



EMPLOYMENT TRIBUNALS

Claimant: Mr M Fatah
Respondent: C3 Construction Limited
Heard at: Nottingham Tribunal (in public)
On: 12 December 2023 & 18 January 2024
Before: Employment Judge N Wilson

Appearances

For the claimant: Mr Fatah
For the respondent: Mr Nuttman (solicitor)

RESERVED JUDGMENT

1. The claimant was not an employee within the meaning of section 230 (1) of the Employment Rights Act 1996, nor was he a worker within the meaning of section 230 (3) of the Employment Rights Act 1996. His claim for discrimination on the grounds of race is therefore dismissed.

REASONS

Apology

1. I want to apologise to the parties for the delay in delivering this reserved Judgment. Thank you for your patience.

Background

2. The claimant alleges that he has worked for the respondent ('C3') as a ground worker on a construction site from 1 March 2022 until his engagement was terminated in May 2023 and that he was subject to less favourable treatment because of his race in that he was not provided with a company van and a fuel card/travelling allowance.

3. The respondent is a specialist groundworker and civil engineering contractor.
4. The respondent denies that it employed the claimant or that he was a contract worker and they were acting in the capacity of principal.
5. The respondent claims that the claimant entered into a contract with Hudson CIS (Guernsey) Limited ('Hudson'), a CIS contract audit and payroll provider operating in the UK, for the supply of services as a self-employed contractor ('the Contract').
6. The Contract it is alleged, provided that the claimant would procure labour (either his own or others) which would be supplied under the Contract to the respondent and operated under the CIS scheme.
7. It is the respondent's case therefore that the claimant was truly self-employed, and the Tribunal has no jurisdiction to hear his claim.
8. The claimant at an earlier preliminary hearing explained that his case is that while paid via Hudson, the respondent had significant control over his work and supplied him with the tools that he needed, he contends therefore that he was employed by them for the purposes of the Equality Act 2010 ('EQA')
9. The respondent requested a Preliminary Hearing to determine the issue of jurisdiction. The case is not listed for a final hearing until 2025 for 3 days. It is proportionate in the circumstances to have a Preliminary Hearing to determine this issue.
10. The claim is about direct race discrimination. The respondent's defence is the claimant is self-employed and denies less favourable treatment on the grounds of race.
11. The purpose of the preliminary hearing is to determine the following issues.
 - a) Whether the claimant was an employee of the respondent within the meaning set out in section 83 EQA.
 - b) Whether the respondent was a principal and the claimant a contract worker pursuant to section 41 EQA 3.
 - c) If time permits: The respondent's application for the claim to be struck out or a deposit order made on the grounds that the claim has little or no reasonable prospect of success.
 - d) If time permits: Any application by the claimant to amend his claim.
12. We did not have time to deal with any applications and the Judgment was reserved due to the time closing submissions were made on 18 January 2024.

The Complaints

13. The claimant is making the following complaints:

13.1 Direct race discrimination about not being provided with the following benefits:

13.1.1. Not being provided with a company vehicle

13.2.2. Not being provided with a fuel card or not paid travel allowance.

The Issues

14. The issues the Tribunal will decide are set out below.

Employment status

14.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

14.2 Was the claimant an employee of the respondent within the meaning of section 83 of the Equality Act 2010?

14.3 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

Documents and evidence

15. I have carefully considered the evidence referred to in the bundle and the oral evidence given to me at the hearing, even if I do not refer to it all in explaining this decision. I refer to such of the oral evidence as is necessary to explain my decision. Where necessary I have referred to page numbers in the bundle.

16. The respondent had filed a 196-page bundle plus a witness statement bundle.

17. I heard sworn evidence from the claimant, Mr Fatah.

18. I also heard sworn evidence on behalf of the respondent from:

a. Chris McCathie (Managing Director of C3)

b. Josh Brown (Independent contractor providing site services as a Contract Manager to C3)

c. Dan Davies (Compliance Manager for Hudson)

The Law

19. Section 39(2) Equality Act 2010 provides that:

An employer [A] must not discriminate against an employee of A's [B]- (a) as to B's terms of employment...

