EMPLOYMENT TRIBUNALS

Claimant: Anthony Manning

Respondent: Walker Crips Investment Management Ltd

Heard at: London Central (by video) **On:** 17-18 September 2024

Before: Employment Judge Housego

Representation

Claimant: Bruce Carr KC

Respondent: Patrick Halliday, of Counsel

JUDGMENT

The Claimant was a worker for the Respondent within the definition in S230(3) of the Employment Rights Act 1996.

REASONS

1. This hearing was to decide the sole question of whether the Claimant is a worker within the definition in S230(3)(b) of the Employment Rights Act 1996.

2. That subsection provides:

   "(3) In this Act "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

   (a) …

   (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."

3. Previous hearings have decided all but one part of that issue. On 25 and 28 March 2022 EJ Stout (as she then was) conducted a hearing which made findings of fact which are not challenged.

4. Her conclusions were challenged by both parties. On 14 June 2021 Michael Ford QC, Deputy Judge of the High Court, sitting in the Employment Appeal Tribunal, allowed the Claimant's appeal in part.

5. The point was remitted for rehearing, but this could not be determined by EJ Stout as she is now in a higher judicial office, and so the hearing had to be allocated to another Employment Judge.

6. As a result of that appeal, it is settled that the Claimant had a contract, under which he undertook to do or perform work personally. The issue is the last part of the subsection. The drafting of this is not the easiest to follow, and put more simply, the questions to be answered are whether the Claimant was in business on his own account, and if so whether the Respondent was a customer or client of his business.

7. I do not set out the law in any detail, for the long and clear judgments of EJ Stout and HHJ Ford do so. All the cases set out that the decision is multifactorial, and that there are a variety of different tests which may be of assistance in deciding whether someone is or is not a worker. All the cases say that no one test is definitive, and that in every case the decision is to be made by reference to the words of the statute. The circumstances of each case may make one test or another more apposite to the particular case being decided. I stated in the hearing that the use of analogies, while generally helpful, is unlikely to assist in this case, and may serve to confuse as none of them are going to be the same as this case, and the decision is fact specific.

8. The principal tests put forward for me to apply were, and I set these out in shortly to avoid extensive quotation from the cases:

    8.1. Byrne Brothers (Formwork) Ltd v Baird & O'rs [2002] ICR 667: the questions of "*business undertaking*" and *"worker"* were *"a matter of informed impression".* The status of worker and the rights that status confers is because *"the intention behind the regulation is plainly to create an intermediate class of protected worker, who is not on the one hand an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business."* Employees are thought to need protection because they are "*subordinate and dependent"* on their employer. Workers *"whose degree of dependence is essentially the same as employees"* need similar protection, as opposed to *"contractors who have a sufficiently arm's length and independent position to be treated as being able to look after themselves in the relevant respects"*.

    8.2. Cotswold Developments Construction Ltd v Williams [2006] IRLR 181: *"a focus on whether the purported worker actively markets his services as an independent person to the world in general on the one hand, or whether he is recruited by a principal as in integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls"*. (The integration test.)

    8.3. James v Redcats (Brands) Ltd [2007] ICR 1006: Courts have asked *"whether the "dominant purpose" of the contract is the provision of personal services or whether that is an ancillary or incidental feature. Only if it is the dominant purpose that the definition is engaged"*. (In that case the claimant was not a worker because the dominant purpose was the distribution of newspapers, not that she should deliver them personally.) (The dominant purpose test.)

    8.4. Wolstenholme v Post Office [2003] ICR 546: the roles of principal and agent do

not preclude the principal being a customer of the agent. The business does not have to pre-date the relationship between the parties.

8.5. Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005: Cases provide *"analytical tools, which although not of universal application may provide material assistance in particular factual matrices"*. (I observe that logically this means that there are two caveats here – they do not apply in every case, and they may not provide material assistance.)

8.6. Bates van Winklehof v Clyde & Co [2014] UKSC 32: In this public interest disclosure case, it was found that it was not necessary to be in a subordinate position to be a worker. The legislation relating to public interest disclosure made the worker status particularly relevant to those working in tightly regulated fields of financial and legal services.

8.7. Autoclenz v Belcher [2011] UKSC 41: the terms of the contract are not determinative, and while relevant are not always even the starting point, especially where the individual is not able to have much input into the documentation. Look at reality, not what lawyers have drafted for the business.

