



EMPLOYMENT TRIBUNALS

Claimant: Mr C Wheeler

Respondent: Swimming Nature Holdings Limited

Heard at: London Central (by CVP)

On: 25 February 2025

Before: Employment Judge Davidson

REPRESENTATION:

Claimant: in person

Respondent: Mr J English, Solicitor

PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's application for a strike out or, alternatively, a deposit order is refused.
2. The claimant was a self-employed independent contractor and is not entitled to holiday pay.

REASONS

Claimant's strike out application/deposit order application

1. The claimant applies for a strike out of the respondent's response under Rule 38(1) on the grounds that it is misleading, unreasonable and obstructing justice. In the alternative, he applies for a deposit order under Rule 40(1).
2. In particular, the claimant alleges:

- 2.1. the respondent has withheld key evidence;
 - 2.2. the respondent gave incorrect information regarding the date it became aware of the claimant's Autistic Spectrum Disorder;
 - 2.3. the respondent has failed to comply with ACAS guidance;
 - 2.4. the response has no reasonable prospect of success.
3. I refuse both applications for the following reasons:
- 3.1. there has been no order for disclosure of documents so far in this case and therefore the respondent has been under no obligation to disclose evidence and it is not correct to say it has withheld evidence;
 - 3.2. any matters which are contested are for consideration at the final hearing when both parties can present their case and be challenged by the other party;
 - 3.3. it would be premature to make findings about the strength of the respondent's case at this stage and I cannot conclude, without hearing the evidence, that the response has no reasonable prospect of success or, alternatively, little reasonable prospect of success.

Employment status

Issue

4. The issue of the claimant's employment status is only relevant to whether he is entitled to be paid holiday pay. The amount in issue is understood to be £560.00. It does not affect any of his other claims. In accordance with the overriding objective, my decision is concise as is proportionate to the complexity and importance of the issue.

Evidence

5. The tribunal heard evidence from the claimant on his own behalf and from Eliza Jaiswal, Operations Director, on behalf of the respondent. There was a bundle of documents of 222 pages.
6. At the end of the hearing, the claimant requested seven days in which to prepare submissions. I agreed to reserve my decision and I gave both parties seven days to lodge their submissions. These were received and were taken into account in reaching my findings, below.

Relevant facts

7. The respondent offers swimming lessons to the public, based on a particular methodology it has developed for teaching swimming. The claimant is a swimming instructor and applied to work with the respondent in mid-2023.

8. He had originally been offered an employment contract but he then requested to be paid at a higher hourly rate than was in the employment contract. The claimant was given a choice between being employed, earning £20 per hour plus benefits such as holiday and sick pay, or being self-employed, earning £25 per hour without holiday or sick pay benefits. Both options were explained to the claimant and he chose to earn a higher hourly rate as self-employed in the knowledge that he would not receive benefits associated with employee or worker status. I do not accept the claimant's evidence that this was done without prior consultation or negotiation regarding the terms.
9. The claimant signed a Self-Employed Contractor Agreement on 8 September 2023. This agreement included a provision specifying that the claimant's relationship with the respondent was as independent contractor and nothing in the agreement rendered him an employee, worker, agent or partner of the respondent. It also specified that it was a contract for services, not a contract of employment, and the claimant was responsible for paying his own tax and NICs and was required to maintain insurance cover. The claimant had a limited right of substitution and was able to work elsewhere (subject to consent if working for a competing business). These terms are in contrast to the terms and conditions of the employment contract.
10. The claimant submitted regular invoices under the name 'A-Class Swimming'.
11. The claimant was required to teach according to the respondent's methodology and was not free to teach in his own way. The sessions that the claimant taught were agreed between the parties by negotiation.
12. The respondent had concerns about the claimant's performance and offered training and monitoring to help him improve. The claimant did not improve to the satisfaction of the respondent and his contract was terminated. He was given pay in lieu of the following week's cancelled sessions as a gesture of goodwill.

