



EMPLOYMENT TRIBUNALS

Claimant: Mr Tadeusz Kulik
Respondent: Gogar Services Limited

Heard at: Birmingham (by CVP)

On: On 24 January 2025 & 14 February 2025 (for consideration of written submissions, deliberation and judgment)

Before: Employment Judge Wright

REPRESENTATION:

Claimant: Mr Briggs (counsel)
Respondent: Ms Janusz (employment consultant)

Observers: Mr Considine (Respondent solicitors) and Ms Morris (Respondent solicitors)

Interpreter: Ms A Dyrda

Witnesses: Mr David (for the Respondent), the Claimant and Mr Stankiewicz (for the Claimant)

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

Employment status

1. The Claimant was not an employee or worker of the Respondent at the relevant time. The claim is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

REASONS

The Issue

2. The Claimant brings claims of discrimination.
3. This preliminary hearing was listed on 24 January 2025 to determine whether the tribunal has jurisdiction to hear his claim. The hearing went part heard with the parties provided written representations and the case being further listed for the consideration of written submissions, for deliberations and Judgment on 14 February 2025.
4. To succeed, the Claimant must show he is in the employment of the Respondent within the meaning of section 83(2), Equality Act 2010 (EqA 2010).

Evidence heard

5. Evidence was heard from the Claimant, from Mr Stankiewicz (on behalf of the Claimant) and from Mr David (on behalf of the Respondent).

Findings of Fact

6. It was not a point of dispute that the Claimant owns a limited company, Tadeusz Kulik Transport Limited ("TKTL"), that this company was incorporated on 2 March 2016, that the Claimant is the sole director, that it files annual accounts and that the Claimant rents premises from "Mitchell Potatoes".
7. Whether the Claimant carried out work on these premises for other clients of TKTL or whether it was just a storage facility and somewhere where he solely worked on the repair of his own vehicle, was a point of dispute between the parties. I heard evidence from the Claimant, Mr Stankiewicz and Mr David on this point and I preferred the witness evidence of Mr David and find that the Claimant carries out work through his business from this location.
8. It is also not in dispute that the Claimant submitted an offer to the Respondent on behalf of TKTL in writing on 6 April 2023 (page 47 of the bundle) to provide services to the Respondent through his Company. The Claimant chose to offer services to the Respondent through his Company as opposed to as an employee of the Respondent. This was not a stipulation imposed by the Respondent or a suggestion of the Respondent's. A term of this offer was a right to substitute his performance for that of his business partner. This offer was accepted by the Respondent, and it contracted with the Claimant's company for services to be provided at £19+ VAT per hour. The invoices provided show that the Claimant

did not provide invoices to any other clients during the same period he was working at the Respondent's premises fixing trucks.

9. The Claimant worked 8am-4pm Monday-Friday for the Respondent from April to November 2023 when, following an altercation, the Claimant left the Respondent's premises and has not returned. The Respondent gave evidence that was not disputed that employees work a 10-hour shift, and the shorter hours of 8am-4pm were dictated by the Claimant and agreed by the Respondent.
10. It was also agreed between the parties that the Claimant or TKTL owned the tools and equipment that the Claimant used to fix the trucks when working for the Respondent, a clear distinction between employees working for the Respondent where these were provided to them.
11. It was a point of agreement that an individual called "Karl" would come to the Respondent's premises to bring tools and coffee to the Claimant. It was disputed as to whether this was all Karl did with Mr David giving evidence that Karl would also assist the Claimant with the jobs he was doing and the Claimant and Mr Stankiewicz stating he was merely bringing coffee and tools. I find that, whilst Karl did not generally accompany and assist the Claimant with his work undertaken for the Respondent, he likely assisted the Claimant on the odd occasion when he attended site and that, on the balance of the evidence, Karl was working with/for the Claimant's company, TKTL.
12. It was agreed between the parties that the Claimant did not send a substitute to work in his place and when the Claimant was not available, other individuals from the Respondent company, including Mr David, carried out repairs.
13. The Claimant gave evidence that he was subjected to the control of the Respondent and the Respondent dictated the tasks and order of these. Mr David confirmed that he was responsible for keeping the trucks on the road and would direct the Claimant to stop repairs on one vehicle and prioritise another to get it out on the road. Mr David also confirmed that he was ultimately responsible for the safety of the trucks and equipment and would inspect work done. I accept there was a degree of direction and control regarding the repairs that the Claimant carried out on behalf of the Respondent. I do not find this determinative of employee or worker status.

