Case Number: 3302882/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Roaf	v	**Mrs J Howman t/a Ashmere Fisheries**

OPEN PRELIMINARY HEARING

Heard at: **Watford** **On: 23 & 24 July 2020**

Before: **Employment Judge Manley (by CVP)**

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr Pourghazi, Counsel**

RESERVED JUDGMENT

The claimant was neither an employee nor a worker under section 230 Employment Rights Act 1996 whilst working at the respondent's business. His claims must be dismissed.

REASONS

1. **Introduction and issues**

1.1 This is a relatively complex matter where there have been several preliminary hearings. At one such hearing on 13 February 2019, applications were made and, for the most part, refused. Considerable further information was needed with respect to the claimant's claims and the respondent was allowed time to respond. This had followed an earlier preliminary hearing on 31 August 2018 where the Judge had set out a list of issues.

1.2 In summary, the claimant claims unfair dismissal, public interest disclosure detriment and dismissal, breach of contract and unpaid holiday pay.

1.3 Some difficulties having arisen with compliance with various orders, at a further preliminary hearing on 18 July 2019, the Judge declined to strike out the claimant's claim for failing to comply with orders. Considerable effort was put into clarifying what the claims were about and what, in particular, were said to be the alleged protected disclosures and detriments. They are listed in that order and I do not intend to repeat them here.

1.4 The matter was listed for a 5 day hearing between 20 and 24 July 2020. There then arose some difficulties with that hearing because of the restrictions placed upon us by the Coronavirus epidemic. There was therefore a short telephone preliminary hearing on 16 July 2020 when it was agreed that it would be useful to have a one day preliminary hearing on these issues which are as follows:

1.4.1 The status of the claimant during the period he was carrying out work for the respondent between 14 October 2013 and 1 September 2017. That is whether he was an employee, worker or independent contractor.

1.4.2 Depending on the outcome of the above issue, the relisting of a full merits hearing and the making of further case management orders required for the full merits hearing.

1.5 This open preliminary hearing was listed to be held remotely by Cloud Video Platform ("CVP"). In the event, it was CVP from the Watford office rather than at Reading. This led to some difficulties because the hard copy file of documents, which was extensive, had been sent to Reading. In any event, I had the bundle of documents in four separate attachments to emails and was able to see them on my laptop as we proceeded, though it was, at times, a little slow.

1.6 The cross examination took considerably longer than was anticipated, partly because of the delays in finding correct documents electronically and the hearing ran over to a second day on 24 July. I reserved judgment and asked for the representatives to send their written submissions on the afternoon of 24 July while I was considering the case.

1.7 As indicated, the documents were extensive because the bundle was prepared for the full hearing as were the witness statements. I saw the full witness statements, but the representatives kindly indicated to me the paragraph numbers I needed to read which dealt with the evidence needed to determine employment status. Cross examination was largely on those paragraphs and on some of the documents in the bundle. The documents included transcripts of covert recordings made during the claimant's engagement with the respondent. In large part, the content of those transcripts was agreed but not necessarily the interpretation of what was said.

1.8 As indicated, this was heard by CVP and there were occasional difficulties in everybody being together in the room although it was largely successful.

I heard evidence from the claimant and Hayley Roaf and the respondent, Mrs Howman.

2. **The facts**

2.1 I find the following facts to be relevant to my determination of the claimant's employment status.

2.2 The respondent, Mrs Howman, owns a fisheries site and has done for many years. She gave evidence that she has, in the past, engaged people both on a self-employed and on an employed basis. On the fisheries site is a cottage (or "bungalow") which is occasionally occupied by people who work on the estate.

2.3 Mrs Howman has run the business for 55 years. The fisheries are set across 30 acres of land with four fishing lakes. There is a Club House and the cottage. There is also private land adjoining the fisheries where Mrs Howman and her husband live and, occasionally, work needed to be carried out there.