Respondent's submissions

13. The respondent contends that the claimant was a self-employed contractor. He chose that status due to the higher pay in the knowledge that he would not receive holiday pay. The reality of the relationship is consistent with contractor status and many of the provisions which only apply to employees such as being told when and where to work, restrictive covenants, disciplinary processes, PAYE and a prohibition on other employment did not apply to the claimant.

Claimant's submissions

14. The claimant contends that he was under the control of the respondent, who dictated lesson plans, methodologies, work schedules and training requirements. He also claims there was mutuality of obligation and that he was not free to work for others. He also relies on integration, lack of ability to negotiate contract terms and imposition of a probation period. The respondent also paid the claimant in lieu of notice

Relevant law

15. An employee is defined in section 230(1) of the Employment Rights Act 1996 as '*an individual who has entered into or works under a contract of employment*'. A contract of employment means '*a contract of service or apprenticeship, whether express or implied, and whether oral or in writing*'.
16. A worker is defined in section 230(3) of the Employment Rights Act 1996 as '*an individual who has entered into or works under ... any other contract...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*'.
17. An independent contractor provides services on a self-employed basis under a contract for services.
18. The relevant law provides that when considering employment status, the tribunal must look at the reality of the relationship and not rely solely on the contractual provisions. A provision stating that there is 'no intention to create a relationship of employee or worker' will be void and ineffective if the object of the provision is to exclude the statutory protections and benefits given to employees or workers. If the facts of the relationship point to the claimant being an employee or worker, such a clause will not change that. If the clause is found to be a reflection of the genuine intention of the parties, that can be taken into account when determining the correct legal characterisation of the relationship.
19. The central factors in determining whether an employment relationship exists are personal service (right of substitution), control and mutuality of obligation.

Determination of the issues

20. I find that the claimant was an independent contractor. I accept that the written contract is not determinative of the issue. However, I have taken into account that the claimant opted to be engaged under that status so that he would receive a higher rate of pay, knowing that this would mean he would not be entitled to holiday pay. The claimant had the choice and it is not a case of inequality of bargaining power. It was also the genuine intention of the parties when entering into that arrangement.
21. Looking at the manner in which the parties conducted the relationship, I find that the respondent acted consistently with a self-employed engagement. The claimant was not compelled to offer himself as available for work on any occasions he chose not to and he invoiced the respondent monthly for the hours he had worked.
22. The respondent offers a particular swimming teaching methodology to its learners and it is consistent with that business model for all the swimming instructors, whether employed or self-employed, to use that methodology.

23. Despite the performance concerns, the claimant was not subject to any disciplinary or performance procedure. However, the respondent had an obligation to the swimming learners to ensure that the lessons they were paying for were at an adequate standard. I do not find that the claimant was an employee by virtue of the fact that his performance was under scrutiny in circumstances where there were concerns about the delivery of his lessons.
24. The respondent offers all instructors the choice between employee status or self-employed contractor status. There are different provisions in use in relation to each and the respondent is familiar with the differences. The claimant chose self-employed contractor status and was treated as a contractor, in the same way as the respondent treats its other contractors.
25. The claimant is suggesting that he was treated as an employee because he was offered help in achieving the right level of performance and because he was compensated for his lost shifts when his contract was terminated. I do not agree with this conclusion. The respondent was looking for swimming instructors and the claimant responded. It was in the respondent's interests to give the claimant an opportunity to improve and to perform at the right level before simply terminating the arrangement. In the end, the respondent did terminate the arrangement as the level of performance was not adequate. As a gesture of goodwill, the respondent paid the claimant the amount he would have received for the following week's shifts. It was not obliged to do so and I do not accept that this act of goodwill has the result of changing the claimant's status.

Employment Judge Davidson
28 March 2025

Judgment sent to the parties on:

9 April 2025

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For the Tribunal:

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