8.8. Inevitably there was also reference to Pimlico Plumbers v Smith [2018] UKSC 29 and Uber BV v Aslam [2021] UKSC 5. *Uber* stressed the vulnerability and lack of any form of control of the drivers who did what Uber told them to do and were paid as Uber directed, and had to used Uber's systems and procedures, and could be sanctioned by Uber. It was the first and a major factor that Uber set the pay rates. As I observed in the hearing, that case also contains the best guidance I have found in any of the cases (and it is from the Supreme Court) – *"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically"*.

9. I have considered the submissions made to me at some length and supported by written submissions and all the law therein set out. It is not necessary to set out the other cases in addition to those above.

10. In his judgment HHJ Ford KC (§27) indicated that the test was the same whatever the field of work, including public interest disclosure, citing §71 of *Uber* (Lord Leggatt). Mr Carr repeated his submission that this was not so. In the event, the difference was not material to my decision. I decided that the Claimant was a worker by applying the test for any worker, not a lesser or easier test for a person working in financial services making a public interest disclosure.

11. The Claimant and Mr Darbyshire were on hand to give evidence if I wished it. There were some points that I thought it would be helpful to know about, but these were covered in the submissions and were not in dispute. I decided that it would not assist to hear further evidence and might give rise to the danger of appearing to revisit the findings of fact which are unchallenged.

12. I made a careful note of the submissions which are available to a higher Court if required (and the hearing was recorded). I do not set them out here but deal with all the points I consider determinative of the preliminary matter of worker status. I approach this afresh. I take the facts as set out in the judgment of EJ Stout. I note and take account of her conclusions, and I note and take account of the observations in the judgment of HHJ Ford KC. However, as I made clear at the hearing, it is for me to make my own observation and analysis of the case and come to my own conclusion, and that I have done.

13. In practical terms this is a very simple set of circumstances. The Claimant has a long history as a regulated investment adviser, and has many clients loyal to him

personally, for whom he manages between £60,000,000 and £85,000,000. He does not trade as a regulated individual business and so needs an umbrella organisation to provide regulatory oversight and registration, and systems for managing the investments of his clients. He left one organisation and held a *“beauty parade”* for an organisation through which to run his business. He selected the Respondent. They became the service provider through which he provided his clients with investment advice.

14. This does not deal with the issue in this case, to which neither party appears to have given any thought before the arrangement between them was ended by the Respondent. That question is whether the way this was effected brought about the status of worker.

Points put forward by the Claimant

15. He was appraised by the Respondent, and referred to as part of a team, and the appraisal covered things such as the company ethos.

16. He was in a vulnerable position, because he relied on the Respondent to certify him to the Financial Conduct Authority (“FCA”) as a fit and proper person. That vulnerability was a reality because he lost all his clients when they declined to do so. That demonstrated control over him by the Respondent.

17. In an enquiry of HMRC about his tax status the Respondent repeatedly referred to him as a “worker”. They stated that he had management responsibilities within the organisation.

18. So far as the outside world was concerned, he was an integral part of the Respondent. He used an email address as every employee did. His business cards had their name on it. The Respondent has employed representatives, and self-employed ones. To the outside world they are the same. They are all workers for the Respondent, whatever their tax status or individual remuneration arrangements.

19. In practice, the Respondent did control what he did with investments. That was demonstrated by the fact that they terminated the arrangement on the basis that they said he had invested outwith those parameters.

20. While the clients were loyal to him, having moved with him to the Respondent, and in large measure moving with him to a new company when he was forced to leave the Respondent, the clients were never his clients in law, for they signed up as clients of the Respondent (as they did for the previous and succeeding organisations). He brought clients with him when he worked for each organisation, but they were still the clients of the organisation, not his clients. Any regulatory issue would fall to the Respondent to deal with.

21. The dominant purpose was the earning of fees for the Respondent by giving investment advice to the clients he would bring to them. He was able to negotiate a financially advantageous arrangement because he was able to bring a large amount of money to be invested through the Respondent.

