



EMPLOYMENT TRIBUNALS

Claimant: Mr F Egan

Respondent: The Chief Constable of Greater Manchester Police

Heard at: Manchester (by CVP)

On: 27 June 2023

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mr Marshall, Counsel

Respondent: Mr Tinkler, Counsel

JUDGMENT ON PRELIMINARY HEARING

The outcome of the Preliminary Hearing is that the claimant is found to have been self-employed and not to have had employee or worker status with the respondent. The claimant's claims are, accordingly, all dismissed.

REASONS

1. Issues

- 1.1. This preliminary hearing was listed to determine a single issue, namely did the claimant have the employment or worker status needed to pursue his claims. The respondent's position was that the claimant was a self-employed person, and thus not able to pursue any of his claims.
- 1.2. At the outset of this hearing the claimant's representative confirmed that there was no claim for arrears of pay pursued.

2. Burden and Standard of Proof

- 2.1. To pursue any of his claims the claimant must establish that he was either a worker or an employee. This means that the burden of proof to establish he has the status to make his claims falls on the claimant. It does not fall on the respondent to show that the claimant is not eligible to pursue his claims.
- 2.2. The standard of proof applicable to all issues in this hearing is the balance of probabilities. To meet this standard on any disputed fact, the claimant, as the party with the burden of proof, must show that his position regarding each fact in dispute is more likely than the respondent's position to be correct.

3. The Applicable Statutory Provisions

- 3.1. The claimant pursues claims under the Employment Rights Act 1996 (Unfair Dismissal and Notice Pay), and the Working Time Regulations 1998 (Holiday Pay). The claimant will not be able to pursue any of these claims in the Employment Tribunal if he was a self-employed person. In effect, the claimant needs to establish that he was an employee to pursue his unfair dismissal claim, and either an employee or a worker to pursue his other claims.
- 3.2. The Employment Rights Act 1996 ("ERA") provides the following definition of an employee and a worker at s230:

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 is 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.

...”

- 3.2.1. The Working Time Regulations 1998 (“WTR”) define a worker in regulation 2 in the same terms as the definition of worker in the ERA.
- 3.2.2. The definition of worker in the ERA and the WTR includes, and extends beyond, the definition of employee. Thus, if he is an employee the claimant must by definition also be a worker. Viewed the other way, if the claimant cannot meet the definition of worker, he cannot be an employee.

3.3. Case Law and submissions

- 3.3.1. The statutory tests for employment status lack clarity. This has resulted in a substantial number of cases reaching the higher courts, and a substantial body of guidance coming from those cases.
- 3.3.2. In determining if a claimant was a worker or self-employed the following issues must be determined
 - 3.3.2.1. Did the claimant have a contract with the respondent to provide work or services?
 - 3.3.2.2. If so, was the claimant obliged to perform that work or those services personally?
 - 3.3.2.3. If so, was the claimant providing that work or services to the respondent in the course of running a profession or business undertaking?
- 3.3.3. These issues are distilled from the wording of s230 ERA.
- 3.3.4. *Did the claimant have a contract with the respondent to provide work or services?*
 - 3.3.4.1. There did not appear to be any dispute between the parties that there was a contract between the claimant and respondent to the effect that the claimant would provide work or services.
- 3.3.5. *If so, was the claimant obliged to perform that work or those services personally?*
 - 3.3.5.1. It did not appear to be in dispute that the claimant was required to provide the therapy services himself, and not send a substitute. Whilst this is a requirement for employee or worker status, it does not establish employee or worker status of itself.
 - 3.3.5.2. There is no legal rule that a person required to provide services personally cannot be self-employed.
- 3.3.6. *If so, was the claimant providing that work or services in the course of running a profession or business undertaking?*

