Case No: 2402832/2023

EMPLOYMENT TRIBUNALS

Claimant: Frank Rotheram

Respondent: (1) NKT HVC Ltd
(2) Andrew Groves
(3) Will Hendrikx

Heard at: Liverpool

On: 22 and 23 February 2024

Before: Employment Judge Liz Ord

Representation:

Claimant: Ms A Reindorf (King's Counsel)
Respondent: Ms K Skeaping (Solicitor)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The claimant was an employee throughout the time he worked for the first respondent.

2. There was no break in the claimant's employment and at the time of his dismissal he had the requisite two years continuous service needed to bring an unfair dismissal claim.

REASONS

Introduction

1. The claimant brings claims of unfair dismissal, harassment and direct age and disability discrimination in connection with his termination of work on 31 October 2022.

2. This preliminary hearing was about whether the claimant worked for the first respondent either as an employee or a worker, after selling his company to them, or whether he was engaged as a self employed consultant.

Issues

3. The issues were determined at a previous case management preliminary hearing as follows:

   - Whether the claimant had the required status as an employee and/or worker as required to be eligible to pursue all or any of the claims presented; and

   - Whether the claimant had the required two years continuous service to be eligible to claim unfair dismissal at the date of termination of employment.

Evidence

4. The tribunal had before it a documents bundle of 559 e-pages. Page references within these reasons are to that bundle.

5. On behalf of the claimant the tribunal heard evidence from Frank Rotheram (claimant). On behalf of the respondent it heard evidence from Amit Patel (Finance Director), Andrew Groves (Operations Director) and Mike Jones (first respondent's solicitor at time of company sale).

The Law

6. The starting point is the statutes.

   Section 230 of the Employment Rights Act 1996 (ERA) 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" … means an individual who has entered into or works under (or, where the employment has ceased, worked under)-
   (a) a contract of employment;
   (b) any other contract whether express or implied and (if 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.

   Section 83 Equality Act 2010 provides:

   (2) Employment means-

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

7. The test for "a contract personally to do work" under the Equality Act is the same as that for a limb (b) worker under the Employment Rights Act – Pimlico Plumbers Ltd v Smith [2018] ICR 1511 SC at §§13-15 per Lord Wilson JSC.

8. Questions of worker status are matters of statutory interpretation rather than of contractual interpretation, since the tribunal's task is to determine whether, by virtue of his relationship to the respondent, the claimant was entitled to statutory rights. Thus the tribunal must apply the statutory tests to the facts, keeping in mind the purpose of the legislation - Uber BV and others v Aslan [2021] UKSC 5 §87 per Lord Leggatt JSC.

9. It was stated in Autoclenz Ltd v Belcher & Others [2011] ICR 1157 SC at §29 per Lord Clarke JSC (see also §32 per Lord Clarke JSC): "the court or tribunal should consider what was actually agreed between the parties, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded."

10. And in Autoclenz Ltd v Belcher & Others [2010] IRLR 70 CA at §91 per Aiken LJ: "There is a danger that a court or tribunal might concentrate too much on what were the private intentions or expectations of the parties. What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties…But ultimately what matters is only what was agreed."

11. Uber BV and others v Aslan [2021] UKSC 5 provides at §76 per Lord Leggatt JSC: "…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."

12. And in Uber at §28 per Lord Clarke JSC - nor should the written contract be disregarded only if it is found to be a sham.

13. And in Uber at §85 per Lord Leggatt JSC: There is "no absolute rule that terms set out in a contractual document represent the parties true agreement just because an individual has signed it".

14. If the written agreement is said to be inaccurate, the tribunal should concentrate on evidence of how the parties conducted themselves in practice, which may be "so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties" – Autoclenze CA at §53 per Smith LJ.

15. Autoclenze CA provides at §34 per Lord Clarke JSC: "…the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem".

16. Excessive focus on wording that might be designed to avoid worker status being established should be avoided – Sejpal v Rodericks Dental Ltd [2022] EAT 91 at §47.

17. A written term which expressly states that the agreement is not intended to create a relationship of employment or a worker relationship may be taken into account as part of the factual matrix, but only if it is found to be a reflection of the genuine intentions of the parties – Ter-Berg v Simply Smile Manor House Ltd and Others [2023] EAT 2.