22. While he did not in fact do so, EJ Stout found that he could have a similar arrangement with other providers, so he was not dependent on the Respondent. HHJ Ford KC said that while EJ Stout was entitled so to find, and I was bound by that finding which was undisturbed by HHJ Ford KC, I should also take note of his observation that HHJ Ford KC could see the force of the argument that he was solely at work for the Respondent and that working for others was hypothetical, and that the Claimant himself regarded it as impracticable. For these reasons there was little or no weight to be given to that finding of EJ Stout.

23. It was settled law that someone could be a worker (or employee) when working, even if that person was not when not working. Attention was drawn to HHJ Ford KC's observation that notional contractual freedoms (such as that there was no obligation to work at all) were not as important as a focus on the degree of factual integration while the individual is actually working.

24. The Claimant would only not be a worker if the Respondent was his customer or client. Time and again the cases stressed that the words of S230(3) were definitive. There were various tests suggested, but none were definitive. Looking at the practicalities it could not be said that Walker Crips Investment Management Ltd was a client of Mr Manning. Therefore he had to be a worker as he met the other parts of the test and was not within the exclusion.

25. Focus should be on the findings of EJ Stout (other than those overturned):

    25.1. §10 – he was engaged as an investigation manager by the Respondent, managing investments mainly for private individuals.
    25.2. §11 – to the outside world he was indistinguishable from employed advisers, and that he was self-employed was not to the point.
    25.3. §18 – he had the title of "Investment Director" for the Respondent, an email address of theirs and business cards identifying him as part of the Respondent, he had a desk in the Respondent's office and they provided a personal assistant. He could deactivate security alarms on entering their premises. He represented the Respondent at social events they organised.
    25.4. §19 – he used only the Respondent's investment management platform. He was integrated into their systems to the extent that he could not see how he could use any other.
    25.5. §29 – it was the Respondent who had to certify him as a "fit and proper person" for the FCA.
    25.6. §33 – he was appraised and was line manager for his personal assistant who was an employee of the Respondent.
    25.7. §34 – if there was complaint about him, it would be dealt with through the Respondent's complaints process, and in fact on one occasion he had been bound to pay client compensation even though he disagreed with the decision.
    25.8. §39 – his personal assistant was an employee of the Respondent (for much of the time).

26. The terms of the agreement between them were relevant.

    26.1. He was appointed to procure clients for the Respondent.
    26.2. The Respondent could (and did) restrict the investments he made for his clients.
    26.3. He was bound not only by FCA rules but also by the Respondent's own in-house rules.
    26.4. The contract could be ended for "unbecoming or detrimental conduct".
    26.5. He was not permitted to contact the press or to issue research notes without the Respondent's approval.

27. The offer letter was an offer to join the Respondent as a self-employed associate, and:

    27.1. Provided that the Respondent would pay any exit fee payable by reason of the Claimant leaving a previous employer;
    27.2. He agreed to provide an orderly handover plan on leaving the Respondent;
    27.3. He was required to treat colleagues with respect empathy and compassion;
    27.4. He was required to be "efficient, clear, brief, concise and proactive" in dealings with colleagues (the use of the word "colleagues" throughout being significant.

27.5. The acceptance part of the letter referred to him being offered a position in the Respondent.
27.6. He attended training they provided.
27.7. He was required to attend an investigation meeting about alleged breaches of personal account dealing.
27.8. The Respondent had a public interest disclosure policy and expressly stated that it applied to him as an associate, referring to him being protected by the public interest disclosure legislation (applicable only to workers or employees).
27.9. As a member of staff he could use the systems for personal dealings, subject to the Respondent's rules.
27.10. He was subject to the Respondent's code of ethics.

28. It followed that the Respondent was now trying to avoid the Claimant relying on public interest disclosures saying that he was not a worker even though the documentation expressly brought him within that policy.

29. The Respondent was simply not, in all these circumstances, a client or customer of the Claimant. The analogy would be with professions, but he was not himself in practice as an investment adviser on his own account. It followed that he was a worker for the Respondent.

30. He was presented to the world as an integral part of the Respondent, and in fact was so. He sold to his clients through the Respondent's platform. He brought business to the Respondent and was rewarded with half the earnings from doing so.

31. Looking at the features of EJ Stout's decision, everything he did in acting as an investment adviser was through the Respondent, into which he was fully integrated and which had a significant degree of control over him.