2.4 Mrs Howman had the help of a friend who helped out at the weekends and at other times at the fisheries and his petrol costs were covered. Mrs Howman also used an external company called Animal Aunts to cover care for some of the animals which include Mr and Mrs Howman's dogs, chickens and quails.

2.5 Towards the end of 2013, the claimant and his wife, Hayley Roaf, met with Mrs Howman and her husband, Keith Howman, to discuss carrying out work for the respondent.

2.6 After that first meeting Hayley Roaf typed up a document, which is at page 210 of the bundle, which set out what she and the claimant say was discussed. Mrs Howman put her signature to it and agrees that those matters were all discussed. Under the heading "*Fishery Employment*" it says:

- *"Dave paid £250 a week (£30 a day or £1,084 per salary month)*
- *This is a split salary with regards to income and self assement*
- *Work Mon-Fri*
- *Hours 8am to 1pm or 7am to 12pm in the summer*
- *Flexibility to share work with Hayley*
- *Paid by cheque at the end of the month*
- *Hayley to do 4 hours cleaning at residence per week*
- *Day/time?*
- *We will invoice them"*

2.7 The note also has some details about the bungalow which it was agreed the claimant and his wife would occupy at no expense with the bills being paid by Mrs Howman.

2.8 It is agreed that what was recorded above was the basis of the beginning of the arrangement between the claimant and the respondent. As I understand it, there was a second meeting to confirm that that was the arrangement. At one of those early meetings, the claimant had a portfolio of his gardening work which he showed the respondent.

2.9 On 30 January 2014, two formal documents were signed. One was a licence to occupy the cottage and that was signed by both the claimant and Hayley Roaf as well as the respondent.

2.10 The other was a document entitled "*Consultancy Agreement*" and it appears between pages 217-225 of the bundle. This was signed by the respondent and by the claimant. It set out the agreement as to the services to be provided by the claimant to the respondent. These are the relevant clauses

> "*3.1 During the engagement the consultant agrees to provide the services to the company and such other services consistent with the services as the company may require of the consultant from time to time.*
>
> *3.2 The consultant may with the prior written approval of the company and subject to the following proviso, appoint a suitably qualified and skilled substitute to perform the services on his behalf provided that the substitute shall be required to enter into direct undertakings with the company including with regard to confidentiality. If the company accepts the substitute the consultant shall continue to invoice the company in accordance with clause 5 and shall be responsible for remuneration (including any relevant tax and/or National Insurance contributions) of the substitute."*

2.11 Clause 5 specified that the respondent would pay invoices submitted by the claimant at the rate of £10 per hour. The invoices were required to be submitted on the last working day of each month and should state hours worked and services provided.

2.12 Clause 6 stated that the claimant could not be prevented from engaging in other business on the condition that it was not in breach of obligations to the respondent or with a competitor without permission. Other clauses covered aspects of intellectual property and the claimant's duty to take out insurance and provide copies of the policies to the respondent. There are clauses for termination with and without notice.

2.13 Clause 12 is a detailed clause about "*Status*".

12.1 reads:-

"The relationship of the Consultant with the Company will be that of an independent contractor and nothing in this Agreement shall render him an employee, worker, agent or partner of the Company and the Consultant shall not hold himself out as such.

12.2 This Agreement constitutes a contract for the provision of services and not a contract of employment and accordingly the Consultant shall be fully responsible for and shall indemnify the Company for and in respect of any income tax, National Insurance and social security contributions……."

2.14 Both parties signed to say the agreement superseded any previous agreement and the only remedy for breach would be action for breach of contract.

2.15 The only other particularly relevant part of that document is what was in the schedule as the services as follows:

"1. The consultant will provide services to the company including but not limited to the following:

- *Attending animals*
- *Maintaining all necessary fishing equipment and*
- *General maintenance of grounds*

2. The consultant will report to Jean Howman"

2.16 The claimant signed that document and my understanding of his evidence is that he accepts that at that point he considered he was self-employed. On that basis he paid his own tax and National Insurance and arranged insurance cover. Using the name Woodoak Gardens for this and other work, he was involved in other business ventures. These included gardening jobs which he had carried out before and during the time of his engagement with the respondent, survival camps under the name Woodoak Wilderness, some security work and, in May 2017, he had arranged some minor construction work. His LinkedIn profile states clearly that he considered himself self employed for many years.

