on two occasions in writing and never asserted that he was an employee during the currency of his work with the Respondent.

    24.4 The Claimant has not established that there was control over his work to make the Respondent his employer.

25. I indicated at paragraph 57 that I am bound by those conclusions and I go on to say at paragraph 57, that even allowing for my conclusion as to the interpretation of paragraph 36, the irreducible minimum in the Ready Mixed Concrete test is not met.

26. That conclusion at paragraph 57, both in respect of the fact that I am bound by the conclusions of Judge Ord and my further statement that the irreducible minimum test is not met, have not been the subject of an appeal.

27. It is therefore important to remember that those conclusions must be carried through into the examination and determination of the worker status issue.

28. I am not permitted to reopen those issues in arriving at a conclusion as to worker status, that would plainly be wrong.

Submissions before me.

29. Mr Butler, on behalf of the third and fourth Respondents, ventures nine points by way of submission. I have those submissions in writing and do

not propose to repeat them in full in this Judgment. However, he refers me to paragraph 49 of my March Judgment which, of course, relates to the Claimant's employment status where I indicate that the findings of fact by Judge Ord, by which I am bound, make it clear that the intension of the parties, as was expressed by the Claimant in the giving of his evidence was always that the Claimant was other than an employee.

30. He reminds me that the Claimant confirmed in his evidence before Judge Ord that he was at liberty to do as he pleased. He confirmed that he did not need to work solely for the first Respondent. He was at liberty to work for other dental practices. He had a discretion whether to attend at the practice to undertake the work.

31. He reminds me that Judge Ord made it clear that pursuant to the evidence he heard, nothing changed between the parties from the initial agreement. He says the agreement is in clear and plain language and it states that the Claimant intended to be self-employed. That has not changed.

32. He refers me to the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB497 and states that a contract of personal service only exists if the three stage test is met.

33. He refers me to paragraph 30 of my March Judgment where I recorded a submission made by the Claimant's Counsel at that hearing. That submission attempted to persuade me that as a result of Clause 36, not conferring an unfettered right of substitution, it must follow that the third test was made out, namely, the contractual provisions are consistent with ordinary contracts of service. He reminds me that at paragraph 57 of my March Judgment, I rejected this and concluded that the irreducible minimum in Ready Mixed Concrete was not met.

34. He reminds me that I concluded that the first Respondent did not have a degree of control over the Claimant, the Claimant was not integrated into the business, and there was no requirement to carry out services personally. There is no mutuality of obligation. I do not accept that in my March Judgment I went as far as to say there was no requirement to carry out services personally. That is something I have to conclude today but I am bound by the findings in my March Judgment and those I have expressed I am bound by in the Judgment of EJ Ord.

35. I do, however, at paragraph 59 of my March Judgment, conclude that Clause 36 in the Claimant's agreement, falls fairly and squarely into the third example given by Sir Terrence Etherton MR at paragraph 84 of his Judgment in Pimlico Plumbers Ltd v Smith [2018] UKSC29 where he says:

> "Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance"

36. I conclude that I agreed with Mr Butler's submissions on that occasion that there are exceptional facts in this case. Those exceptional facts are set out by Judge Ord in his conclusions at paragraph 98 by which I am bound. I go on to say that the limited instruction of Clause 36 does not defeat that true intention.

37. My conclusions as set out, have not been appealed.

38. Mr Butler goes on to refer me to the case of Redrow Homes (Yorkshire) Ltd v Wright [2004] EWCA Civ 469 where the Court confirmed that whether or not a person is a worker depends entirely on the terms of the contract construed in the light of the circumstances in which it was made including the parties real intention.

39. He reminds me that the role of the Tribunal is to identify the true agreement between the contracting parties. He refers me to various other Authorities including the case of Sultan-Darmon which was authority for the fact that, having concluded that a Claimant was not an employee, the Employment Judge should have used the same findings of fact and analysis to determine the question of whether he was a worker.