20. Section 230 of the Employment Rights Act 1996 states:

(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 contracts, whether expressed 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.

21. Section 83 Equality Act 2010 states:

(2) Employment means-

- a. contract of employment, a contract of apprenticeship, or a contract personally to do work.*
- b. Crown employment.*
- c. Employment as a relevant Member of the House of Commons Staff.*
- d. Employment as a relevant member of the House of Lords staff.*

22. Contract workers pursuant to Section 41 Equality Act 2010-

(1) A principle must not discriminate against a contract worker-

- a. As to the terms on which the principle allows the worker to do the work.*
- b. By not allowing the worker to do or to continue to do the work.*
- c. In the way the principle affords the worker access or by not affording the worker access to opportunities for receiving a benefit, facility or service by subjecting the worker to any other detriment.*

(5) A 'principle' is a person who makes work available for an individual who is-

- a. Employed by another person and.*
- b. Supplied by that other person in furtherance of a contract to which the principle is a party, (whether or not that other person is a party to it).*

(6) 'Contract work' is work such as is mentioned in subsection (5).

(7) A 'contract worker' is an individual supplied to a principle in furtherance of a contract such as is mentioned in subsection (5) (b)

23. The Supreme Court in **Uber BV V Aslam [2021]** UKSC 5 held that the definition of 'employee' under the Equality Act 2010 in effect includes the definition of 'worker' as understood under section 230 (3) (b) Employment Rights Act 1996.

Findings of Fact

24. The claimant is a member of the Construction industry scheme (CIS). In order to be in this scheme, he has to be personally registered with the HMRC as being self-employed in the construction industry.
25. The claimant has a tax advisor (RDG Accounting) and his tax return for 2022 declared he was self-employed, and he received a tax refund of £1,311.00 for this year because of his self-employed status. He also claimed expenses of £1,000 from this period of self-employment.
26. In his 2023 tax return the claimant again declared himself as self-employed. For this period of self-employment, he claims business expenses of £2,504 relating to car, van and travel expenses. He also claims maintenance for property and equipment at £4,000.
27. During this tax year because of his self-employed status, the claimant paid tax under the CIS scheme of £6,898 against a turnover of £34,000 because he was only taxed at 20%. Of this, he reclaimed £2128.
28. During the tax year 2022 / 2023 the claimant earned additional earnings on a self-employed basis, in addition to those earnings paid to him by Hudson (pages 187 and 100).
29. It is clear from his tax returns the claimant claimed expenses consistent with him being a business on his own account.
30. The claimant commenced his work with C3 via an agency called Farsight Recruitment Limited. The claimant was contracted with this recruitment agency on a self-employed basis.
31. After approximately 13 weeks the claimant was given an opportunity to contract to work for C3 through Hudson.
32. The respondent asserts that the claimant's rate of pay would increase as a result of contracting through Hudson (as he would not be paying an agency fee). However, the claimant denies there was any discussion about an increase in his rate of pay. The claimant initially denied he ever negotiated any rates of pay but when pressed he accepted he negotiated fuel allowance after not receiving this initially.
33. The claimant then entered into a contract with Hudson (not C3) albeit clearly in evidence he did not appear to understand the role of Hudson. The claimant's position is that he signed paperwork for C3. It is clear, however, the claimant entered into a contract with Hudson and not C3 (page 58). There is no suggestion being made by the claimant that he was under any undue pressure to sign the contract.
34. The claimant accepted that once he had entered into the contract with Hudson for provision of services that at no point was he paid directly by C3.

