EMPLOYMENT TRIBUNALS

Claimant: Mr C John
Respondent: EC1 Build Limited

Heard at: Watford (over CVP)
On: 10 December 2024
Before: Employment Judge Dick

Representation
Claimant: Mr Young (solicitor)
Respondent: Miss Doble (counsel)

JUDGMENT having been sent to the parties on 20 December 2024 and reasons having been requested on 23 December, the following reasons are provided:

REASONS

Introduction

1. These reasons relate to a hearing which took place on 10 December 2024. The letter from the Tribunal that had informed the parties of the purpose of the hearing was perhaps not as clear as it might have been, but the parties came prepared to offer evidence and for me to make a decision on the substantive point about the claimant's employment status before 21 November 2022 and that is what I did. The point was significant as the principal complaint in this case is of "ordinary" unfair dismissal, which requires the claimant to have been an employee, within the meaning of the Employment Rights Act 1997, "ERA", for not less than two years. (In these reasons, wherever I say employee I mean it in that sense.) The parties agree that the claimant was an employee of the respondent between 21 November 2022, when he signed a written contract of employment ("the contract"), and 12 July 2024, when his employment ended. The issue was whether the claimant was also an employee *before* 21 November 2022. If he was, he had been employed for more than two years and his complaint of unfair dismissal could proceed; otherwise, it could not. The same applies to the complaint of failing to make a redundancy payment. (There is also a complaint about breach of contract which is unaffected by my judgment in this case.)

2. It was the claimant's case that his engagement with the respondent amounted to employment from January 2021 when he began to work as a Site Manager and his hours became more stable. The respondent's case was that although the claimant worked for the respondent before signing a

contract, he had not been an employee till then.

Procedure

3. I heard evidence from the claimant and from Mr Edward Clarke, then submissions from the advocates. Having concluded that the claimant was not an employee before 21 November 2022, giving oral reasons, I dismissed the complaints of unfair dismissal and failing to make a redundancy payment, on the basis that the claimant did not have the required two years' service. My judgment was sent to the parties on 20 December 2024. A request for reasons was made on 23 December 2024 and passed to me on 8 January 2025. I apologise for the delay thereafter in providing these reasons.

Findings of fact

4. I make the following findings of fact on the balance of probabilities.

5. I have not decided every point in dispute, but only those points which assisted me in coming to my decision on the issue that I had to decide.

6. I will start by recording that I clearly heard from two honest witnesses. They both answered questions frankly and to the best of their recollection, both conceding points that did not necessarily assist their own case. Where there were differences between the witnesses they were relatively minor differences in their recollections of dates and so on.

<u>June 2019 to the end of 2020</u>

7. The respondent is a construction company and Mr Clarke is its Director. The claimant started working for the respondent around June 2019. All agreed that, at that point, his status was of a self-employed contractor and that is something that the claimant conceded in cross examination.

8. The claimant was subject to the Construction Industry Scheme ("CIS"). His recollection, which I accept, was that he did not personally sign up. He provided details to someone in the respondent's accounts department, he said, which included his National Insurance Number and a UTR (Unique Taxpayer Reference) which he had from his previous self-employment as a Skiing Instructor. On the basis of the evidence I heard, I understand that the CIS scheme applies to someone whom HMRC considers to be a self-employed contractor or sub-contractor in the construction industry. That person must pay a set percentage of their earnings straight to HMRC, i.e. it is deducted at source. The money is essentially a payment on account for when the person on the scheme completes a self-assessment tax return. From HMRC's point of view the claimant was a self-employed contractor and, as I will go on to find, that in fact reflected the understanding of the parties at that time and, indeed, later as well. I stress at this point that HMRC's view of whether someone is self-employed for the purposes of tax law does not assist my decision on employment status (i.e. for the purposes of employment law).