40. Mr Butler reminds me that my construction of Clause 36 as being on its face, consistent with personal service does not detract from the role of the Tribunal to have regard to all relevant factors to determine the question of whether a person is a worker. The Tribunal will genuinely consider issues such as control, the predominant purpose of the agreement and, to a lesser extent, subordination. He says there is no single key to unlock the words of the statute in s.230 and there has to be an analysis of all relevant factors to determine whether a person comes within the definition of worker. He reminds me that in my March Judgment I upheld Judge Ord's conclusion that the first Respondent did not have a degree of control over the Claimant, the Claimant was not integrated into the business, and there was no requirement to carry out services personally. He says there was no mutuality of obligation.

41. He finally reminds me that the limited construction of Clause 36 cannot defeat the true intention of the contracting parties.

42. Mr Jenkins' submissions are brief. He accepts the weakness of the Claimant's position in respect of this Preliminary Hearing is that I used the same wording at paragraph 59 of my March Judgment "Exceptional facts", as is used in the Pimlico Case. However, he goes on to say that when it is read as a whole, my conclusions relate to the broader issue of employee status and not the specific issue of personal service. He says this for the following reasons:

    42.1 He says that the finding of "exceptional facts" are essentially findings of EJ Ord relating to matters relating to employee status as a whole, including intensions. He says it is difficult to see how the use of intent, which is live in most disputes relating to worker status

can be considered exceptional for the purposes of the issue of personal service.

42.2 He says the findings of Judge Ord, as regards intent focused on the issue of whether the Claimant was self-employed or an employee, go well beyond the issue of personal service.

42.3 Accordingly, he says that when I reference the findings of EJ Ord as regards intent and say that the limited constructions of Clause 36 does not defeat that true intention, I must be referring to the intention as regards self-employed or employee status and not the specific issue of personal service.

43. He reminds me that my March Judgment dealt with only the issue of employee status not worker status. He said I did not rule on the specific issue of personal service.

44. He suggests that my judgment did not decide the issue of personal service as I was very careful to leave the door open for further arguments as to worker status.

45. He says in the event that there have been no further substantive arguments or evidence on worker status and the point does now turn on the interpretation of Clause 36 that interpretation has been settled and accordingly the Tribunal is invited to conclude that the Claimant was required to provide personal services and is therefore a worker at the times material to this claim.

46. I am most grateful for those submissions.

The Law

47. The law on worker status is governed by statute and set out at paragraph 230 of the Employment Rights Act 1996. This states as follows:

"(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."

48. It is for the Tribunal to make findings of fact and then with the help of the authorities, apply those facts to the statutory test.

49. In this case, only limb (3)(b) is relevant as my March Judgment has already determined that the Claimant is not an employee.

50. So the issue here is whether there is an obligation to perform personal services.

51. Those authorities I have referred to in my March Judgment remain relevant. They include :
Autoclenz Ltd v Belcher [2011] UKSC 41,
Pimlico Plumbers Ltd and another v Smith [2018] UKUT UKSC29,
Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance [1967] 2QB497
Redrow Homes (Yorkshire) Ltd v Wright [2004] EWCA Civ 469
which tells me that the terms of the contract entered into, in light of the parties real intensions, is cricital.

52. It is important to remember that a Court can conclude that terms in a contract, including a substitution clause is not reflective of the reality of the working relationship between the parties. That principle was set out in Autoclenz Ltd v Belcher.

53. In Town and Country Glasgow Ltd v Munro EATS 0035/18, the EAT applied the analysis of Sir Terence Etherton MR in the Pimlico Plumbers case.