35. The claimant signed the contract with Hudson on 10 August 2022. The contract is for the future provision for services [self-employed] between Hudson CIS [Guernsey] Limited and the claimant who is referred to in the contract as a freelance operative. The claimant also has a plain English declaration within the same contract. The declaration states '*I understand my contract is with Hudson CIS (Guernsey) Ltd and no contract with the client company*'.
36. The first point of the declaration states '*although I am self-employed, I was given the option of providing my self-employed services on an employed basis for holiday pay, income tax and National Insurance purposes only*'. The claimant, however, chose to continue to be self-employed.
37. The claimant in evidence did not dispute that he was self-employed. He repeatedly referred to being self-employed for tax purposes and that he was for tax purposes self-employed. It is evident this was so that he could enjoy tax advantages.
38. The claimant denies the contract having been explained to him. However, on questioning he accepted he had read it and I find it unlikely that he would not have at the very least understood the plain English explanation that he had the option of remaining self employed or not. He was clearly aware of his self-employed status given the information he had given to his tax advisor for submission of his tax returns. He also clearly had the intention of remaining self employed whilst doing work for C3. When questioned by me he was clearly aware of paragraph 5 of the declaration but said he did not think it applied to him. There was no evidence before me that he was informed it did not apply to him or that he had any real basis for believing so. He also when pressed clearly accepted that he was given the option of being employed by C3, but he chose to remain self-employed. I find it is clear the claimant knowing he could have been employed by C3 in the alternative chose to remain self-employed. I find the contract is clear in that it is between Hudson and the claimant and not the claimant and C3 and this ought to have plain to the claimant when signing the Contract.
39. The claimant also initially denied that he had the right of substitution, notwithstanding paragraph 5 of the declaration clearly stating that he was free to send in a replacement to perform his tasks, being any person or people of his choosing who he considered has appropriate skills and experience to perform the works to an acceptable standard. The claimant initially denied the respondent permitting him to do this. He later changed his evidence saying that as he was not a company, he did not have anyone to send. I find that the claimant had this right of substitution, albeit he may not have exercised the right. I was persuaded by the evidence of Chris Mcathie on this point. The claimant's evidence was that he did not have a company status or employ others to be able to send a substitute. However, I find paragraph 5 is clear in its intention and the claimant read it before signing the contract.
40. Paragraph 5 of the declaration in the Hudson contract also confirms that he is not obliged to accept any work offered and that he was not expecting to be supervised, directed or controlled by any person and that he was free to work elsewhere at any time. His evidence was that he was supervised and had no qualifications. The claimant also denied being a skilled groundworker however I take note that it is a condition of the scheme that one has to register as working in the construction

industry as a trade. Without this accreditation you are not permitted to go onto a construction site and in order to get an accreditation you have to have certain skills. I do not accept the claimant would not have had a sufficient degree of skill for the role he was engaged to perform i.e. that of a groundworker. I did not hear any real evidence to persuade me that he was a servant who is subject to the directions of an employer. The claimant relies on the fact that he had someone helping him and that his work was signed off. However, I do not find that this demonstrates a sufficient degree of control as I accept the evidence of the respondent's witnesses that it would be usual on a construction project for different works to be signed off. Without any further evidence of supervision and control this signing off of his work is not persuasive that the claimant was not a competent and skilled groundworker working without direct supervision, direction or control.

41. The claimant denied ever signing into the accounts app to see his wages payments (page 62 and 63). The relevance of this being the respondent states signing in to the app forces you to see the same contract and declaration as you have to click to accept it and agree the contract terms again every time you log into the app. It also states if any of the declaration stops being true that he is to tell Hudson. However, page 61 of the bundle shows Mr Fatah's login times and dates on the connect app contrary to his oral evidence. He also accepted he received payment documents in the post which also have the same declaration. I find Mr Fatah will have seen the declaration as set out in the Hudson contract on multiple occasions aside from the instance when he signed the contract. Further I find the declaration is clear as to what the claimant, Hudson and the client (C3) are agreeing to. I find it improbable Mr Fatah did not know what arrangement was being entered into by virtue of this contract. I find the claimant's oral evidence inconsistent with the documentary evidence in relation to this issue.
42. The respondent established by going through the claimant's works records showing his working days that for a period of 10 weeks he only worked 3 full weeks and for the remaining 7 weeks the claimant did not work full days during those weeks. I find the claimant clearly had a high degree of flexibility with his working hours and when he did and did not work.
43. Since ceasing work for C3 the claimant has signed another Hudson contract in or around July 2023 with Shanko. The claimant continues, by virtue of this contract, to maintain a self-employed status.
44. I accept the evidence of Dan Davies, the Compliance manager at Hudson, that they carry out site audits to determine employment status. He gave clear and compelling evidence regarding the contract and the relationship between the parties. He confirmed Hudson visit numerous C3 sites (82 sites over nine years, 16 of which he has visited personally). They do so to review workplace circumstances, interactions between clients and subcontractors to evidence a lack of supervision direction and control. Whilst Mr Fatah relies on the site giving him instructions, for example to fix steel at a certain plot as evidence of supervision and control I accept the evidence of Mr Davies which drew a distinction between control relating to the manner in which the services are to be provided. I was satisfied with his evidence that whilst an instruction may be given, for example to pick up steel, the subcontractor could choose to do it without anyone telling them what to do every step of the way. I was also satisfied with his explanation that someone has to sign the work off because it is a building site and this is necessary

