



EMPLOYMENT TRIBUNALS

Claimant: Mr Miroslaw Skiepkó

Respondent: JBP Foods Ltd

Heard at: Reading (by CVP)

On: 12 February 2025

Before: Employment Judge McCooley

REPRESENTATION:

Claimant: In person

Respondent: Ms McIntosh, Litigation Consultant

JUDGMENT having been announced to the parties at the hearing on 12 February 2025, and written reasons having been requested by the Claimant at the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant was an employee of the respondent at the relevant time. The claim for unfair dismissal and holiday pay will therefore proceed.

REASONS

2. This case involves claims for unfair dismissal and holiday pay. The sole purpose of this hearing was to determine whether the claimant was an employee, a worker, or a self-employed contractor, for the purpose of establishing whether the Tribunal has jurisdiction to hear his claims.

3. The findings in this judgment were based on the evidence prepared for this hearing and are not intended to bind any future judge, except as to the issue of employment status.

Procedure

4. I received a bundle of 669 pages from the claimant and a witness statement. He also gave oral evidence.
5. For the respondent, I received an additional bundle of 157 pages and a witness statement from Director, Patryk Zajac. Mr Zajac did not attend to give oral evidence on behalf of the respondent, as he was abroad and his application for an adjournment had been previously refused. No alternative witness gave evidence for the respondent.
6. Overall, where there was a factual dispute or difference in interpretation between the claimant's oral account and Mr Zajac's written account, I therefore preferred the claimant's version, as it was given under sworn oath; he was cross-examined on it; and it was consistent with his written evidence.

Submissions

7. The respondent's case was that the claimant was self-employed and therefore both his claims must fail today. Submissions focused on the fact that the claimant was told verbally during his interview that he would be working on a self-employed basis with the company, to which he agreed. The claimant then referred to himself as self-employed in his ET1 form, and gave no indication that he would take issue with that status; he also referred to himself as being self-employed during discussions with the respondent at the end of 2022. The respondent says the claimant had a level of control and flexibility over his work consistent with being self-employed.
8. The claimant's central argument was that whilst the label of 'self-employed' was indeed attached to him by the respondent, and he accepts verbally agreeing to this status at interview, the reality and facts on the ground were that he worked as an employee, and was treated as such by the respondent. If he sought to assert control over his work by reference to his self-employed status, he was ultimately threatened with being fired by Mr Zajac. Regarding his work, he was required to do things the respondent's way. For that reason, he says he lacked sufficient control over his working life to be truly self-employed and was in fact an employee for the purposes of s.230 Employment Rights Act 1996, or a worker at least.

Findings of Fact

9. The claimant was first introduced to the respondent in 2020 through one of its clients, who recommended him for the role of sales representative.

10. On 7 July 2020, the claimant had an interview with the respondent and was told he would be working on a self-employed basis. He did not understand the legal definition of self-employment, and its implications, to the level we have been discussing today, he nonetheless accepted the status.
11. Remuneration, it was agreed, would be in the form of commission set at 5% for sales from the company's main catalogue of food goods, or 2% from the leaflets used by the respondent company to promote sales. The claimant was paid on the 10th day of every month by direct personal bank transfer.
12. Initially, the claimant was offered £500 per month for the use of his personal car for his work, though shortly after, the respondent offered him a company car which the claimant accepted. It is agreed this was fitted with a GPS system which the respondent could access to monitor the drivers' whereabouts. Mr Zajac accepts having done so on a number of occasions.
13. The respondent gave some of their customers to claimant when he started out. By the end, the claimant had a mix of the respondents' customers and those he had generated himself in the role.
14. The claimant was responsible for his own taxes, national insurance and had an accountant.
15. The claimant received a tablet, Windows software, and later, a terminal barcode scanner. This scanner would send information about the claimant's sales direct to the respondent, who would then work out the commission owed to the claimant, minus any returns, from that information.
16. As such, the claimant did not send invoices to the respondent; rather the respondent looked at invoices generated by his scanner for customers and worked out what the claimant was owed from those.
17. I find, as the claimant suggests, that the catalogue, leaflets and scanner, were 'tools', as it seems all customers made orders by reference to those items; his commission was calculated according to them; and therefore without them, he would not have been able to perform his job.
18. Initial training was carried out informally by Ms Bogumila Gruda, partner of Mr Zajac, who also had a senior role in the business. Ms Gruda had regular conversations and texts with the claimant about how best to approach his role.
19. Nothing in writing was sent to the claimant about his role by the respondent, for example, there were no written terms of employment; no written basis of agreement around his self-employed status; no written policies; employee handbook or training materials. Everything took place verbally, and this seems to have been the case for the seven others that worked for the respondent.
20. Ms McIntosh says because of this verbal arrangement, there was no contract. I think she means no contract of employment, because clearly there was an oral agreement to carry out work for the respondent from July 2020 onwards,