2.17 The claimant understood that he was to be engaged on a self-employed basis at the respondent. He now says that Mrs Howman suggested that is how he should be engaged but he agreed to that arrangement and that he could use her tools, perhaps for insurance reasons. As he says in paragraph 3 of his witness statement:

"*It was agreed that I would have the freedom of being able to decide the tasks I did based on my knowledge and skills, that I could work elsewhere as long as it did not conflict with my job at Ashmere Fisheries."*

2.18 There appeared to be few difficulties between the parties at the outset. The respondent lived close to the fisheries and would attend daily unless

she was away. She would often leave notes in the incubator hut for the claimant which set out what she would like him to focus on. The claimant left invoices there as well.

2.19 There was a dispute about whether the claimant also left there, what he called timesheets, but Mrs Howman said that she had never seen those timesheets except for a claim for what the claimant called "*accrued hours*" which he left at the end of the engagement. I accept that there were no timesheets left before then and none have been shown to me.

2.20 The claimant was engaged, as the consultancy agreement set out, to do grounds maintenance, fisheries maintenance and look after the birds on the site as well as, on occasion, walking the dogs. The boats on the various lakes needed to be baled out and it was agreed that this should be done first thing in the morning. The clubhouse also needed to be cleaned as well as feeding the chickens and the quails. Initially, it was agreed that Hayley Roaf would carry out cleaning at the Howman's home but this never materialised. This arrangement might have been in recognition of her living in the bungalow at no cost. As I will come to, she did carry out other work.

2.21 I heard considerable evidence about the hours of work carried out by the claimant for the respondent. The expectation was that the claimant would work five hours per day. It was also expected that that work would be carried out in the morning. That is what was recorded in the verbal agreement note at page 210. However, it is also clear to me that this was not always what happened in practice. I have seen evidence that, for instance, when there was inclement weather, the claimant could and did do some of the work at other times. He has begun to call some of this time "*accrued hours*"; that is that he asserts where he worked more than 25 hours per week he would not invoice for the hours over 25 but would in some way save those hours until a time when he was working fewer than 25 hours. The respondent says there was no such agreement and I accept that evidence as there was no mention of it until close to the end of the relationship. The respondent's expectation was that he would spend five hours per day on the work he was required to do. Mrs Howman's evidence, which I accept, was that the claimant could decide the order in which he carried out some tasks after he had done those things which were best done at the beginning of the day. The order in which he did things was a matter for him.

2.22 The claimant supplied invoices to the respondent. They are in the name of "*David Roaf trading as Woodoak*". This is not a limited company but the claimant told me that he paid his own tax and National Insurance under the self-assessment scheme and was very used to being self-employed as that was the arrangement that he had had with other work. The invoices all state "*Thank you for your business*". The invoices do not in themselves indicate a working pattern of five hours per day as they vary in the hours per day. For example, an invoice at page 403 for October 2014 shows hours worked for the weeks in that month (which were one short week followed by four whole weeks) as follows:- 11; 29; 22; 30 and 23. The

claimant points out that this was an invoice which still came to a total of 25 hours per week. The claimant's explanation for the invoices not showing a definite amount of five hours per day was that Mrs Howman had asked him to prepare them in this way. This is something which she denied. I do not accept that Mrs Howman gave any such instruction as there was no motive for her to do so. It is much more likely that these were the hours worked by the claimant. In any event these invoices were always paid without any question.