9. Common to all of the period of the claimant's engagement from 2019 to the point at which he signed the contract were the following. The claimant was paid for the hours he worked, i.e. at an hourly rate. (There is slight qualification to that in that the claimant said, and I accept, that depending on

what system was in operation at the time, if he worked under eight or nine hours, he might bill for the full eight or nine hours but if he worked more than the eight or nine hours he would be paid for the further hours.) The claimant was not paid holiday pay and he was not entitled to sick pay. As I have said, he paid his tax through the CIS Scheme and then via self-assessment. There was no written agreement in place concerning the relationship between the respondent and the claimant and he was not subject to the respondent's disciplinary or grievance procedures.

10. From 2019 the claimant worked his way up – he started as a labourer and then started working as a site supervisor.

January 2021 to November 2022 – Site manager

11. The claimant, as I have said, says that there was a material change in or around January 2021 which took the relationship from one of contractor and sub-contractor and in to the employment sphere. The claimant relies on two particular changes. The fact of those changes was not materially disputed, though the legal effect of them was. First, he started being paid more around that time. Second, he began to work as a site manager (i.e. one up from a site supervisor) from around that time. It is right to say that his hours became less variable, but it seems to me that that was more a reflection of the work the claimant was choosing to accept rather than an inherent feature reflecting a change in the type of work. I accept the claimant's recollection that he started to work as a site manager around January 2021. Mr Clarke in fact agreed that he thought that was about right but if there had been any doubt, the parties agree that the claimant started working a site manager on a project called Sigma Sports around November 2021. The claimant was able to talk me through three other projects that he thought he had worked on before then; one of three months; and two of two months each with a bit of a gap in between. So, starting in January must be about right for the site manager work. In between projects the respondent would put the claimant to other work.

12. So far as the role of the site manager is concerned, Mr Clarke agreed in evidence that the claimant had set out what that role was, to some extent at least, in the email at page 168 of the bundle dated January 2021. The claimant said there that he had been a keyholder on almost every site; he did a multitude of tasks from general building to carpentry and joinery, neither of which were necessarily tasks exclusive to the site manager, but he then went on to say:

> "I provide other members of staff with direction on how to complete jobs, tools to do the jobs, I order materials and supplies to site, organise trades, ensure the safe running of sites, organise rubbish removals etc."

13. It was not disputed either that the claimant, at least at times, was responsible for planning the workflow of other people engaged by the respondent and, indeed, for approving the hours that they had put in for payment.

14. It is clear that there was no agreed written right of substitution. For example, nobody was suggesting that if the claimant did not feel like attending work one day he could simply send somebody else. It is clear to me that, once the claimant had accepted a particular job, by which I mean working as a site

manager for a period of a month or so at a particular site, it was expected that it would be him doing the work. However, there was an exception in that he and the respondent would essentially between them agree who was to cover for him if he was not going to be working on a particular day. Sometimes that would be a contractor, sometimes that would be an employee of the respondent. I do accept what Mr Clarke said that, particularly in the case of the project manager (and that is what the claimant started doing a little later) it was not always necessary to arrange someone to cover. So, the claimant was not solely responsible for arranging cover when he was not to be working but clearly he had some responsibility in that regard which was really of course inherent in his role as site manager.

15. So far as the control the respondent exercised over the claimant on the subject of how he was to do his work, the claimant's evidence, which was not in dispute and which I accept, was that he was given a list of jobs to do perhaps at the start of the week and it was for him to decide how to go about completing that work. He would report back or log it when the work was finished. Sometimes he would finish earlier than expected, sometimes it would take longer. If a project manager asked him to do work in a certain way he would do that. Ultimately, I regard that as something of a neutral point in that it is the sort of control that might well be exercised over an employee but, equally, it is the sort of control that might well be exercised over a contractor in these sorts of circumstances.

16. There is no dispute that the claimant used some of his own tools. Occasionally he would request the use of other sorts of tools from the respondent. His use of the company van was not in my judgement significant in this case – he used it occasionally when needed. Likewise, I do not consider the fact that he had access to a laptop to be significant. The claimant's email footer had the company name on it. The claimant providing some of his own equipment and using some of the respondent's seems to me to be a broadly neutral point.

