EMPLOYMENT TRIBUNALS

Claimant: Mr A Boxer

Respondent: Excel Group Services Ltd (in liquidation)

Heard at: Central London Employment Tribunal

On: 21 and 22 March 2017

Before: Employment Judge JL Wade (sitting alone)

Representation
Claimant: Mr C Glyn QC (Counsel) and Ms R Barrett
Respondent: Not present or represented

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(1) The claim for holiday pay brought under section 24 of the Employment Rights Act 1996 and regulation 30 of the Working Time Regulations is well founded and the Tribunal makes a declaration to that effect and

(2) The respondent unlawfully failed to pay the claimant for one week's holiday and is ordered to pay him £321.16 without deductions.

REASONS

1. The claimant, Andrew Boxer, is a cycle courier. He argues that when he worked for the respondent he was a worker within the meaning of section 230(3)(b) of the Employment Rights Act, otherwise known as a "limb (b) worker" who:

> *"has entered into or works under…. 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".*

2. His claim is for one week's holiday pay in respect of holiday between 8 and 15 Match 2016 which he took but has not been paid for.

Litigation history

3. The ET1 was filed on 22 March 2016. The claimant argued that he was both a worker and an employee but the latter argument had been withdrawn. The ET3 was filed on 17 June. The case was set down for hearing at a Preliminary Hearing on 9 June 2016.

4. On 3 February 2017 the claimant applied to join CitySprint as a respondent on the basis that his employment had been TUPE transferred over. CitySprint and the respondent objected. The respondent stated:

a. That it had entered voluntary liquidation;
b. That its courier business "was sold to CitySprint pursuant to an asset sale in September 2016; and
c. That in its view TUPE did not apply and the claimant was not an employee for the purposes of the TUPE regulations.

5. On 17 February the respondent wrote to say that:

"*On a purely commercial basis, the respondent proposes, respectfully and without acceptance of the validity of the claimant's claim, that it does not further participate in proceedings. The respondent does not therefore intend to produce witness evidence or attend the hearing, should one be required. The respondent is willing to pay an amount equal to the value of the claimant's claim for holiday pay incurred whilst providing services to the respondent. The respondent has valued Mr Boxer's claim for holiday pay in the sum of £321.16".*

6. In the light of this information I decided not to join CitySprint.

7. The claimant did not accept the terms of the commercial offer because he wanted a declaration from the tribunal and the respondent was not prepared to admit liability. Therefore, the hearing took place. Given that there was no attendance or witness evidence from the respondent the hearing was short and concluded within the first day. I have carefully considered the material before me, including the respondent's Grounds of Resistance.

The Evidence

8. I heard evidence from the claimant.

9. I read the pages in the bundle to which I was referred.

The issues

10. The issues are:

1. "What was the true agreement between the parties" (as expressed by Lord Clarke in *Autoclenz v Belcher* [2011] ICR 1157)?
2. Is the claimant a "limb (b) worker" under the true agreement?

3. If so, when was the claimant a worker.

I set out below the findings of fact relevant to these issues.

The relevant facts

11. The claimant started working for the respondent in September 2013. He signed two contracts when requested to do so. The first dated September 2103 referred to him as a "contractor" and the 2016 version as a "Subcontractor"; as explained below, neither description is accurate in the employment law sense of the word although I appreciate that these are commonly used terms.

12. When asked whether he queried any of the clauses, and if not why not, he said "I had no choice, it would not have made any difference, they would have laughed at me if I had challenged a particular clause!" The claimant signed a new agreement when the business was acquired by CitySprint although he still works under the Excel branding.

13. He provides his own bicycle, mobile phone and protective clothing but Excel provides the radio and the palm computer known as the XDA although this has now been replaced by an App which is installed on his personal phone.

14. Through most of this time he has worked five days a week, approximately 9 hours a day, for the respondent. He is expected to tell his controller, with whom he has a good working relationship, when he is planning to take time off. The controller is usually accommodating but expects to be told in advance. His hours are not absolutely fixed depending on the needs of the business and sometimes he takes time off (which may be holiday) to go to auditions as he does some work as an actor or to do a more sedentary job for a visa company which occasionally offers him work. The 2013 contract says that *"the driver shall be retained on a non-exclusive 'when needed' basis"* and the 2016 *"the Subcontractor shall be entitled to supply his services to any third party during the term of this agreement …."* but this was not the reality and indeed the business could not have managed with couriers who were this semi- detached.

15. He attends the office approximately every 3 months to renew his ID and he is obliged to carry the ID at all times. To the outside world Excel's website declares that it has its own dedicated team couriers saying "we only employ the very best and most experienced control staff, riders and drivers".

16. On the days he works both he and his controller expect that he will be available throughout the working day and when questioned about flexibility that he might have during that time he did not even understand the question, because there is none. This means that he is not only expected to pick up the jobs allocated and deliver them in the order prescribed but also wait around, again in a prescribed area, until the next job is allocated. There are times when he might like to have a gap between jobs but he has to "jump to" and keep working which was sometimes exhausting.

17. Although the agreement says that "the subcontractor shall generally determine the manner of performance of the Services" the experience of a tighter and more controlling relationship is mutual because the respondent need this level of reliability to run its business as nearly all of the courier jobs are time

critical and an adequately sized fleet is needed, and the claimant needs to earn a living. He believes that if he became less reliable he would lose his job. As far as I can work out this is never in fact been an issue because of his good relationship with his controller and his reliability.