Mrs Roaf

2.23 As can be seen from the written note of the oral agreement before the engagement started, it was recorded that Mrs Roaf would do some cleaning at the respondent's residence. As it transpired that did not take place. Mrs Roaf regularly carried out some of the work that the claimant had been engaged to carry out. This was not by prior agreement and there was no written approval but was with the full knowledge of Mrs Howman who said that she was "*delighted"* that Mrs Roaf was doing some of the work. She was not paid directly for it as it was included in the invoices that the claimant submitted. Mrs Roaf gave evidence that she was told that what she could not do by Mrs Howman. This was denied by Mrs Howman. Again, I do not accept that any such instruction was given to Mrs Roaf as there was no motive for any such limitation on her work. Although it seems that she concentrated on certain areas such as cleaning of the bird pens and dealing with the feed stock, on the evidence before me, I do not accept that Mrs Howman restricted what Mrs Roaf could do. There is no evidence of any instructions to Mrs Roaf from Mrs Howman save for one note when she asked her to walk the dogs and feed them when she was away. I find that it was up to the claimant and Mrs Roaf to decide what work she did.

2.24 For the most part, the claimant used the tools of the respondent except for a leaf blower, his own strimmer harness and PPE equipment of his own.

2.25 In a letter before action that he sent in May 2017 to the weekend worker after an accident, the claimant made it clear that he understood his position as a self-employed contractor. On Page 299 he says this:

> *"As I am sure you are aware I am not employed by Jean as an employee. I am a separate business registered as Woodoak working as a visiting consulting contractor with other clients and proprietor of two other unrelated businesses. The injury to my hand not only left me unable to meet the contractual responsibilities I have with Jean, but also resulted in my having to pay someone else to meet some of my other working obligations and leaving me no option but to cancel a job in London."*

2.26 As I understand it, this having caused some upset to the weekend worker, an insurance claim was made by the respondent with respect to this injury. The respondent did have insurance for both employees and public liability. When she was cross-examined about why she had such insurance if she

did in fact have no employees, she said that she had from time to time had employees and she had not thought to change it and did not think there was very much difference.

2.27 As indicated there began to be more disagreements between the claimant and Mrs Howman and she certainly became concerned about the claimant's work. From the transcripts of the covert recordings I can see that she attempted to ensure that the claimant was working the hours which she believed she was paying him for and that she was expecting him to work the mornings between 8 and 1pm. However, she gave evidence to me that, as long as the work was done, she was not overly concerned about the time it was done. Rather, she was concerned that she was paying the claimant, but he might not be carrying out the work that she expected him to.

2.28 In May or June 2017 the local authority environmental health department became involved with respect to questions of health and safety. It seemed that it was necessary for the claimant to write down the tasks he was expected to carry out. In an email of 28 June 2017 to the respondent the claimant set out his experience of risk assessments making direct reference to the Woodoak Gardens "health and safety guidelines folder".

2.29 As indicated the relationship appeared to get increasingly difficult as time went on. The claimant has suggested that he was subjected to some sort of disciplinary action but there is no disciplinary procedure nor any evidence of any disciplinary action such as a warning or similar steps. The respondent was concerned about what hours the claimant was doing and, at one point, there was a reference to the claimant needing to "*clock in*". I find that this was an attempt to check that the hours the claimant was being paid for were worked rather than to control that work. This was not progressed before the end of the claimant's engagement.

2.30 The claimant decided to end his engagement with the respondent by a notice of termination email at the end of August 2017. He also gave notice to leave the cottage and there was a discussion about his notice period which meant that he did not work beyond 3 September 2017. At that point he asked for payment for hours that he had "accrued" but which was denied by the respondent.

3 The Law and submissions

3.1 This is an area which has led to a significant amount of case law and it seems sensible to incorporate in this summary, where appropriate, the submissions of the claimant and the respondent's representatives. The statutory provisions with respect to employee and worker status are set out in s.230 ERA. This reads:-

"230 Employees, workers etc

(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 express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, 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;

and any reference to a worker's contract shall be construed accordingly."

3.2 Dealing first then with the question of whether the claimant was an employee under the s230 (1) ERA definition, the leading case might still be said to be Ready Mix Concrete (South East) Ltd v Minister of Pensions & National Insurance [1968] 2QB 497 even though that case has been rather overtaken by different ways of working in the late 20th and early 21st century. It is still a good starting place, however and, the language of that case aside, my job is to consider whether there is a contract of service or a contract for services. There are three main elements - the requirement of personal service; mutuality of obligation; and a sufficient degree of control of the "employee" by the "employer".

