



EMPLOYMENT TRIBUNALS

Claimant: Mr E S Owusu
Respondent: Contract Security (UK) Ltd
On: 12 February 2024 and
6 March 2024
Before: Employment Judge Ahmed (sitting alone)
At: Leicester

Representation

Claimant: In person
Respondent: Ms Eleanor Mayhew-Hills, Litigation Consultant, Croner

JUDGMENT AT A PRELIMINARY HEARING

JUDGMENT having been sent to the parties on 6 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. In these proceedings the Claimant brings complaints of unfair dismissal, breach of contract and holiday pay. This case was listed for a full hearing but in view of the preliminary issues raised was converted to a preliminary hearing.
2. The issues for determination at this preliminary hearing were as follows:
 - 2.1 Was the Claimant an 'employee' of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996?
 - 2.2 If not, was the Claimant a 'worker' of the Respondent within the meaning of section 230(3) of the Employment Rights Act 1996?
 - 2.3 Was the Claimant self-employed?
 - 2.4 Does the Claimant have the 2-year period of qualifying service to bring a complaint of unfair dismissal?

3. The issue as to qualifying service has fallen away. It is now agreed that the Claimant's employment began on 28 May 2021 and that his effective date of termination was 3 June 2021. The Claimant therefore has the relevant period of service to bring a complaint of unfair dismissal provided of course he is an 'employee'. If the Claimant is an "employee" under paragraph 2.1 then he is also deemed to be a "worker" under paragraph 2.2.
4. The facts for the purposes of this Preliminary Hearing are not largely in dispute save for one issue in relation to alleged forgery of documents which is dealt with below.
5. On 28 May 2021 the Claimant applied for a role with the Respondent as a Security Officer. The application was on the Respondent's standard application form. That form does not stipulate whether the role is for employment or on a self-employed basis. The Respondent engages in both types of contracts for Security staff.
6. After submitting his application the Claimant received a number of documents by email including a document headed 'Procurement Terms and Conditions' which I shall refer to as the 'contract'. The Claimant disputes having received this and also denies signing it despite the signature on the form which purports to be his signature.
7. The Claimant was also sent a series of emails by Mr Mike Lindop on behalf of the Respondent as part of the recruitment pack. Mr Lindop is no longer with the Respondent and did not give evidence at this hearing as to what he sent and what he received from the Claimant. Some of the relevant emails have not been produced.
8. As part of the recruitment process the Claimant sent to the Respondent his Inland Revenue UTR number and various other documents including his driver's licence and Security Industry Authority (SIA) licence.
9. On 7th June 2021 the Respondent sent to the Claimant a letter by way of an e-mail, which the Claimant also denies receiving. The material part of this letter was as follows:

"Please be aware that we will accept a substitute worker from you in your place so long as the following guidelines are met [it then sets out a number of requirements such as the person being fully vetted having a SIA licence having received training on the site and for the control room being made aware all of them].
10. The Claimant was sent (which he also denies receiving) an authority to opt out of the maximum 48 hour working week.
11. It may be appropriate for me to deal with the allegations of forgery at this stage. Whilst I accept that the allegation is made in all honesty, that is to say Mr Owusu is not being disingenuous in terms of his own belief, I am not satisfied that there was any forgery involved. Firstly, I cannot see any possible benefit to the Respondent in forging Mr Owusu's signature. If he had not accepted the role I imagine they would have offered it to someone else. There is no shortage of applicants for Security roles. Whilst I accept the Respondent has not been unable to produce the relevant e-mails sending the Claimants some of the documents that is for technical reasons to do with the retrieval of the emails from the Respondent's systems rather than deliberate concealment.

12. Furthermore, I find it difficult to accept the Claimant's evidence that he can remember precisely which documents he received and signed and those which he did not some two years ago. On the face of it the signature on the contract looks very similar to the signature he does accept is his own on a different document. To establish forgery there would need very clear and cogent evidence which is wholly absent in this case.

13. I am therefore satisfied that all of the documents bear the Claimant's signatures and in particular that the contract contains his signature.

14. The contract makes it clear that the Claimant is to be considered a 'sole trader' and hence he enters into the relationship as being self-employed. The contract also makes it clear that the Claimant is not entitled to (nor did he ever receive) holiday pay.

THE LAW

15. Section 230 of the Employment Rights Act 1996 ("ERA 1996") so far as is relevant 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 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."

16. There is a significant body of case law on the above provisions. The main cases are as follows:

Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497

Carmichael and another v National Power plc [2000] IRLR 43.