18. The claimant is paid according to a fixed tariff for the work that he does. He has no opportunity to negotiate the rate nor is he responsible for recording or justifying the hours which he has worked as this is all done centrally. He is not expected to vary his charge of a job "does not go well". He receives a document each month entitled "Driver memo (This is not an invoice)" which tells him what he is being paid. It is correct that it is not an invoice because it is in reality a payslip. He is registered as self-employed with HMRC so there are no deductions for tax or national insurance.

19. The respondent's business takes on individual jobs but also has contracts with the companies to supply services. A typical extract from a tender document (with Hearst Magazines) makes it clear that the client/contractor relationship is between the respondent (the "Supplier") and the companies to which it provides courier services: "The supplier shall recruit, train and provide suitable staff in optimum numbers to match the work requirements demanded by the provision of the services". The respondent takes out insurance as needed, this is not the responsibility of the claimant and although the contract says both that he should have insurance and that he might be liable for losses and breakages, in reality this has never been the case.

20. The 2016 agreement entitles the claimant "to assign or subcontract the performance of services". However, the right of substitution is limited by the fact the respondent "must be reasonably satisfied that the subcontractor has the required skills, qualifications and licences to provide the services to the required standard and is satisfied the company's usual background including possession of …. a valid DBS". Given that courier work is nearly always urgent this makes substitution impracticable in reality. The only person who can take on a job in substitution for the claimant would be another Excel courier in which case the controller would organise that. The respondent agreed in its Grounds of Resistance that the claimant has never employed a substitute in practice.

Conclusions

21. I start with the guidance from Sir Terence Etherton MR in the Court of Appeal's recent judgment in *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51. The following observation applies here as this was:

> "*A business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker".*

22. As has already been pointed out above, the contract which the claimant signed did not reflect the reality of the situation and so, applying *Autoclenz,* I have identified the true terms to the extent needed to apply the "limb (b)" test. Mutuality is important but not required when determining whether an individual is a worker and sometimes, when there is plenty of work to be done, it is hard to tell

whether he is a successful and busy contractor or just a hard-working worker. Understandably, the main focus of the Grounds of Resistance is in defending the allegation that the claimant was an employee, a claim since withdrawn.

EU law

23. My starting point is EU law, helpfully brought to my attention by Mr Glyn and Ms Barrett. It was confirmed by the CJEU in *Fennoll*, [2016] IRLR 67, that the tribunal's interpretation must be consistent with EU law as it has an autonomous meaning specific to EU law and that the essential feature of employment relationship is that:

> *"for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration".*

24. That sums up the working relationship here precisely. It is not correctly characterised in the Grounds of Resistance which says, for example:

> "*If the claimant is available to provide his services on a particular day at a particular time he contacts the respondent's office that the note he is available. In the event that the respondent has worked to provide to the claimant it will then contact him…. Letting him know the pickoff and drop-off locations of the relevant item."*

The claimant was under the direction of another and was not running his own business

25. Turning to domestic law, the leading domestic authority on worker status is now *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730 in which Lady Hale said:

> *"24. First, the natural and ordinary meaning of 'employed by' is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.*
>
> *25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in* Hashwani v Jivraj *[2011] UKSC 40, [2011] IRLR 827 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in* Hospital Medical Group Ltd v Westwood *[2012] EWCA Civ 1005; [2012] IRLR 834, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of s.230(3)(b) of the 1996 Act …"*

26. Although the claimant provided his own "tools of the trade", whilst he was working for the respondent he was not providing his services on his own account as a business undertaking and he was not entering into contracts for his business with clients, or even with one client, the respondent. Drawing on the findings of fact above, I reach this conclusion because:

a. He signed a contract because he had no choice, there was no negotiation or tendering involved. The inequality of bargaining power at this point was very notable.

b. The business model required him to work 5 days a week under the control of a controller.

c. Whilst he enjoyed some flexibility this had to be by arrangement and with notice.

d. He was paid a fixed rate for his work which was non-negotiable and he played no part in computing the rate.

e. He did not have to bear the cost of any damage in transit or pay insurance.

f. The only contractor in the business was the respondent who contracted with companies to supply to them and the claimant was "staff".

g. Not only was he expected to work and in return was entitled to expect a steady stream of jobs, he was also expected to stand by in between jobs waiting for the next one. Furthermore, if he wanted to move location he had to get permission from a controller. Even if he is not expected to wait around for the next job, this is what he does because he does not have his own client base or other means of earning an income in between jobs provided by the respondent.

h. He was also expected *not* to take a break when another job would come in and he was needed.

These are the features that distinguish his activity from that of a busy contractor agreeing to take on a series of jobs for a customer.

Personal service

27. In terms of personal service and substitution, the respondent has admitted that this did not happen in practice. This was largely because substitution would be impracticable because of the nature of the business and the obvious approach was for Excel to send another courier instead so that the reality of the situation was that substitution was not permitted.

28. However, is also useful to look at what the Court of Appeal said in *Pimlico Plumbers* because at paragraph 84 the Master of the Rolls clarified that a conditional right to substitute is not necessarily incompatible with personal performance. In this case the conditional right was so restrictive as to make the clause in the contract inoperable and therefore irrelevant.

The duration of the claimant's work

29. The claimant worked five days a week and was a worker during that period. The time that he took off may have been all holiday or some holiday and some unpaid leave depending on the duration. A week's holiday pay is the average pay over the previous 12 weeks.

30. Even if the work was more sporadic this would only mean that the claimant spent a shorter time each week being a "worker". During the time that he was

signed into the system in the morning up to the time he logged off, the working relationship, looked at as a whole, was only compatible with his being a worker under “limb (b)”.

Employment Judge Wade
23 March 2017