hence the monthly payments to him for the work the claimant in fact carried out for 2.5 years.

21. It was further said that there is no written evidence of the claimant's being employed or a worker, and that should cause me to prefer the assessment that he was in fact self-employed. However, nor is there written evidence of the claimant being self-employed. This is largely because the respondent chose not to have any formal system in place for documenting the working relationship and avoiding such ambiguity. Notwithstanding being a small company, I could see no coherent rationale for the total lack of written evidence in this respect.
22. I accept the claimant's evidence that initially he thought he would be self-employed, as the respondent said, but as time went by, he realised that whilst he might be self-employed in name, the practical outworkings of his job were going to look like those of an employee. I will return to that below.
23. The respondent had rules, which it called 'policies', though these were not in writing, which it expected the claimant to follow, for example: around minimum sales; when to allow customers 'one-in-one-out' payments; and what level of commission could be applied in different scenarios. I accept what the claimant said: he could only apply up to 10% commission for his customers and could not choose when to allow 'one-in-one-out' payments, unlike Mr Zajac.
24. It is agreed there were no set start times or finishing times for the working day, but Mr Zajac required the claimant to be in certain geographical locations, taking orders from certain customers, on most weekdays. The claimant would also be asked to change his schedule at the respondent's request and the impression from his evidence was that he was not free to decline.
25. The respondent's position here is that there was a higher degree of flexibility than the claimant suggests, for example, he could work only 15 hours per week if he wished, and still generate £3,000 in commission. However, I accept the claimant's evidence that Mr Zajac challenged him about his working hours in a message contained in the bundle, the suggestion being on that occasion that he should have been working more.
26. At different points, Mr Zajac also took an interest in the routes the claimant used to get to various sites, and whether they were time effective. This was corroborated by messages in the bundle. Mr Zajac requested contact details for the claimant's own customers; and on 15.1.2024 challenged the claimant about his decision to delay taking payment from one of his customers by two weeks, which Mr Zajac said was not in line with the company's process. Mr Zajac also took issue with the claimant for using his company car for personal things, such as seeing his accountant and not visiting clients in Southampton on the days Mr Zajac expected. Some of Mr Zajac's knowledge of the claimant's whereabouts came from the GPS system installed in his car.
27. It seems the claimant took little holiday during his time because he was worried he might lose out on customers. Whilst accepting he may have been a little paranoid about this, he pointed to an incident where he took three days of sick

leave, and during that time, the respondent withdrew customers it had previously given to him. This is consistent with Mr Zajac's threat to remove customers at a later stage, discussed below, and I find it is likely to have happened.

28. By the end of 2022, I find that the claimant had serious doubts about whether he was truly self-employed; whilst this had not troubled him initially, he was finding the restrictions placed on his work and how he structured it to be a problem. If he was really self-employed, he felt, for example, that he ought to be able to prioritise work for himself and choose jobs that provided him the most commission.