3.3 In particular, in this case, I need to consider what level of control there was by the respondent over the work undertaken by the claimant and what is consistent with the relationship being a contract of service or a contract for services. Not surprisingly, the respondent's representative submits that there was a lack of control whereas the claimant submits there is sufficient control for me to find it was a contract of service.

3.4 Another requirement for there to be a contract of service is for mutuality of obligation to be present. The leading case here is Carmichael & another v National Power [2000] IRLR 43. This can be shown by reference to documents and to what actually happened in practice and is necessary for there to be a contract of service. It is not significantly in dispute that mutuality of obligation existed here given the expectation that the claimant would work for 25 hours per week.

3.5 The essence of determining the claimant's employment status with respect to the respondent requires me to consider all the available evidence. This must include the written documents, in particular the consultancy agreement;

evidence of what the parties' intention was at the time of making the agreement but also assessing what actually occurred in practice. It is often useful to consider what falls on the side of consistency with there being a contract of service (employment) and then, on the other hand, considering what falls on the side of consistency with there being a contract for services (self-employment). I am reminded by Carmichael that I should not determine the nature of the relationship "*solely by reference to the documents"*. In this case, it is accepted that it was the intention of the parties at the outset that the claimant should be categorised as "self-employed". The claimant's case is that it changed over time with increasing control over his work.

3.6 It might also be relevant to consider how integrated the claimant was within the business. As the claimant (and, sometimes his wife) was the main person carrying out work on the site, it seems to me, he was important to the running of the business.

3.7 Bearing in mind the way in which the claimant was paid when he submitted invoices and not by way of a regular salary or wages, it may be also be right for me to consider the economic reality test. For instance, I should consider whether the claimant was running a business of his own, the tax and national insurance arrangements and whether there was any financial risk to him from the arrangements between the parties.

3.8 A recent case might be of assistance with respect to the question of employment status is Pimlico Plumbers Limited and Mullins v Smith [2017] EWCA Civ 51 ("Pimlico). This is particularly relevant to the question of whether the claimant was a worker under s230 (3) b). I am reminded by that case that the "*over-arching question*" is whether the alleged employer be said to be a client or customer of the claimant. Of course, the facts in each case will be different and my findings will depend upon an assessment of those facts.

3.9 The Court of Appeal in Pimlico summarised these principles with respect to a power to substitute:-

"Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of

another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance".

3.10 I was also asked to consider, by the respondent's representative, the cases of Express & Echo Publications Ltd v Tanton [1999] ICR 693, and Autoclenz Ltd v Belcher [2011] UKSC 417 which found that, if someone enjoys an unfettered contractual power to delegate (or substitute), even if they never actually exercise it, there cannot be a contract of service. Finally, the court will always attach some weight to how the parties have categorised their relationship, see Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99 [52].

3.11 If the claimant does not fit into the definition of **employee** whether under s230 (1) ERA, because there is no contract of employment, I will move on to determine whether he is afforded protection as a **worker** under s230 (3) b) ERA. One of the issues that might arise is the right (or otherwise) of the claimant to send a substitute if wanted someone else to do the work. This is central to the determination in this matter because of the substitution clause in the contract and the work Mrs Roaf carried out.

3.12 The term 'worker' in s.230(3) ERA (quoted above) incorporates and therefore includes the definition of 'employee' at s.230(1), but it is generally thought of as a distinct category; and the term 'limb (b) worker' often appears in the case law (as shown in Pimlico). The test for personal service is the same for employee status as that for worker status (Byrne Brothers (Formwork) Ltd v Baird [2002] ICR 667, EAT)

3.13 The relationship between the parties should not be that of a client/customer and profession/business if the claimant is to be found to be a worker. A self-employed person may fall within the definition of a worker, if obliged to perform services himself. In this regard the law distinguishes between workers (even though self-employed) and what are sometimes referred to as 'the truly self-employed', who are genuinely in business on their own account.