The Law

14. The issue of employment status is often both a question of fact and a question of law (**Carmichael v National Power plc [2000] IRLR 43**).
15. The Claimant's representative has referred me to the test of the existence of the employment relationship as set out in **Ready Mixed Concrete (South East) Ltd**

v Minister of Pensions and National Insurance [1968] 1 All ER 433 per McKenna J:

“A contract of service exists if the following 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.”

16. She also referred me to *Catamaran Cruises Ltd v Williams* [1994] IRLR 368 (EAT) regarding the formation on a one-person company not automatically preventing the establishment of employee status, nor does a contract that expressly states an individual is self-employed (*Cables & Wireless Plc v Muscat* [2006] ICR 975 (CA)).

17. Section 83 (2) EQA provides:

(2) 'Employment' means— (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

In *Autoclenz Ltd v Belcher & Others* [2011] UKSC 41 it was held that in the context of employment relationships where the written documentation might not reflect the reality of the relationship, that it was necessary to determine the party's actual agreement by examining all the circumstances and identify the parties' actual legal obligations.

18. The definition of employment under discrimination legislation does not contain the exclusion of the professional or business relationship found in s230 (3) (b) ERA 96. In ***Jivraj v Hashwani* [2011] IRLR 827** the Supreme Court applying ***Allonby v Accrington and Rossendale College* [2004] ICR 1328** held that the definition does not cover independent providers of services who are not in a relationship of subordination with the parties who received the services.

19. In ***Autoclenz Ltd v Belcher & Others* [2011] UKSC 41** it was held that, in the context of employment relationships where the written documentation might not reflect the reality of the relationship, it was necessary to determine the parties' actual agreement by examining all the circumstances and identify the parties' actual legal obligations.

20. The Supreme Court considered limb (b) workers in *Uber BV and others* (appellants) v *Aslam and others* (respondents) [2021] IRLR 407. Whether a contract is a 'worker's contract' within the meaning of the legislation designed to protect employees and other 'workers' is not to be determined by applying ordinary

principles of contract law. The task for the tribunals and the courts was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory provisions so as to qualify for the rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation. The conduct of the parties and other evidence might show that written terms were an exclusive record of the parties' rights and obligations towards each other, but this was not an absolute rule.

21. The key question is whether the individual undertook to *personally* perform work or services under that contract.
22. In **James v Redcats (Brands) Ltd [2007] ICR 1006** the EAT approved a line of authority that tribunals should enquire into whether personal service was the dominant feature. The case was approved by the Supreme Court in **Jivraj v Hashwani [2011] IRLR 827** and **Pimlico Plumbers Ltd and another (appellants) v Smith (respondent) [2018] UKSC 29**.
23. The EAT in **Community Dental Centres Ltd v Sultan-Darmon UKEAT/0532/09**, confirmed that an unfettered right for an individual to appoint a substitute for any reason without sanction will be fatal to a claim that they are a worker.

Decision

24. There was a contract in place between the Claimant's company and the Respondent, the fundamental terms of which were set out in the Claimant's email to the Respondent at page 47 of the bundle.
25. Whilst some of the elements of the relationship between the Respondent and the Claimant in practice point towards worker status, such as the regularity of the hours worked and the agreement of an hourly rate, when viewed as a whole, I find that the Claimant was self-employed.
26. Crucial to my findings are the intentions of the parties. The Claimant was under no obligation to offer his services through his limited company but chose to do so owing to the tax efficiencies and flexibility this afforded him, including the right to substitute. The choice to provide his services in this way was entirely his and his intention was to provide services to the Respondent through his limited company with the right to substitute. The Respondent accepted the Claimant's terms and contracted with his company on this basis. I find that it was both the intention of the parties and the reality that personal service was not a requirement. The fact that in practice the Claimant had not yet chosen to exercise this right does not impact on the fact that he had a right to substitute. The indication given by the Claimant was that the substitute would be his business partner. The Respondent had no details of who this was or their qualifications and had accepted this term. The Claimant, therefore, in practice had an unfettered right to substitute and I find this to be fatal to a claim that he was a worker. It is only now, when it is

convenient for him to claim to be so to bring this claim, that he is asserting worker status.

27. Given that I have found that there was no requirement for personal service, I consider the Claimant's claim defeated and it is dismissed.

**Approved by:
Employment Judge Wright
23 March 2025**