Express and Echo Publications Limited v Tanton [1999] IRLR 367

Autoclenz v Belcher (2011) UKSC 41

17. There are four essential elements which must be fulfilled in order for a contract of employment to exist. If any one of them is absent then the Claimant does not have the status of being an employee. If all of them exist then there is a *possibility* of him being an employee and the tribunal must look at further factors. There is ultimately a balancing exercise with no single factor being determinative.

18. The four elements are as follows:

- 18.1 There must be a contract between the parties;
- 18.2 There must be an obligation to provide work personally;
- 18.3 There must be mutuality of obligations;
- 18.4 There must be the requisite degree of control.

19. The following principles also emerge from the cited cases: The label applied by the parties is not necessarily determinative – the Tribunal has to look at the reality of the situation. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. However, there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has agreed to it by conduct. The parties' intentions may be a relevant factor but it is the substance of the situation that should be given significant consideration.

20. In this context mutuality of obligation amounts to an obligation on the employer to provide work and pay with a corresponding obligation on the employee to accept and perform that work.

21. Control does not necessarily mean day-to-day control or exercise of control but that there is a sufficient contractual right of control i.e. the right to direct the employee if required.

22. Personal performance amounts to an agreement by the employee to do that work him or herself with no genuine right of substitution.

23. The Tribunal must consider the relative bargaining position of the parties.

24. Whether an individual has arranged their tax affairs to be treated as self-employed or otherwise is similarly not determinative of their employment status at law but a factor to be taken into account.

CONCLUSIONS

Contract

25. There is no dispute that there was a contract between the parties. Clearly, this was an arms' length transaction. The parties entered into a legally binding agreement.

Personal Service

26. I am satisfied that the Claimant was required to undertake his duties personally. I am also satisfied that the Claimant was not in reality permitted to provide a substitute for his services notwithstanding the letter he received as to substitution. The reality was that it was the Claimant was expected to offer his services as a security officer personally. The clearest example of that is when the Claimant was away for a period of approximately one month in September 2022. He was not asked to provide a substitute nor did he do so.

Mutuality of obligations

27. I am satisfied that there was an obligation on the employer to provide work and a corresponding obligation Mr Owusu to accept and perform any work offered. The Claimant attended work every day unless he was unable to do so by reason of sickness or for the month that he was absent on leave. There was never a situation where the Claimant was required to stand down or asked not to attend work.

Control

28. I am satisfied that the Respondent exercised the requisite degree of control for the Claimant to be an employee. Mr Owusu was required to undertake his tasks in the manner in which the Respondent imposed on him. The Claimant could not pick and choose how he was to do his job. For example, he was required to undertake various rounds, to complete a daily occurrence book and other documentation. He could not choose to dispense with any of those tasks. Given the nature of his work he had little discretion as to how he was to do it. The Claimant was supervised by the Respondent's staff on a regular basis.

29. It is not realistic to say that the Claimant could choose to work where he wanted. He was assigned to work principally in Hinckley but he could be moved to work at a different site. At least once he was required elsewhere and he was sent to a site in Leamington. The Respondent exercised control not only of what the Claimant did but also where he performed his duties.

30. I have then gone on to consider other relevant factors. The following suggest that he was *not* an employee:

30.1 the Claimant rendered invoices instead of being paid on an hourly basis;

30.2 the Claimant was not taxed at source and thus arguably benefitted from paying less income tax than if he paid it via PAYE.

30.3 the Claimant did not receive holiday pay or sick pay;

30.5 the Claimant was not subject to any disciplinary procedures;

31. The following factors indicate he is likely to be an employee;

31.1 any equipment required for the role was provided by the Respondent;

31.2 there was little or no financial risk involved to the Claimant;

31.3 the Claimant was fully integrated into the Respondent's business;

31.4 to an outsider it would appear to all intents and purposes that he was part of the business;

31.5 he was issued with a personal identification number and an ID card;

31.6 he was required to comply with the company's dress code;

31.7 he was required to attend training and was paid for it.

32. Considering all the various matters in the round I am satisfied that the Claimant was an "employee" within the meaning of section 230(1) ERA and is entitled to pursue his claims of unfair dismissal, breach of contract and holiday pay.

33. Case management orders for the final hearing are given separately.

Employment Judge Ahmed

Date: 25 March 2024

JUDGMENT SENT TO THE PARTIES ON
28th March 2024

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FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>