2022/ 2023 discussions

29. With this in mind, a significant phone call then took place in December 2022 between the claimant and Ms Gruda in which he explicitly sought to rely on his self-employed status to challenge the 'demands' he was receiving to take certain routes to customers and distribute more leaflets as the respondent wished. He said: *"I'm self-employed and I should be focused on things that bring me the most commission."*
30. To this, Ms Gruda hung up. Following this call, Mr Zajac asked for a meeting with the claimant at the respondent's offices at the beginning of January 2023, which the claimant called a 'disciplinary conversation'.
31. Mr Zajac makes no mention of this meeting in his witness statement, or of the phone call with Ms Gruda. Instead, he says, *"I spoke to the Claimant in June 2023 regarding the service he was providing because I was not happy. It came to light that he was starting to lose customers and didn't find any new customers. He said to me, "I am self-employed, and I do what is good for me".*
32. In the absence of Mr Zajac's oral evidence, I accept the claimant's detailed account that there was a meeting in early 2023 at the respondent's offices and Mr Zajac said he should be fired for making the comment to Ms Gruda referencing his self-employment, using a Polish phrase: *"he should throw me out from the job on my beaten face,"* and that Mr Zajac used a derogatory word 'pysk'.
33. I also find that when the claimant challenged the use of monitoring his movements by GPS, Mr Zajac then threatened to take customers away so the claimant would only have his own. As a result of that conversation, the claimant kept the company car and felt unable to his assert his self-employed status in any way going forward, otherwise he risked losing his job.
34. The claimant was challenged in cross-examination as to why did he not raise his complaint sooner. I find that his reason was he was relatively satisfied with his working situation prior to the end of 2022, whilst becoming more aware that the label 'self-employed' was just that, a label, and he could not in truth work in the way he wished.

35. It is agreed that the working relationship ended between the claimant and respondent on 15 February 2024; the claimant will say he was unfairly dismissed, the respondent will say the claimant was dismissed as a result of misconduct or capability, but that was not an issue for me to decide for the purposes of today's hearing.

The legal framework

36. The definition of an employee is contained in section 230(1) and (2) of the Employment Rights Act 1996:

(1) In this Act "employee" means an individual who has entered into or worked a contract of employment.

(2) In this Act "contract of employment" means a contract of service whether express or implied, and (if it is express) whether oral or in writing.

37. The definition of a worker is contained in section 230(3) of the Employment Rights Act 1996:

(3) In this Act "worker" means an individual who has entered into or 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.

38. The question as to whether someone is a worker, and employee, or self-employed, is primarily a question of fact for the Tribunal, **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32, [2014] IRLR 641 SC.**

39. Guidance regarding this exercise has been generated by many cases over the years, including **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] 2 QB 497,** where McKenna J explained:

"A contract of service exists if these three conditions are fulfilled. (i) The servant 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 his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a

sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service”

40. In the case of **Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51; [2017] ICR 657; [2018] UKSC 29; [2018] ICR 1511**, Lord Wilson JSC focused on whether a worker could substitute someone else to do his work if unavailable, or whether he had to do it himself; he said:

“The sole test is of course the obligation of personal performance; any other so called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith’s right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.”

41. In **Stuart Delivery Ltd v Augustine [2022] ICR 511**, it was stressed that **Pimlico** sets out two principles: (i) that an unfettered right of substitution is inconsistent with an obligation of personal service, and (ii) that a conditional right may or may not be, depending on the nature or degree of the fetter.

42. **Autoclenz v Belcher [2011] UKSC 41, [2011] ICR 1157** establishes the principal that a Tribunal must look at the real arrangement between the parties rather than simply accept what is said in any written agreement.

43. Similarly, the parties’ own descriptions of a person’s status are relevant but not conclusive. The Tribunal’s focus is on the reality of the relationship, having regard to any oral or written agreements and how those agreements worked in practice, including over a sustained period of time, **Richards v Waterfield Homes Ltd [2022] EAT 148**.

44. The ‘multiple test’ refers to the various factors that may be relevant when considering the nature of a person’s employment relationship.

45. These factors include (non-exhaustively):

- a) The intention of the parties;
- b) What any contract says, verbal or written;
- c) The method of remuneration and taxation;
- d) Whether the claimant had paid sick leave or paid holidays;
- e) How much control the company had over the claimant’s work;
- f) How integrated a claimant was within the company; for example, whether a claimant was provided with any equipment or tools by the company;

- g) Whether there was an obligation to perform work personally, rather than by way of delegation;
- h) Mutuality of obligation between parties;
- i) Whether the claimant hires staff;
- j) The degree of financial risk taken by the claimant;
- k) Whether there were pension arrangements;
- l) Whether disciplinary or grievance procedures applied to the claimant.

Discussion

46. Applying the relevant law to the findings of fact, I reached the following conclusions.

Was there a contract of service?

47. It is agreed that an oral agreement to start work existed and the respondent told the claimant he would be self-employed in interview. The discussions at this early stage suggest a mutuality of obligation, as there seems to have been clear expectations as to how the respondent wanted the claimant to carry out his work, with targets laid down, with further explanation provided by Ms Gruda in text/phone discussions as she trained him in the role. This was not mere suggestion, but was an expression of the way the respondent wanted things done, and which Mr Zajac monitored. The claimant agreed to carry out these obligations for remuneration.