    31.1. §68(a) He "brought his clients to the party" which was akin to a solicitor moving from one firm to another with a following.
    31.2. §68(b) That he negotiated favourable terms was no reason for him not to be a worker, as it was simply a reflection of how much business he could bring to the Respondent when he came to work for them on a self-employed basis.
    31.3. §689(c) – to be disregarded because of the EAT judgment.
    31.4. §68(d) – that he brought clients with him was not relevant to his status within the Respondent in looking after them.
    31.5. §68(e) – the extent of his appraisal, which led to the ending of the arrangement indicated worker status.
    31.6. §68(f) – integration was a choice: but that choice having been made he was fully integrated into the Respondent's business; anathema to the Respondent being his client.
    31.7. §68(g) – as with (f).
    31.8. §68(h) – choosing when to work and when to take holiday is not inconsistent with being a worker working autonomously.
    31.9. §68(i) – disregarded by reason of the EAT judgment.
    31.10. §68(j) – the risk being run was only that if he earned nothing for the Respondent, he would be paid nothing. But as he had a percentage fee on funds under management (which exceeded £50m) that was no risk at all. In any event it was akin to a salesperson remunerated solely on commission.
    31.11. §68(k) – any risks he ran as to compensation had to be balanced against his income, of over £250k pa.
    31.12. §68(l) – EJ Stout recognised "very significant levels of control", and that he was able to exercise skill and be entrepreneurial in growing his client base was no reason why he was not a worker because of that control of the Respondent over his activities.

32. In all these circumstances plainly the Claimant was a worker for the Respondent, not

in business on his own account with the Respondent as his client or customer.

Points put forward by the Respondent

33. The Claimant had a long history as an investment adviser with many clients loyal to him, and with £50m or more funds under management. He chose an organisation through which he would service his clients. In short, he was in business on his own account and the reality was that the Respondent was a client of that business, and though it was set up the other way round for regulatory reasons, the reality was that he charged them half the income he earned from his clients' investments which were being serviced through their systems. He set the terms of that arrangement just as any business sets out the terms on which it will provide services to its clients.

34. The Claimant set the terms for his clients. He would not accept the Respondent's charging rates for his clients. While they reserved the right to do so, they never did, and the finding of EJ Stout was that in practice he would have to agree before they did so. A worker does not set the terms of business for the employer's[1] clients or customers.

35. He was entirely reliant on what he earned from his clients and was liable for any losses arising from his activities (he indemnified the Respondent against any such losses). The Respondent did not pay him at all, save half the commission arising from his business activity in investment advice.

36. The FCA regime required the Respondent to have some oversight of the investment decisions but apart from that the Claimant was independent of the Respondent and not controlled by them. He could work as much or as little as he wished, he had total control over holidays and working hours. He had no KPIs. He worked largely from home. Subject only to overall guidelines he chose the investment strategy for his clients.

37. The clients were signed up to the Respondent for regulatory purposes but they were his clients – most of them moved to the Respondent when the Claimant asked them to do so, and most of them then moved to his new provider when he asked them to do so after he left the Respondent.

38. The agreement provided that if he wished to retire the Claimant could sell his book of clients to the Respondent, on terms set out in the agreement which would lead to a payment getting towards £1,000,000. This would be the sale of his business to them, so that he was running a business, which meant that he was not a worker.

39. The Claimant earned at least £250,000 a year. His income was entirely dependent on the amount charged to the investors he looked after. He was paid nothing by the Respondent, which serviced his clients in return for half the fees they paid.

40. The investors were personal connections of the Claimant such that they expressed concern that he was putting friendship above professional obligation on occasion. That is because they were all part of his business.

41. The dominant purpose of the arrangement was that he could look after his own clients. That is, he was in business on his own account.

42. He could invest his clients' funds as he wished, subject only to firmwide parameters affecting everything they did. He accepted that restriction as part of the terms for running his business through the framework they provided.

[1] I use the word employer in a non-legal sense. No one suggests that the Claimant was an employee.

43. The Claimant undertook in the agreement to reimburse the Respondent for any loss or expense they incurred as a result of the Claimant's dealing with or for the clients.

44. The Claimant had to have his own professional indemnity insurance and dealt with his own regulatory approval by the FCA.

45. He had never thought to have holiday pay, and he could take as much or as little as he wished. He could work as much or as little as he wished.