17. The claimant would usually work, at least in 2021, around 40 hours a week. Sometimes it was more, sometimes it was less. Nobody disputed that the claimant would occasionally choose to work a half day, for example. It was put to the claimant in cross-examination that how long he worked depended on how long the task took. I accept what the claimant said here, that that was not quite right. He would be on a site for set hours. It would open between 8 a.m. and 5 p.m. He would arrive at 7.30 a.m. and generally leave at 5.15 p.m. In my judgement, what is significant here is whether the claimant's hours were guaranteed. In practice, certainly in 2021, the respondent offered the claimant as much work as he wanted and he accepted all, or nearly all, of the work that was offered. That is not the same thing as saying the respondent was obliged to offer the work and the claimant was obliged to take the work. While it is right that the claimant was told or instructed where his next job would be, I do accept Mr Clarke's evidence that others in the claimant's position, and there were others, did have some degree of control and they could accept or refuse those assignments. I find that the claimant could have refused work without the respondent considering that he should be subject to any consequences. In other words, had he refused work, the respondent would not have been concerned. Likewise, I find that there was no requirement for the respondent to offer the claimant any particular number of

hours. He was offered a lot of hours in 2021 because the respondent had the hours and not because it was obliged to offer them to the claimant.

18. So far as holidays before the contract was signed are concerned, I find that holidays were arranged more by way of the claimant informing the respondent when he was available rather than it being a case of the claimant seeking permission to have time off. That is something that changed after he signed the employment contract – he then had to use an app to request holidays. Before the claimant signed the contract, he was not paid when he took holidays. One minor instance indicative of the approach in the pre-contract period is as follows. It is evident from some texts which were in evidence that the claimant went away in August 2022 without knowing his return date. That would have been inconsistent with him having to have got permission from the respondent to go on holiday although, in fairness, it does seem that even if there was not a firm return date the respondent would have had some sort of idea of when the claimant was likely to return.

19. I have heard some evidence about the claimant's work as a skiing instructor. There was a difference between the parties about whether, over 2021 and 2020, he had taken three and a half or five weeks off to do that. I do not regard that a point of great significance in the context as I have already found it, that the claimant was entitled to refuse work.

20. I do consider a significant feature of this case to be the parties' intention or understanding of the nature of their relationship and there are three emails in my judgment that are significant here:

    22.1 An email of 4 January 2021, which is at page 167 of the bundle. The claimant emails Mr Clarke seeking an increase in his pay. He explicitly says that having looked at freelance rates available in the rest of the industry, he should be paid essentially at similar rates. So he is asking there to be paid at freelance rates and he explicitly says that that is because freelancers lack the job security that is associated with permanent employment. Although later on in the same email the claimant does go on to describe himself as an employee, it is clear to me in the round that he regarded himself as a freelancer.

    22.2 An email of 14 October 2021, at page 51, is from Mr Clarke to the claimant, describing the latter as self-employed and saying, "We would be interested in taking you on as a full time member of the team". There is then a reference to payment for courses and so on which I will come back to later. Clearly, it is possible to work part-time and still be an employee but, in this context, it seems to me that here where Mr Clarke says full-time he plainly means employee in contrast to the claimant's then-current position as the parties understood it.

    22.3 A similar offer was made to the claimant in August 2022 in an email at page 118 and that is an email that shows the claimant negotiating about the contents of what was to become the employment contract that he signed. He asks about, amongst other things: notice period, expenses, death in service benefits and payment for doing courses. It is clear in that context that what the claimant is seeking there is a significant change to the current arrangements.

21. All three of those emails, in my judgement, are a clear reflection of the parties' understanding that the claimant was self-employed. I also take into account, of course, the claimant's own oral evidence which is that he had enjoyed the flexibility of self-employment, at least initially, because he wanted to work as a freelance skiing instructor for some of the time and it does seem to me that part of the reason for the change was that the claimant wanted less of that.

22. Some other relatively brief points now. I have already referred to the 14 October email. The other point of significance there is that the claimant was told that because he was self-employed the respondent would not be paying for him to go on courses. The position was clarified somewhat during the course of the oral evidence. It is clear that the claimant was never paid for his time, in other words paid to attend courses, although Mr Clarke did concede that it may have been that some courses were paid for by the respondent. The slight qualification to that is that some of those may actually have been paid through bursaries rather than out of the respondent's "pocket", but I do find that some courses at least were paid for by the respondent.