48. I do not find the mere reference to the claimant being self-employed in the interview persuasive in a context where there was no written agreement whatsoever, and no suggestion that this was an informed arrangement negotiated between the two parties; the claimant was told he was self-employed in the interview and so agreed, feeling there was little alternative if he wanted the job.

49. There was no sense that the claimant could substitute another person should he fall ill or be unavailable; he explained that other colleagues who worked for the respondent would cover for him. Indeed, he rarely took any days off for fear that the respondent would remove clients it had initially given to him at the start of their working relationship. I found this happened on at least one occasion. There was not a sense he could choose to take time off when he wished, rather he would need to agree this with the respondent and faced adverse consequences when he did take time off. This is not suggestive of a self-employed relationship.

50. The claimant used tools provided by the respondent to carry out his work, as mentioned above, as well as having a company car which monitored the claimant's whereabouts. The respondent said this was merely for insurance purposes and to monitor fuel consumption but Mr Zajac accepts going beyond this; he monitored the claimant's routes on a number of occasions and asked him to go on alternative routes, with alternative agendas, that best suited the respondent. This again suggests the respondent sought to exert a high level of control over the claimant and how he carried out his work, akin to an employee.
51. Weighing against this being a contract of service at this stage is the fact that the claimant was responsible for his own taxes and had an accountant. Further, the claimant's monthly pay did vary and was called 'commission', being based on his number of sales, rather than being a monthly salary more typical of an employee. Though, his monthly pay was ascertained for him by the respondent's tools, rather than him providing his own invoices.
52. A further matter against him is the ET1 form failing to raise employment status as an issue. However, at the time of writing that, the claimant had not yet received the ET3 and respondent's Grounds of Resistance in which it argues the claimant was not an employee or worker, and the implications of that in terms of the Tribunal's jurisdiction. The claimant is a litigant in person and I accept had in mind his unfair dismissal and holiday pay claims, rather than a fully formed worker status argument when completing the ET1. He was using the label self-employed with partial understanding; in any event, parties' own labels may be relevant but are not conclusive.
53. When considering the relationship overall, the most persuasive matter on the issue is the discussions that took place first between the claimant and Ms Gruda, then him and Mr Zajac, at the beginning of 2023. These discussions answer the question of whether the relationship was truly one of self-employment in reality. They also offer a window into the true intentions of parties, in particular of the respondent.
54. They show that when the claimant sought to assert himself on the basis of his purported self-employed status, this was forcefully challenged, and he was sworn at and ultimately told he should be fired for doing so. It is clear that the respondent did not truly want to offer the flexibility and autonomy afforded by self-employed status to the claimant. It was self-employment only in name with the benefits of that status being enjoyed only by the respondent.
55. Similarly, when the claimant challenged his whereabouts being monitored by GPS, this was met with hostility and the threat to remove customers from him. The claimant was clear that invoking his self-employed status would lead to him being fired should he do so again.

56. By at least the end of 2022, it is therefore clear that the respondent was exercising a level of control consistent with an employee/employer relationship.
57. Other factors supporting this analysis are that the claimant had to go to set locations and clients of the respondent's choosing most days; he had only limited control when it came to discounts and payment plans he could offer customers; his hours were queried and his routes were challenged. If he went, for example, to see his accountant on a work day, that too was challenged by Mr Zajac.
58. All of the above confirms that the claimant was an employee for the purposes of s.230.

Worker status

59. It follows from the conclusion that the claimant was an employee, that he was also a worker, "*... all employees are workers, but not all workers are employees,*" **Ajar-Tec Ltd v Stack (2012) EWCA Civ 543.**

Conclusion

60. I consider that the claimant was an employee for the purposes of s.230 ERA and accordingly, the Tribunal has jurisdiction to consider his two claims (a) unfair dismissal and (b) holiday pay, which will be determined at the final hearing currently listed on **15, 16 and 17 October 2025** by CVP, with a first case management hearing to be heard on **22 April 2025**.

Approved by:

**Employment Judge McCooey
10 March 2025**

Judgment sent to the parties on:
11 March 2025

For the Tribunal:

Note

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) 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.