for quality issues. I accept the unchallenged evidence of Mr Davies that the act of getting to that sign off point is down to the subcontractor. He gave clear evidence that it is a key task of Hudson being an intermediary that they have to satisfy the HMRC of their auditing procedures. Mr Davies clarified that when construction companies engage with Hudson, they do it for supply of labour. The claimant made a decision at some point to come away from the agency he was at previously to providing his services on a self-employed basis to C3 away from the agency. Hudson's role was to formalise those intentions.

45. I also accept Mr Davies' evidence that there were no conditions placed upon the claimant if he wanted to delegate his work to someone else and send someone in his place, aside from they needed to be suitably skilled and experienced to carry out the work. I accept his unchallenged evidence that they would easily be able to have a site induction as people come and go on site every day. He also gave unchallenged evidence that the claimant did not need to obtain permission from anyone to send anyone in his place. I accept his evidence supported by the Contract that the claimant could either send someone in his place or bring someone in to assist him. I also accept his unchallenged evidence that C3 could not refuse the right to substitution and that the claimant did not need to tell anyone that he was sending someone in his place. I accept his unchallenged evidence that it was common for different people to turn up on construction sites and to make themselves known to the site foreman so that they could go through the health and safety induction.
46. Whilst Mr Fatah disputed his ability to bring someone else in and raised with Mr Davies that they would have required insurance and asserted C3 would not accept him bringing someone in to work I accept Mr Davies' cohesive evidence that it was common place for a groundwork company to engage with labour only bricklayers who will be inducted by C3 and they may in turn engage other bricklayers. He explained the claimant could bring someone else in with him or send someone in his place and they could be inducted. They would provide labour only services and therefore the bricklayer who brought in someone else to assist him or exercised his right of substitution could then pay the others who they had brought into help them. They did not need insurance as they would be insured by C3 as labour only. I accept that Mr Fatah could therefore have brought someone to assist him and could have exercised his right of substitution. Mr Fatah does not advance any evidence of any occasion where he sought to exercise this right, and it was refused. This does not mean he did not have the right to do so, and I find that he did indeed have this right.
47. Mr Fatah also seeks to rely on the wearing of a yellow vest, hard hat and a high vis jacket with the C3 logo as evidence of employment status. I accept the clear explanation given by Josh Brown in evidence that wearing of PPE is for health and safety reasons and the purpose of the C3 logo on the high vis jacket is to identify which of the workers on site are self-employed for C3 given the different people on site.
48. Mr Brown's evidence was consistent with that of Mr Davies in so far as the claimant's ability to delegate his work and to exercise his right of substitution was concerned. He confirmed any replacement simply needed to have the relevant skills and experience. I accept his evidence that the claimant could bring in someone else or send anyone else in his place whenever he wanted to. Again,

his evidence was consistent with that of Mr Davies in that the process for substitution did not require anyone needing to be informed in advance and the replacement would simply attend the site induction. He also confirmed their work would be inspected and monitored for quality standards in the usual way as was the claimant's.