23. The next point is that there is evidence, and I have referred to it already, that at various points the claimant negotiated about the pay that he received – he negotiated successfully to increase his hourly rate.

24. I was also referred to a chart at page 179 which is an organisational chart for the respondent. It puts sub-contractors in a different category to site managers and project managers. I do not give that chart any great weight in deciding the issues in this case. It is clear that there was a completely different category of sub-contractor engaged by the respondent, who only worked a few weeks at a time and it seems to me that the chart most likely reflects that. It does not prove that the claimant was not a sub-contractor.

November 2022

25. There was no dispute that, following the negotiations reflected in the August 2022 email I refer to above, and following an application and interview, the claimant signed a contract of employment with the respondent which took effect on 21 November 2022.

26. There was an issue between the parties as to whether the claimant started to take on a project management role, that being the next step up from site manager, in December 2022 as Mr Clarke recalls or October as the claimant recalls. That is not a difference in recollection I needed to resolve. There was no suggestion that this was a fundamental change that would have taken the relationship from contractor to employment, and even if it had, the claimant would still not have had two years' service.

The law

27. Although not all of the authorities I refer to below were formally cited in argument before me, they establish points of law which the advocates did address me on in substance even if each case was not specifically referred to.

28. The starting point is s 230 ERA, which so far as is relevant provides:

> (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.

29. "Employee" is to be distinguished from "worker"; the latter is defined by s 230(3) ERA and is not relevant to this case in that workers do not have the right not to be unfairly dismissed (though it is relevant in the sense that some of the authorities I refer to below deal with the distinction between employees and workers).

30. In *Ready Mixed Concrete Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 Mackenna J set out the three conditions necessary for a contract of service to exist.
    i. The employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer ("mutuality of obligation" and a requirement of "personal service").
    ii. The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the employer's control in a sufficient degree consistent with an employment relationship ("control").
    iii. The other provisions of the contract are consistent with its being a contract of service.

31. Regarding mutuality of obligation, there must be an obligation on the employee to do some work and for the employer to pay for that (described as the "wage-work bargain" in *Commissioners for His Majesty's Revenue Customs* v *Professional Game Officials Ltd* [2024] UKSC 29). As long as there is an obligation to do *some* work, the fact that an employee is entitled to turn down (some) work is not necessarily inconsistent with mutuality of obligation and the obligation of personal service (*Ryanair DAC* v *Lutz* [2023] EAT 146 para 180). It is also appears to be that case that (with the exception of "single engagement" employment contracts, which are not relevant to this case), mutuality of obligation involves more than payment in return for personal work but requires also an obligation on the part of the engager to provide work (or pay in lieu of work).

32. Regarding personal service, in *Stuart Delivery Ltd* v *Augustine* [2022] ICR 511 the EAT held that while an unfettered right to substitute another person to do the work or perform the services was inconsistent with an undertaking to do so personally, a conditional right might or might not be inconsistent with personal performance, depending on the precise contractual arrangements and, in particular, the nature and degree of any fetter on that right. The fact the claimant could withdraw agreement to work once he had accepted an offer did not mean that there was no agreement to do the work personally in *Nursing and Midwifery Council* v *Somerville* [2022] ICR 755.

33. Regarding control, in *Ready Mixed Concrete*, at 515, the court said:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make [an employment contract]. The right need not be unrestricted.

34. The question is whether there is to a sufficient degree a contractual right of control over the employee, rather than whether in practice the employee had day to day control over their own work. The *extent* of control will remain relevant to the overall assessment where the employee/worker establishes *sufficient* control to satisfy the *Ready Mixed Concrete* control requirement (*Revenue and Customs Commissioners* v *Atholl House Productions Ltd* [2022] I.C.R. 1059 at para 75).

35. Once mutuality of obligation and control are established, a multi-factorial approach must be applied to determine whether, judged objectively by reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made and on the basis of facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties (*Atholl House* (above)).