18. Sejpal v Rodericks Dental Ltd [2022] EAT 91 provides at §26 – there is no need to consider the concept of an "irreducible minimum" of mutual obligations where the individual is working under a single engagement rather than a series of engagements.

19. Where the written agreement contains a clause which purports to give an unfettered right of substitution, the tribunal must scrutinize it against "the facts viewed realistically" to determine whether the clause is genuine – Manning v Walker Crips Investment Management Ltd [2023] ICR 1265 EAT at §68.

20. The tribunal should consider whether and, if so, how the right was ever exercised in practice to ascertain whether in reality the predominant purpose of the agreement was personal service - Sejpal v Rodericks Dental Ltd [2022] EAT 91 at §§32, 59(d), 66(b).

21. A genuine and conditional right of substitution may be inconsistent with personal performance, depending on the nature and degree of the fetter – Pimlico Plumbers Ltd v Smith [2017] ICR 657 CA at §84 per Sir Terence Etherton MR.

22. Real Time Civil Engineering Limited v Callaghan UK EAT/2516/05 provides that an unequivocal written contractual term providing an unfettered, absolute discretion to substitute, could only be displaced if it were a sham or had been varied. The fact there had actually never been any substitution was no basis for displacing such a term.

23. There are three requirements of a contract of service: 1) the employee must have agreed to do the work personally; 2) the employee must be subject to the employer's control; 3) the other terms of the contract must not be inconsistent with a contract of service - Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD per Mr Justice MacKenna.

Findings of Fact

24. The claimant founded Ventcroft Ltd in 1989, which specialised in cable manufacturing, and he was the majority shareholder until he sold it to the first respondent on 10 January 2022. Prior to completion he was employed as the Managing Director (MD)/Chief Executive.

25. The claimant was a "hands on" MD and prior to completion was actively involved on the shop floor making and repairing machine tools as well as engaging in strategic decision making. He worked alongside his son Ian Rotheram (Technical Director), who had stepped up to take on some of the claimant's managerial responsibilities, as well as Karen Jones (Finance Director) and Andrew Groves (Operations Director). His wife, Lesley Rotheram was also employed in the company.

Parties' Intentions

26. The claimant states that, on completion of the sale, it was his intention to resign as a director but to stay on as an employee, working with the first respondent company on the shop floor for at least three years. He says he made it clear during sales negotiations that he did not want to leave the business. He points to an internal email of 22 February 2022 from Will Hendrikx headed "Frank Rotheram Employment Contract" (p547), which refers to the company having to realize that Frank doesn't want to leave and wants to stay and be the toolmaker forever.

27. The respondents' case is that the parties intended that the claimant cease work on the completion date and he was required to resign as a director and employee. They say that, as he was the sellers' representative under the terms of the Sale and Purchase Agreement (SPA), (p78 clauses 16.1 and 16.3), he would have known this, and would have received legal advice to this effect from his commercial solicitors, Weightmans.

28. The SPA set out the names the resigning employees (p61): "Resigning Employees means each of Frank Rotheram, Karen Jones, James Malone, Stephen Berka, Ian Rotheram, Andrew Groves, Jennie Rotheram and Lesley Rotheram". However, it is not disputed that, apart from the claimant, the first respondent did not intend that these individuals would resign on completion and none of them did.

29. The respondents say they did not require the claimant to work for them although, to get the deal done, they were prepared to give him a short term contract. They intended that he would sign a consultancy agreement and be engaged on a self-employed basis.

30. The SPA reads (p57) "FR Consultancy Agreement means the six month fixed term service agreement to be entered into between the Company and Frank Rotheram as soon as is practicable following Completion".

31. The claimant says that he did not read the SPA in any detail at the time and he did not read this clause. In any event, the reality is that there was no six month agreement, although there was a consultancy agreement that the claimant later signed (see below).

Resignation Letters

32. The first respondent drafted resignation letters for the former Ventcroft directors stating that they were resigning as directors and as employees. The words "and employee" were then crossed out by the claimant's solicitors for each of the claimant (p255), Karen Jones (p256), James Malone (257), Lesley Rotheram (258), and Andrew Groves (259).