49. The claimant's position is that he was working for an agency and then was offered a job with C3. He relies on the fact that he did not have to make any application to work for them and it was C3 who offered him work directly. It is clear from Mr Fatah's evidence that he is confused as to the role of Hudson. It is also clear from his evidence that he signed the contract with Hudson having read the plain English declaration accepting that he was a self-employed operative and was free to send in a replacement to perform tasks and that he was free to work elsewhere at any time. His tax returns show he did work elsewhere during the time he was working with C3. Whilst Mr Fatah seeks to persuade the Tribunal his self-employed status was for tax benefits only and that for all intents and purposes, he was employed by C3 I did not hear any cogent evidence to support this assertion from the claimant. To the contrary I heard consistent and clear evidence from the respondent's witnesses as to the Hudson contract, the intention of the contract and what happened in practice.
50. Mr Mcathie clarified how someone may come to Hudson from an agency. He explained where an agency worker does a good job conversations will happen between the worker and somebody on site who is a supervisor and as part of this they would discuss pay and the fact that the worker may be better off working through Hudson rather than an agency. There would then be an induction process for people working through Hudson whereby the training manager would deliver training and as part of this, the terms of the contract would be explained. His evidence is supported by pages 64 to 67 of the bundle which show Mr Fatah has attended new starter training and undertaken knowledge tests.
51. The claimant seeks to persuade the Tribunal that he was told he would be working for C3 direct and was not aware he would be working through Hudson. He also denies having any discussions about pay. However, this is contradicted by his own evidence that he read the contract with Hudson, made a declaration in that contract that he was self-employed and further made the same self-employed declaration on his tax returns. It is also inconceivable even on his own case that where he was leaving an agency, he would not have had any discussion about pay especially if he believed he would now be working directly for C3. His own evidence confirms he did in fact negotiate a fuel allowance.
52. Based on the respondents' witnesses' evidence, I do not find that Mr Fatah was ever told that he would be working for C3 direct. I find that he was aware of his self-employed status. I find that whilst he may not have exercised his right of substitution (and may have been mistaken that this was an option for companies only), in reality he had the right and could have exercised it at any time and that the right is clearly described in the declaration to the Contract he signed.
53. In arriving at my decision, I also take note of the inconsistencies in the claimant's evidence. In his written statement he states he had set hours working 7:30am to 4:30pm which were extended to 5:00pm. His statement also says that he did not have his own tools and he could not leave the construction site and go home

whenever he wanted. He says he was controlled by C3 in terms of him being told what to do and managing his work time and hours. However, this is contrary to the documentary evidence at pages 104 and 105 of the bundle showing his working pattern for a 10 week period. He also accepted in evidence that he had the ability to say he was not coming in but he then asserted he could not choose when to work or not which I find is contradicted by the documentary evidence which plainly shows he was not working full days or full weeks.

54. Whilst the respondent accepts heavy tools and machinery were provided as would be usual on a construction site the claimant also conceded in evidence that he brought his own tools with him which again is inconsistent with what he asserts in his witness statement that C3 supplied tools and equipment.
55. I find his explanation as to the tax return at page 187 of the bundle where he claimed £4,000 for repairs and maintenance of property and equipment as a self-employed business was unsatisfactory. Mr Fatah said he did not make a claim for tools or expenses, yet he was unable to answer satisfactorily what this £4,000 related to. I take note that he was unable to give a direct, clear response in relation to this point.
56. It was also concerning the claimant has signed a contract with Hudson both whilst working with the respondent and since leaving them again through Hudson declaring he was skilled and capable and could work without direct supervision and control yet in evidence repeatedly stated he did not have qualifications and needed someone to help him because he was not a qualified ground worker. I am not persuaded by Mr Fatah's evidence that he was not sufficiently skilled. This is contradicted by the documentary evidence and the respondent's witness evidence and indeed to some extent the claimant's own witness statement where he states that he was helping other colleagues in their activities at the construction site when needed.