46. He had no key performance indicators, of any sort. He was left alone to service his clients, and the Respondent provided back-office support and regulatory approval in return for half the fees generated. He was working for his clients and running their finances through the systems of the Respondent.

47. He held a beauty parade to choose who to entrust with the running of his business.

48. On moving to the Respondent, the Claimant arranged a loan of £225,000 from them, repaid by taking 40% commission and not 50% until the money was repaid.

49. While the EAT had overturned two of the twelve factors set out in EJ Stout's judgment no fault had been found with the other ten, which were more than enough to find that the conclusion that the Claimant was not a worker for the Respondent was correct without reliance on these two points.

50. (Those two points were §68(c), that parties of relatively equal bargaining power had chosen to characterise their relationship, and to arrange their tax affairs on the basis that the Claimant as self-employed (because that does not preclude worker status) and §68(i), that he conducted his own investment business through the Respondent as well as that of his clients (because what he did for himself is not relevant to his status when investing for his clients.)

51. The written submission puts these points succinctly:

"R now submits that C was not a "*worker*" because he was conducting his own "*business*", with R falling to be treated as the "*client or customer*" of that business, for the following reasons.

(i) The vast majority of EJ Stout's reasoning on this limb of the test remains valid. Although the EAT could not be certain that she would have reached the same conclusion absent her two erroneous factors, the other factors which she considered remain as compelling reasons for concluding that C was not a worker under this limb of the test.

(ii) Analysing all the circumstances of C's case, he was in business on his own account. The most significant factors here were: he had his own clients (whom he brought to R, and could equally take away from R whenever he chose to terminate his contract, or sell to R, or sell to anyone else); he took the full financial risks of his work; and, apart from R's regulatory oversight of his work, he was free to work as he chose. Overall, C falls to be treated as being in business on his own account, as he did not fall within the category of "*vulnerable*" or "*dependent*" workers whom the legislation is designed to protect.

(iii) C's principal argument (relying on guidance given in ***Cotswold Developments Construction Ltd v Williams*** **[2006] IRLR 181** at ¶53) is that he was "*integrated*" within R's organisation, and provided services only to R. However: (a) as EJ Stout pointed out (in an aspect of her judgment which was not successfully appealed), that was a matter of C's choice, in that his contract permitted him to use other investment platforms; (b) it has been expressly stated

in the case law that providing services to only one client does not mean someone is a 'worker', employed by that client, and this is merely one amongst other "*factors*" to be considered[2]; and (c) the extent to which C was integrated in R's organisation is outweighed in this case by the other factors summarised in ¶0(ii) above.

52. The "beauty parade" through which the Claimant selected the Respondent to service his clients showed that he had the bargaining power, and he was able to get the Respondent to depart from its usual terms and charge less than its standard terms.

53. The Claimant could retire and sell his client portfolio to the Respondent on set terms, and the figure would approach £1,000,000. This was a strong indicator that this was his business, and that the Respondent was a supplier to it of transactional services.

54. In addition, on starting he had taken a loan from the Respondent of £225,000. This was another strong indicator of his bargaining power.

55. The finding that he could, if he chose, put some clients' affairs through another platform was undisturbed by the appeal, and while in practice the Claimant decided for practical reasons to stay with one service provider, the fact that this was a real possibility was another indicator that this was his business, because a worker for one business could not direct business to a rival.

56. There had, during the continuance of the arrangement, never been any contemplation of holiday pay. That was because, when all was going well, the Claimant could not have thought he was entitled to any – because he did not think he was a worker for the Respondent.

57. As to the public interest disclosure policy being applicable, that was no more than an error of law by the Respondent.

58. The regulatory control was the minimum necessary to permit the Respondent to provide services to the Claimant's business.

59. The Claimant followed his own unique investment style which, within regulatory limits, he was permitted to do even though it did not accord with the Respondent's own house style (to oversimplify, the Claimant focused on tax efficient investments such as EIS schemes, and on smaller illiquid companies).

60. EJ Stout's judgment at §31 stated that there was a very significant degree of control over the Claimant because it could (and did) withdraw regulatory approval with the FCA and told him not to contact his clients. This was undisturbed by the appeal and was an important factor.

61. The appraisal was found to be primarily focussed on the regulatory responsibility the Respondent had in respect of the Claimant.