33. Andrew Groves gave evidence under cross-examination that he had been told by the first respondent's HR Manager, in the presence of Will Hendrikx, that they were all being transferred to the first respondent's employment under TUPE and this was the reason for the crossing out.

34. The respondents say that the amendment to the claimant's letter was done unilaterally, although they proceeded with completion regardless and did not

seek to rectify it. It was not until the claimant's contract was later terminated, that the issue arose. Furthermore, the respondents made no complaint about the other employees' letters. It was only that of the claimant which concerned them.

35. Looking at the documentary evidence, an email from Weightmans to Ian Rotheram dated 26 September 2023 (p551) refers to the resignation letter saying "…the deletion of "*and employee"* was expressly agreed between the parties in order to finalise this as an agreed form document…Please forward this onto your Dad if necessary…"

36. An email from to Karen Jones to Weighmans of 11 January 2022 (p555) asks whether everyone will be getting an amended letter and the reply of the same date (p554) reads "We've amended all of yours in manuscript (in pen), for the final version – removing the "and an employee" wording. This was expressly agreed with the Buyer."

37. In cross-examination, Mike Jones, from the respondents' solicitors, was asked whether he had any knowledge of this at the time and he replied "I certainly didn't expressly agree it." The answer somewhat evades the question and, from this I find that he did know.

38. After notice of termination had been given, about which the claimant was complaining, Mike Jones wrote an email of 17 October 2022 (p421) saying the claimant had made an amendment to his resignation letter in breach of his accepted contractual obligation.

39. Another email from Mike Jones to the first respondent of 20 October 2022 stated that "Frank was something of a "special" case (in that he was accepting a consultancy arrangement) but was continuing in role pending agreeing the detail of that consultancy."

40. Mike Jones' evidence in cross-examination was that "it would appear" that the claimant had not resigned his employment prior to signing the consultancy agreement.

41. I find that the words "continuing in role" demonstrate that by October 2022, Mike Jones was of the view that the claimant had not resigned his employment pending the consultancy agreement.

42. Furthermore, the respondents did not take issue with the amendment at the time as they wanted to get the deal done and completed. Whilst the respondents did not signal any consent to the variation by initialling the amendment, the claimant clearly signalled his disagreement to the original by crossing out the word "employee".

Work after completion

43. After the sale, the claimant continued to work at the factory. The respondents submit that there was no work for claimant to do. They say he took it upon himself to attend without instruction, although they agree they were passive about this and let him work as a gesture of goodwill. The claimant's case is that he was employed by the respondents from the start without any break in service.

44. The Claimant carried on being paid the same weekly salary (£511.61) via payroll both before and after the sale (wage slips pp222-235) (bank account statements pp205-221) until Will Hendrikx cut his pay in April 2022 (pp 213-215, 318). He was re-imbursed his expenses (p318).

45. He was paid under PAYE until he was dismissed (pp194-195) and, on dismissal, he was provided with a P45 (pp191-193). He was given a P60 for the tax year to 5 April 2022 (p197) and a P11D for expenses and benefits for the year 2022 to 2023 (p198), which included his company car.

46. The respondents submit that it was simply an error on their part to continue paying the claimant after completion, which was caused by retaining the same payroll provider. I do not accept this. Any such error would have most likely been discovered early on and been acted upon. Furthermore, Will Hendrikx knew that that the claimant was being paid through payroll when he reduced the amount of his salary.

47. The respondents say there was no obligation on the claimant to work at all and they suggest that he was just undertaking his own personal projects. However, the second respondent, Andrew Groves, confirmed that, after the sale, the claimant was very visible making tools and working with the shop floor personnel. Given his extensive specialist skills and experience (over 60 years), he was the person who the shop floor workers asked to do repairs and make tools.

48. The respondents did not give the claimant any particular duties and his working hours were undefined. Nonetheless, he continued doing the same shop floor activities as he had done previously and worked the same hours. He came into the factory early in the morning, opening it up at around 6.00am and worked for about 12 hours. Whilst he was not supervised and was largely allowed to work as and when he wished, this was because he was a highly skilled toolmaker who did not need supervision.