Conclusion

57. There was no express written contract between the claimant and the respondent, and I heard no evidence to persuade me of any express oral contract between the claimant and respondent. The claimant must therefore establish there is an implied contract between him and the respondent.
58. On the evidence I have there is no proper basis that I can find there was any direct contractual relationship between the respondent and the claimant. I take note of case law which states a contract between an agency worker and the end user can only be implied if it is necessary to do so and the onus is on the claimant to establish their contract should be implied.
59. I heard no compelling evidence to support a finding of an implied contract between the claimant and the respondent. I also take note that it is not necessary to infer the contract because I find the contractual relationship adequately explains the commercial situation. Based on the clear and consistent evidence from the respondent's witnesses supported by the documents the claimant's supply of labour to the respondent is fully explained by the express contractual provision for

the claimant to supply labour to Hudson, and Hudson to supply labour to the respondent.

60. It is clear the claimant's intention evidenced by his signed declaration and contract with Hudson is that he rejected employment to be a self-employed operative. I rely on the case of **Alstom Transport V Tilson UK EAT 0358/09/CEA** where the EAT said: *'the claimant himself asserted that he was not an employee and when invited twice to become an employee, refused to do so. The intention of the claimant was to remain an independent contractor. The claimant obviously had benefits in the terms of tax as being an independent contractor and he was paid at a rate per hour far more than an employee was, because of course an employee had other benefits'*. I heard no evidence which supports the claimant's intention was to enter into a contract with the respondent.
61. It is plain that he understood he would not have the rights enjoyed by an employee or worker. I find the contract was fully explained to him and that he was not under any obligation to personally carry out the work and was free to send any person of his own choice who had the appropriate skills and experience to perform the works. I do not find that he was under the control of C3 or Hudson. He was not obliged to accept any work offered and there was no obligation on either C3 or Hudson to offer him work. It is clear from the evidence and the documents that he was indeed free to work elsewhere during the contract and did so. Accordingly, I do not find the claimant was a contract worker.
62. I do not find it necessary to infer the existence of the implied contract in order to give business reality to what was happening. In this instance I find the respondent was not under any obligation to provide the claimant with work, and the claimant was not obliged to attend and do the work as I have found there was a valid substitution clause and the claimant was not subject to the direction and control of the respondent.
63. I find the claimant had an unfettered right of substitution (subject only to that person needing to have certain skills) and there was no obligation on the claimant to provide his services personally. I find the claimant therefore cannot be a worker. In this regard I have regard to the Court Appeal in **Pimlico Plumbers Limited and Another V Smith, [2017] E WCACIV 51**. In which it was held *'a right of substitution, limited only by the need to show that the substitute is as qualified as the contractor to do the work whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.'*
64. I find this case falls within this category. The right of substitution was only limited by the need for the claimant to believe that the substitute had appropriate skills and experience to perform the work. The claimant disclosed no exceptional facts and absent a finding that the contract was a 'sham' the substitution clause cannot be challenged. I find the Contract document is clear in relation to the right to substitute and I was persuaded by the cogent and clear evidence from the respondent's witnesses in relation to the substitution clause reflecting the real intention of Hudson when they entered into the contract.
65. I find the claimant clearly intended to enter into a self-employed status and had rejected employment status. I find the written agreement negates worker status and reflects the genuine intention of the parties.

- 66. I find there was no mutuality of obligation. The claimant was clearly under no obligation to accept work and nor was the respondent or Hudson under any obligation to provide work. This is expressly stated in the contract and the claimant was free to work for others.
- 67. I have not found there was sufficient level of control by Hudson or the respondent over the claimant. I heard no persuasive evidence that he was under any direct supervision or control.
- 68. In arriving at my decision, I also take note of the claimant's declaration in his tax returns and accounting to HMRC which support a self-employed status.
- 69. I therefore find the claimant is not an employee or worker of the respondent and was a self-employed independent contractor consequently his claim for discrimination on the grounds of race fails as the Tribunal has no jurisdiction to hear this claim.

All judgments and written reasons for the judgments (if provided) are published in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties in a case.

Employment Judge N Wilson
Dated: 7 April 2023

Sent to the parties on:

...08 April 2023.....

For the Tribunal Office:

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