54. In the case of Community Dental Centres Ltd v Sultan-Darmon [2010] IRLR1024 to which I have been referred, the EAT overturned a decision of the Employment Tribunal on the basis that there was an obvious inconsistency between the Tribunal's conclusion that the Claimant in that case was not an employee because there was no mutuality of obligation and its subsequent conclusion that he was a worker. In the EAT's view, the finding that there was no mutuality of obligation when considering the issue of employee status was also determinative in showing that he was not a worker. Under the contract, SD (the Claimant) was plainly entitled to decide for himself whether to turn up and provide dental services. This right did not depend solely on whether he was unable to provide services but whether he was willing to do so. Also, this was sufficient to decide the appeal in the company's favour. The EAT also held that the Claimant's unfetted right to appoint a substitute meant that he could not be a worker.

55. In Uber v BV and others v Aslam and others [2021] ICR657, the Supreme Court held that the determination of worker status is a question of statutory interpretation, not contractual interpretation and that it is therefore wrong in principle to treat the written agreement as a starting point. The correct approach is to consider the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependant position in relation to a personal organisation who exercises control over their work.

Conclusions

56. As I have indicated, the conclusions I arrived at in my March Judgment I am bound by. Those conclusions were arrived at in my March Judgment in light of binding findings in EJ Ord's Judgment.

57. I was at great pains in my March Judgment to make it clear that the issue of whether the Claimant was a worker was not before me. It had not been before EJ Ord. My conclusions, therefore, related specifically to the Claimant's employee status.

58. Despite the assertions of Mr Butler, I did not draw any definitive conclusion in that Judgment as to whether there was a requirement to carry out services personally or not.

59. At paragraph 49 I did make it clear that pursuant to the findings of EJ Ord, the intention of the parties was always that the Claimant was other than an employee.

60. At paragraph 57 I referred to the findings of Judge Ord at paragraph 98 of his Judgment and indicated that I was bound by those conclusions and that therefore, even applying my construction of Clause 36 (which agreed with HHJ Aeurbach, and disagreed with EJ Ord), I found that the irreducible minimum in Ready Mixed Concrete, under the test set out, was not met.

61. As to the substitution clause, I found at paragraph 58 and 59, that the clause fell within the third example given by Sir Terence Etherton MR at paragraph 84 of his Judgment in Pimlico Plumbers. I found that there were exceptional facts. The true intention of the parties was reflected in the agreement. I was bound by Judge Ord's findings that the Claimant had not established that there was control over his work. The Claimant also asserted that his position as a self-employed contractor was clearly what was intended between the parties and had remained the same throughout the efficacy of the agreement. Those exceptional facts render Clause 36 inconsistent with personal performance.

62. Mr Jenkins argues that those cannot amount to exceptional facts. However, my March Judgment and the conclusions drawn at paragraphs 58 and 59 has not been appealed. It would be wrong for me to depart from those conclusions now. I repeat that the limited construction of Clause 36 does not defeat the true intention of the parties.

63. Applying the Autoclenz v Belcher principle, a Tribunal must look at the real arrangement between the parties rather than be a slave to the written agreement.

64. Applying the reasoning of the EAT in the case of Community Dental Centres Ltd v Sultan-Darmon, set out above, it would be inconsistent for me to find that the Claimant is a worker in light of my conclusions that

there was a failure to meet the irreducible minimum in the Ready Mixed Concrete test.

65. Whilst I made no findings that there was no requirement to carry out services personally, I do so now, based on the conclusions drawn in my March Judgment.

66. There was no mutuality of obligation. The Claimant was plainly entitled to decide for himself whether to turn up and provide dental services. It was clear in his evidence before EJ Ord, set out in EJ Ord's Judgment by which I am bound, that this was the case and accepted it. That state of affairs, which is the true state of affairs which existed between the parties is inconsistent with the suggestion that there was a requirement to carry out personal services.

67. For the reasons I have set out above, the (b) limb is not satisfied. The Claimant is not a worker.

68. His remaining claims, therefore, fall away and the full merits hearing will be vacated. His remaining claims are dismissed.

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Employment Judge K J Palmer

Date: 25 January 2024

Sent to the parties on: 29 January 2024

For the Tribunal Office