62. The remaining factors in §68 of EJ Stout's judgment – which found he was not a worker – were all sound reasons to maintain that conclusion:

    62.1. a - he was bringing the money to the party so had significant bargaining power
    62.2. b – the Respondent could not dictate tariff to the Claimant's clients
    62.3. d – the goodwill was that of the Claimant - he brought and could take away his clients
    62.4. e – there was no disciplinary process applicable and appraisal was

[2] See ***James v Redcats (Brands) Ltd*** **[2007] ICR 1006** at ¶¶49-51 and ***Hospital Medical Group Ltd v Westwood*** **[2013] ICR 415** at ¶16.

primarily regulatory

62.5. f and g - integration and marketing were a matter of choice. That part of the Claimant's appeal about those paragraphs was unsuccessful - EJ Stout was entitled to take account for them being a matter of choice

62.6. h – the Claimant could chose holiday and hours of work. The Claimant was only interested in fees and commission, not where or whether he was working.

62.7. j - he bore the entire risk – there was no salary and he incurred some expense

62.8. k – the same

62.9. l – he could invest for clients as he wished subject to being within the regulatory framework.

63. The case law indicated that there was no single test, and the issue was multifactorial – an "informed impression" There were 2 analytical tools. He was not vulnerable, nor subordinate and nor was he dependent so as to need protection for public interest disclosure purposes. This was a touchstone, but was not a necessity, but part of the mix. The best guidance was in the cases and particularly the Supreme Court in *Uber*.

64. Next was the dominant feature of personal work or particular outcome - *Recats* and the *Cotswold* approach as to integration – his business retained its identity, shown by the very large percentage of clients (about 85%) which moved with him to another provider when he left the Respondent.

Observations on the points put forward by the Claimant

65. The appraisal of the Claimant (which wes primarily for regulatory purposes) was of more than ensuring that the Claimant met the regulatory requirements of the FCA. This secondary purpose is an indicator of integration and of control by the Respondent of the Claimant's work.

66. He was vulnerable to some extent as he relied on the Respondent certifying him to the FCA as a fit and proper person. That is limited vulnerability as the size of the Claimant's client base, and its loyalty to him, meant it was largely transferable with him, as occurred twice.

67. The HMRC enquiry as to his status has as its implicit assumption that the Claimant was a worker. He is repeatedly described as such and is said to have management responsibility. This was not a document into which the Claimant had input. It is evidence that this was how the Respondent saw him – as a worker.

68. The Claimant was presented to the outside world as an integral part of the Respondent's business. Not only that, but in fact he was completely integrated into the Respondent's business.

69. There were limits to what the Claimant could do with investments. While he had a lot of flexibility, the control of the Respondent was greater than just FCA rules. It was their own house rules too. While the Respondent's construction might be that the Claimant accepted the terms on which his business would engage a subcontractor, the reality is that the Claimant's freedom to invest his client's money was constrained by the Respondent to the extent that when they were not happy with the investment strategy they ended the arrangement.

70. It is a fact that the Claimant's clients were the clients of the Respondent introduced by the Claimant. It is in the non-legal sense that they were his clients – the clients accepted his recommendation of to which organisation they should become clients for their investment affairs. I am concerned with the legal status of the Claimant in his arrangement with the Respondent.

71. The dominant purpose of the arrangement was the delivery of investment advice to the Claimant's clients, by the Claimant, and by doing so to earn fees which were shared between the Claimant and the organisation to which he introduced them. This really does not assist either party.

72. That the Claimant could have gone elsewhere in addition to the Respondent was much discussed. It is not a material factor in deciding what his relationship with the Respondent was. He might, for example, have decided that he would run the riskier portfolios through an arrangement with another company. The Respondent would still have received 50% of the fees earned through the others, and as there was no kpi of income to be earned no reason why this would involve any conflict of interest.

73. While *"marketing to the world"* indicates someone likely to be running a business on their own account and the Claimant did not do this, this is not an indicator that he was a worker for them in the circumstances of this case. A business can have only one client.

74. The Post Office case makes it clear that a business may have only one client, even when the business starts at the commencement of the arrangement between the parties. He could be running his own business through the Respondent. This is therefore not a strong point for the Claimant.