36. In *Uber BV and others* v *Aslam and others* [2021] UKSC 5 the Supreme Court held that when deciding whether someone was a worker it was wrong in principle to treat the written agreements as a starting point. Rather, it was necessary to determine, as a matter of statutory interpretation, whether the claimants fell within the definition of a "worker". The Tribunal's findings should be based on the language of the agreement but also the way in which the relationship in fact operated and the parties' evidence about their understanding of it. As the court put it in *Autoclenz Ltd* v *Belcher* [2011] UKSC 41, 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. The *Autoclenz*/*Uber* principle applies to determination of employee status just as it does to the determination of worker status – *Ter-Berg* v *Simply Smile Manor House Ltd* [2023] EAT 2 para 47. In the latter case, the EAT clarified that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms do truly reflect the agreement, applying the broad *Autoclenz* approach rather then stricter contractual principles. At paras 65 onwards, the EAT said that a written term stating that a person is not an employee or worker could not stand if as a matter of fact the person was, nor if the object of the term was to defeat statutory rights. Absent those circumstances, it is however legitimate to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

Conclusions

37. Clearly the claimant was obliged to do the work once he has accepted it, and the respondent was obliged to pay him for it. That aspect of the wage-work

bargain applies to employees but also to workers or indeed, contractors. What is significant here, in my judgment, is that on the basis of the facts as I have found them, the respondent was not obliged to offer work nor was the claimant obliged to take it; I reject the claimant's contention to the contrary. So, in my judgement, the essential element of mutuality of obligation is not made out here. I have already explained why the right of substitution, such as there was one, is broadly a neutral point in this case.

38. So far as the right to control exercised by the respondent is concerned, though Ms Doble conceded on behalf of the respondent that that went more in favour of there being a contract of employment, I would not say that it went all the way. While some control was exercised on the way the claimant went about his work, he generally exercised his own judgment about how to do the tasks he was assigned, though of course that will be the situation for many sorts of professional people who are undoubtedly employees. The list of tasks was undoubtedly provided by the respondent. Once the claimant had accepted work on particular project, he did not set his own hours in the sense that he worked as long as was needed to complete the work, but that is another point that might apply just as much to a contractor as an employee. All were agreed that the claimant was not subject to, for example, the respondent's disciplinary processes, so that element of control was lacking. The respondent did not exercise significant control over when the claimant took holiday.

39. Standing back and looking at it in the round, was the claimant "in business on his own"? I agree with Mr Young's suggestion that this is not an apt way to describe the situation, at least in the sense that the claimant was not running his own business. He was clearly important to the respondent's business although, equally, so were very many other people who nobody would dispute would be described as contractors. But, again looking at it in the round, "self-employed" or, even better, "contractor" do both seem to me to be accurate ways of describing the claimant's situation before November 2022. Before then, the claimant was offered the opportunity to become what the respondent would have described as a full-time employee, so there is less of an issue here of the power imbalance as there might be in some of the other reported cases. The claimant was also able to negotiate pay and so on. On the facts of this case, the intention of the parties gives a guide, in fact it helps me decide, what the relationship was in practice, which is particularly important given that there was no written contract in the period with which I am concerned. In my judgement, in this case, there is nothing to separate the parties' intentions from what actually happened in practice – the parties acted on the basis of the relationship as they intended it to be. My conclusion is that the parties' clear intention was that the claimant was to be self-employed. That was also reflected in what the parties considered to be the claimant's tax status and indeed, in how they described the relationship. But those factors are significant only in that they reflect the reality of the relationship. The claimant was, as he in fact believed himself at the time to be, a contractor not an employee; indeed he had, until he began negotiations before signing the employment contract, appreciated the flexibility that afforded him.

40. I did not need to decide in this case whether the claimant would have qualified as a worker.

41. Having decided that the claimant was not an employee within the meaning of ERA before November 2022, the claimant cannot have had the required two years' service. I was therefore obliged to dismiss the complaint of unfair dismissal and the complaint of failing to make a redundancy payment.

Approved by:

Employment Judge Dick

11 February 2025

JUDGMENT SENT TO THE PARTIES ON
19 February 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/