4 Conclusions

4.1 This is a difficult matter to determine. As is often the case with these less formal arrangements, the decision that I have to take must be based on the evidence before me which includes documentary evidence which is, by and large, not in dispute, but also oral evidence of what happened in practice. Much of that is in dispute or at least an interpretation of what happened has led to different conclusions about the claimant's employment status.

4.2 First, I should say that I am quite satisfied that the claimant was not an employee when he was engaged by the respondent. I do not accept the claimant's evidence that he was under sufficient control of Mrs Howman when carrying out his tasks. As he himself said to me, he is a very experienced businessman and had great experience in grounds maintenance. That was the reason that he was engaged to carry out this work and there was no need for there to be control of him. I accept that he did receive lists of what was required

to be done, but it was not, except in very limited circumstances and the one example he took me to, an indication of how he should carry out that work. That does not indicate to me, hearing all the evidence before me, sufficient control.

4.3 I accept that there was mutuality of obligation. There was limited requirement for personal service which I will deal with later.

4.4 The claimant agreed explicitly that he was to be self-employed. He was aware of what that phrase meant, and he prepared invoices based on the hours that he (and Mrs Roaf) worked. He was self-employed for tax and National Insurance purposes, presumably for the work carried out for the respondent and for other parts of his business. The claimant here could choose how to do most of the work that he was engaged to do. What is more, he could arrange for his wife to do some of the work if he needed to concentrate on something else.

4.5 On the evidence of the written agreement and on what the claimant understood at the commencement of the relationship, this was one of an independent contractor providing services. He was free to carry out whatever work he wanted elsewhere as part of his business and he accepts that he did have other clients.

4.6 The freedom that the claimant had to carry out work in the way in which he felt appropriate, the way in which the work was described by him and in full agreement with him means that I have found that it was not an employment relationship.

4.7 Turning then to the question of whether the claimant was a worker, this is a more difficult question. It is difficult partly because of the substitution clause in the agreement which I will spend some time looking at. I should start by saying that the substitution clause is relatively unequivocal. It provides for the claimant, called in that document "*the consultant*", to appoint a substitute. There are some restrictions in that it is suggested that prior written approval is required and that the substitute should be suitably qualified. On the face of it, this is a clause which would suggest self-employment. Although in practice no written approval was given, it is undisputed evidence that, as a matter of fact, the claimant's wife often worked as a substitute for the claimant for the work that he was engaged to carry out. There does not seem to be any real dispute that she was suitably qualified and skilled for the work she did carry out. I do not accept, as a matter of fact, that she was told there was some work which she could not do and I have seen little evidence to that effect, save for what was given in oral evidence. It might be that there were some things that she did not do because the claimant decided to do them himself. I accept that it was a conditional right to substitute but, looking at the whole of the arrangements, I do not find that personal service was required.

4.8 The claimant seems to be suggesting that the consultancy agreement and the substitution clause was a sham arrangement, but this is hard to square with the facts before me. When Mrs Roaf did work there was no payment to her, and it

was not invoiced separately. Rather, the claimant included any work she did in his own invoice. There seems to be little dispute but that Mrs Roaf carried out quite a lot of work that the claimant was carrying out. I accept that the claimant did not provide any other substitute. The question is whether that substitution clause would prevent the claimant being a worker or would mean that he fell into the category of being self-employed because he could not meet the test that he was to provide personal service.

4.9 The burden of proof falls on the claimant. He has not satisfied me that he was required to provide the personal service that was needed for him to be a worker. I find that on all the evidence before me, he was neither an employee nor a worker. This was an arrangement between a person in business on his own account and a client. His claims must be dismissed.

_____

Employment Judge Manley

Date: 25/08/2020

Sent to the parties on:

……25/08/2020…….

For the Tribunal:

……S.Kent …..……..