75. The analogy of the solicitor with a following is not a real analogy. Such a person would not have to take out his or her own professional indemnity insurance and could not sell clients whose affairs had been handled by the firm (though he might be entitled to payment for goodwill, although this is now largely written out of solicitors' accounts). Such a solicitor would (usually) be subject to a restrictive covenant.

76. The Respondent told the Claimant not to contact his clients. The Claimant says this indicates control. There is nothing to indicate that they had the right to do so, but plainly the Respondent thought they had the power to do this, so to that extent it is a point in favour of the Claimant.

77. The terms of the agreement between the parties are of more significance than in cases where they are dictated by one party. The Claimant could change things he did not like, as he did with the charging rates for his clients. They are indicative of worker status, but this is not the starting point, which is to examine the actuality of the relationship. That the agreement largely accords with that reality is a point in favour of the Claimant.

Observations on the points put forward by the Respondent

78. The size and loyalty of the Claimant's following is the reason why he had such negotiating power with the Respondent, as it generated large fees to be shared. However, it is not that the Claimant was in business as a regulated investment adviser seeking to engage the Respondent to provide back-office functions to process investments.

79. The Claimant set the terms on which he introduced his following to the Respondent. That is a reflection of the size of the investment funds that followed him, which is not directly relevant to the status of the Claimant when with the Respondent.

80. That the Claimant relied entirely on 50% of commission and fees earned through his following is no reason to assert that he was not a worker. With annual fees of a percentage of fees under management of over £50m there was always going to be a substantial income. In any event his success over many years would have given him the confidence to rely on a commission only income.

81. There was oversight beyond FCA requirements. He had to adhere to house rules as well. There was no need for KPIs as his track record spoke for itself, and the Respondent got 50% of all earnings with no overheads other than paying for a personal assistant and costs of running the client's portfolios, which would be funded from the commission.

82. The following was indeed loyal to the Claimant, but legally they were the clients of the Respondent, introduced by the Claimant.

83. That the Claimant could sell his book of clients to the Respondent for a sum approaching £1m is highly unusual for a worker and is a strong point for the Respondent. The terms of the agreement are that he did not have to do so, but that if he did wish to do so the Respondent had to pay him. This makes the point stronger still.

84. The Respondent says that the clients were his friends. Even if so that does not affect the examination of the basis of his relationship with the Respondent.

85. The dominant purpose was for the Claimant to earn an income as an investment adviser. He was not himself registered with the FCA as a provider of investment advice and so needed to be associated with a firm such as the Respondent to do so, sharing the commission with them to mutual advantage. This is not, of itself, indicative of his status in entering into such an arrangement.

86. The restriction on investment was such that it led to the ending of the relationship. The Respondent could argue that the Claimant accepted house rules on investment as part of the overall arrangement through which he was able to earn income from advising his following, and to that extent the point has some weight for the Respondent.

87. The Claimant indemnifying the Respondent for loss arising from investment advice is no more than a corollary of his relative freedom to invest the money of his following in a unique style. It does not bear in any substantial way on his status with the Respondent.

88. It is a point for the Respondent that the Claimant had to have his own professional indemnity insurance. It is not usual for employees and workers to arrange their own insurance, at least in the professional field. As a point of principle, it is of less weight as delivery drivers who are workers often have to arrange their own vehicle insurance.

89. He was an autonomous individual with no KPIs. His freedom to work when he liked is irrelevant to his status when he did work. He was well remunerated and had as much time off whenever he wanted to take it. That no one thought about holiday pay is not a weighty factor as to whether or not he was entitled to ask for it.

90. He had no KPIs but the cost to the Respondent of his work was a proportion of the income. There was no need for any KPIs for this reason, especially given the Claimant's track record. If the income dwindled to the extent that it was no longer worthwhile for the Respondent they could end the arrangement. It is not a strong point for the Respondent.

91. The *"beauty parade"* is no more than a reflection of how the profitability of the following made the Claimant attractive to the Respondent and others. While analogies may not be helpful, a much sought after footballer will have a beauty parade of clubs he might join, but no-one would suggest that he in the business of being a footballer when he joined one of them. He would be a worker.

92. The loan of £225,000 is highly unusual, and with the sale of the following is not indicative of worker status.

93. Whether the Claimant could have had more than one service provider was discussed at some length during the hearing. It matters not. If he could have done so that would mean only that he might be a part time worker with the Respondent. It is not a point which affects the assessment or whether, when with the Respondent he was a worker within S230(3) of the Employment Rights Act 1996.