49. The respondents say the claimant did not have to report to anyone and neither did anyone report to him. He was not given a designated line manager, although he says he checked in with Amit Patel almost daily. According to his evidence he would notify Mr Patel of the jobs he was doing and about the prioritisation of work. He said he would answer Mr Patel's queries on how he used to operate the company and give him information. Mr Patel would approve his expenditure, including the purchase of materials.

50. The claimant says he was told by Mr Patel to start clocking in to work, which was new to him as he had not clocked in before. From 17 January 2022 he clocked into work (timesheets pp200-204) until 29 April 2022, when he was told to stop. There were no timesheets between 10 and 17 January as this was a transition period. However, the claimant was at work during this time.

51. This situation was different to contractors, who would sign in via the visitors' book and were monitored by an employee (p171).

52. Whilst Mr Patel stated in his witness statement (§6) that he had "no dealings with the Claimant on a day-to-day basis", under cross-examination he conceded that he did have conversations with him about work saying "At the

end of the day he ran the business for 40 years so you would be a fool not to ask him things". He also confirmed that the claimant sought his permission to purchase materials.

53. On the basis of this evidence, I find that the claimant reported to Mr Patel.

54. The claimant also answered to Will Hendrikx, although Mr Hendrikx attended the factory infrequently. In an internal email of 22 February 2022 (p547) headed "Frank Rotheram Employment Contract" Mr Hendrikx wrote about the claimant: "…for many years he took the decision to never work for a boss again…And now he is suddenly in a situation where he has a boss telling him what will happen."

55. The respondents issued the claimant with yellow high viz clothing to wear on the shop floor, which was the colour used by employees, as opposed to orange high viz, which was for consultants. However, they submit that he was not required to wear it.

56. With respect to holidays or time off, the respondents submit that the claimant was not required to tell anyone. However, in practice he would complete a holiday request form (pp337-338) and holidays were written in the office diary, as were medical appointments (pp236-254). The respondents say this was out of choice.

57. The claimant was still included in certain senior management team matters after the sale, such as sales figures and daily sales reports (pp 296-310) and assisted management with an employee's grievance. He liaised with solicitors (re AIE p287) and negotiated with suppliers.

58. All materials and tools were provided by the first respondent and the claimant never undertook work for anyone other than the respondents. He was not required to have his own insurance and never took out any.

59. It is unlikely that the claimant would have worked in this way and on the salary he was paid, if he was only doing personal projects. I reject that argument and find that the claimant was doing work for the company.

Consultancy Agreement

60. The claimant received the draft consultancy agreement in February 2022 after the sale. He was not happy with it (see email from Amit Patel dated 22.2.22 p549) and initially refused to sign it, although he eventually did so in March 2022.

61. The claimant said he only signed under protest after being told by Will Hendrikx that it was just a formality that had to be done as part of the SPA, otherwise it could affect the sale. Will Hendrikx did not give evidence and there is no cogent evidence to contradict the claimant. Accordingly, I accept the claimant's account.

62. The effective date of the agreement was stated to be 1 February 2022 and its end date was no later than 14 March 2023 with a provision for either party to terminate at any time on 15 days written notice.

63. There is no specific provision within the agreement that operates to terminate the claimant's employment with the first respondent. Mike Jones accepted in cross-examination that neither this agreement nor any other document amounted to a resignation by the claimant.

64. Considering the agreement itself, the respondents say that clause 3.3 (b) (p154) recognises that the claimant could substitute someone in his place and militates against personal service. However, the clause simply imposes an indemnity on "…the Consultant or any Substitute…" with respect to liability for employment-related claims. Clause 11.5(b) also make reference to a substitute with respect to data protection.

65. The claimant argues that he could not substitute anyone because his skills were so specialist that there was nobody around to substitute and, even he could, he would not do so because it would be cost prohibitive. No-one was ever substituted for him.

66. The respondents suggest that the consultancy agreement was "non-exclusive" in that the claimant could work elsewhere. However, clause 7.1 (b) (p156) prevented the claimant from engaging in similar activities if they were in any way competitive with the first respondent without the first respondent's prior written consent. Similar restrictions are contained within the SPA preventing the claimant from working for a competitor (pp 70-71 clause 8 restrictive covenant).