Conclusions

94. There are points that support both contentions. I set them out above. For the Respondent perhaps the strongest are the loan of £225,000 at the start and the right to sell his following to the Respondent. This is the Respondent buying its own clients, on the basis that in reality they belong to the Claimant and must be sold or paid for even when the Claimant wants to cease to advise them.

95. I attach little weight to the contractual documents. The Claimant was at least as powerful in the negotiation as the Respondent. He was giving them the opportunity to be paid a lot of money in return for processing the affairs of the individuals he would bring to the Respondent. He was able to impose the terms he wanted for the clients he brought to the Respondent. If the document reflects reality, it has weight. In so far as it does not it has less or no weight. This is the A*utoclenz* guidance, which really is to assess the circumstances and decide whether the documents fit those circumstances. This indicates worker status, and at §102.7 I make a further point about documentation.

96. In practical terms, the Claimant has a large following of investors with a very large amount of money invested, loyal to him, and from which a very substantial amount is earned in fees, both as a percentage of funds managed and transaction fees. He services this following through an FCA regulated firm to which he attaches himself so that he and his following comply with the regulatory framework for investment advice.

97. In that everyday sense, he is in business as an investment adviser, with a group of loyal long-term clients who follow him from one service provider to another.

98. However, this decision is not to be made in an everyday sense, for it is whether the Claimant was a worker within the definition in S230(3) of the Employment Rights Act 1996. Given past decisions the decision for me is whether the Respondent was a client or customer of a business run by the Claimant.

99. I take full account of the points that are in favour of the Respondent, set out above.

100. None of the indicative tests from the case law above determine this case. I have taken account of the fact that the Supreme Court in *Uber* said that the first and most important factor was who set the level of pay. That was in the context of total control by Uber over the terms of drivers, and I do not think the fact that the Claimant was able to set his own terms undermines my conclusion.

101. My overall assessment is that in order to service his following, the Claimant had to become a worker for the Respondent (whether or not for the firms he associated himself with before and afterwards I do not say).

102. Some of the factors are:

    102.1. The degree of integration within the Respondent (set out above) and the impossibility of any member of the public seeing him as any different to employed advisers or any other associate. He looked to the world like a worker.

    102.2. The restriction on him contacting the press or publishing investment papers

– anyone in business on their own account would not let a supplier of back-office services tell them what they could or could not do in this way.

102.3. The fact that the following was signed up as clients to the Respondent. It is an odd sort of business which has only clients of another organisation.

102.4. The judgment of EJ Stout found as a fact that the appraisal was primarily for regulatory purposes. I do not seek to go behind that finding. However, the secondary aspects of the appraisal, in particular the requirement to adhere to the Respondent's ethical standards, are of significance.

102.5. While I give limited weight to the documentation, this does state, in terms, that the Claimant is entitled to the statutory protection afforded to those who make public interest disclosures. This was not a contractual extension to someone not entitled to it, but a statement that he was so entitled. The Respondent was taking on someone likely to bring in a very substantial amount of money, and the arrangement was the subject of negotiation. I do not take this as an accidental effect of handing out standard documentation.

102.6. While I do not think the Claimant particularly vulnerable (and so to require the protection of worker status for public interest disclosure reasons) the fact remains that he gave his professional standing into the hands of the Respondent such that they could, and did, remove his right to be an investment adviser. I cannot conceive of a business that would give to a client of customer the right to make that business cease to trade.

102.7. The sums involved are very large I indeed. The amounts are large enough to justify the expense of a bespoke agreement for a business run by the Claimant to be serviced by the Respondent. Instead, he was recruited as a self-employed associate.

103. These are the main points. My conclusion is the result of assessing all the facts found by EJ Stout, the conclusions of EJ Stout, the judgment of HHJ Ford KC, and the lengthy submissions of both parties Counsel, upon which I comment above.

104. That I have not referred to any particular argument or fact does not mean that I have not considered it, for the submissions ended late on the first day of the listed hearing and I have spent much more than the second day allocated to this case in considering the case and in drafting this judgment.

Employment Judge Housego

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Date 20 September 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

26 September 2024

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FOR THE TRIBUNAL OFFICE