67. There were many other clauses in the agreement that were clearly contradictory to the reality. These included the following:

    Clause 3.3 (a) (p154) which provided that the claimant would be responsible for and indemnify the first respondent in respect of any income tax, National Insurance and social security contributions and any other liability…

    Clause 6.1 (p156) which provided that the claimant would furnish at his own expense, all labour, materials, equipment, tools, vehicles and other items necessary to carry out the terms of the agreement …

68. This was despite the fact the claimant was being paid under PAYE through the first respondent's payroll, and that there was never any requirement for him to provide his own tools etc and he had a company car.

Termination

69. The claimant received a letter on 26 September 2022 terminating his "Independent Consulatancy Agreement" (311) with effect from 31 October 2022.

Discussion and Conclusions

Did the claimant resign as an employee on completion of the sale?

70. The first respondent's intention was that the claimant would resign his employment, although the claimant's intention was that he would continue in employment working for the first respondent. Whilst the SPA named several resigning employees, it was never the first respondent's intention that, apart

from the claimant, they would resign on completion, and none of them did. The SPA did not reflect the reality in this regard and does not serve as proof of resignation.

71. The respondents did not object to the claimant's amended resignation letter deleting the words "and employee" and it cannot be construed as evidence of him resigning his employment.

72. There is nothing else in the completion documents or otherwise that serves as proof of resignation. Consequently, I find that the claimant did not resign his employment on completion of the sale.

Was the claimant employed by the first respondent after completion of the sale?

73. The claimant worked for the benefit of the company and was paid a salary in return, which demonstrates there was a contract.

74. He undertook work personally and reported to Amit Patel and Will Hendrikx. He was integrated in the company, working long hours, taking work from the shop floor and assisting at times with more strategic matters. He clocked in, recorded his absences, wore employee high viz clothing, and was paid via payroll under PAYE. His materials and tools were provided by the respondents and he never worked for anyone other than the respondents.

75. For these reasons, I find that he was an employee at this time.

Did the claimant become self employed upon signing the consultancy agreement?

76. The respondents say that, if the claimant did not resign on completion, the relationship between the parties changed with effect from 1 February 2022 when the claimant became a self-employed contractor.

77. The starting point is the statute, not the consultancy agreement. After signing the agreement in March 2022, the claimant continued working just as he had done previously.

78. He did not want to sign the agreement, but was persuaded to do so by Will Hendrikx, who told him it was just a formality of the sale. He did not intend to resign by signing it, and there is nothing specifically in the agreement that operates to terminate his employment.

79. With respect to undertaking work personally, whilst clause 3.3 of the agreement refers to "any substitute" in the context of indemnities and clause 11.5 references substitutes with regards to data protection, there is no express substitution clause. Consequently, the clauses cannot be construed as conferring a right of substitution and, indeed no substitution ever took place. Therefore, these clauses are not inconsistent with a contract of employment.

80. Although the respondents suggest that the consultancy agreement was "non-exclusive", there were restrictive covenants in clause 7.1 of the agreement and clause 8 of the SPA, which prevented the claimant working for a

competitor. Apart from this, having another job is not inherently incompatible with a contract of employment.

81. Furthermore, there are other clauses within the consultancy agreement, which patently conflict with the reality and render the agreement largely inaccurate. Consequently, I take the view that what has taken place factually reflects the true position of the parties.

82. Therefore, I find that the claimant did not resign his employment when he signed the agreement and he continued working as an employee until his dismissal.

Was there a break in the claimant's employment?

83. The respondents say that there was a break period in the claimant's service from the completion date of 10 January 2022 until the consultancy agreement came into effect on 1 February 2022. Therefore, they argue, he does not have the requisite two years' service to bring a claim for unfair dismissal.

84. There was no break in the claimant's employment. He worked continuously until his dismissal.

Conclusion

85. For the reasons given, I find that the claimant was an employee throughout the time he worked for the first respondent and that, at the time of his dismissal, he had the requisite two years continuous service needed to bring an unfair dismissal claim.

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Employment Judge Liz Ord

Date 22 May 2024

JUDGMENT SENT TO THE PARTIES ON

6 June 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.