- 3.3.6.1. The parties did not refer the Tribunal to any further specific case authority as guidance which should be considered when determining this issue. The parties' submissions focussed primarily on factual matters relevant to this case.
- 3.3.6.2. This is an issue for the Tribunal to determine based on the evidence presented. The authorities presented make it clear that this question will always be fact sensitive.
- 3.3.6.3. The parties referred to the control test, which is a multifactor approach to assessing if the degree of control exerted by the respondent over the claimant was inconsistent with the claimant being self-employed. This cannot be logically separated from what some authorities call the '*economic reality*' test.
- 3.3.6.4. The question of whether the claimant was truly in business is one for the Tribunal to decide, considering any relevant evidence or submissions. There is no simple formula to apply in determining this issue, there is no checklist of factors that can simply be ticked off. All relevant factors will have uniquely varying weight and relevance in each case, the weight and relevance being for the Tribunal hearing that case to determine as best it can.

4. **The Evidence**

- 4.1. The claimant presented oral evidence on his own behalf. For the respondent evidence was presented by a Mr Sipple, the respondent's Head of Occupational Health and Wellbeing Service. Both witnesses had provided written statements of evidence that were taken as read before being cross examined.
- 4.2. The Tribunal was also provided with a substantial bundle of documentary evidence of which only a small part was actually referred to at the hearing.
- 4.3. Submissions were made orally by Mr Marshall on behalf of the claimant and from Mr Tinkler on behalf of the respondent.

5. **Background**

- 5.1. The claimant is a therapist. The claimant provided therapy sessions to members of the respondent's staff. These sessions were a response to therapy needs which arose from incidents which the respondent's staff had been required to deal with at work. The claimant was not the only therapist which the respondent used for this purpose.
- 5.2. The claimant had provided these services since mid-2018. Initially the claimant provided these services via a company called "*Healthwork Limited*", who employed him at the time. As part of his contract of employment with Healthwork Limited the claimant had entered into a restrictive covenant.

- 5.3. In or around early 2019 the claimant ceased to be employed by Healthwork Limited. The claimant states that from that time, in order to avoid the restrictive covenant, he provided therapy services to the respondent as a sub-contractor for a fellow counsellor used by the respondent. From this time the claimant started to submit invoices to the respondent directly, at no point did he submit invoices via the fellow counsellor whom he stated he was sub-contracting for.
- 5.4. There was a significant degree of factual dispute about the way that the claimant's arrangement with the respondent actually worked, meaning that further agreed background was limited.
- 5.5. At all times the claimant provided this therapy at the respondent's premises. The claimant was subjected to vetting before being issued with a contractor pass that entitled him to access the premises.
- 5.6. The claimant did not pay for the use of the respondent's premises. The claimant submitted regular invoices to the respondent. The amount which the claimant was paid for therapy work done was not negotiable, there being a rate fixed by the respondent. The claimant paid his own Tax and NI.
- 5.7. The claimant initially did therapy sessions on only one day a week for the respondent. Until May 2021 the claimant provided therapy sessions for another organisation.
- 5.8. The claimant was not permitted to offer therapy to staff of the respondent otherwise than under the arrangements which he had with the respondent. The claimant was free to provide therapy services elsewhere.
- 5.9. In around March 2022, at the time another counsellor started maternity leave, the claimant increased his work with the respondent to two days per week.
- 5.10. The claimant never took any holidays whilst engaged with the respondent, and at no point was unable to work due to sickness.
- 5.11. The claimant arranged his own professional accreditation, which the respondent did not pay for.
- 5.12. The claimant's arrangement with the respondent was terminated by the respondent in July 2022 for reasons that are not relevant to this decision.

6. Witness Credibility

- 6.1. In this case there were a significant number of factual disputes between the two witnesses.
- 6.2. The claimant's oral evidence during cross examination at numerous points lacked consistency and / or credibility. At times under cross examination the claimant made assertions that were clearly not correct or reliable, and when this was exposed in cross examination, the claimant conceded that it was either not reliable or not accurate. This included significant points in evidence, such as the number of therapy sessions which the claimant provided for the

respondent and whether that number fluctuated, how much the claimant invoiced the respondent, and whether that related to the number of therapy sessions provided or was a fixed amount each week or month.

- 6.3. The evidence of Mr Sipple was not only consistent throughout his cross examination, but at no point were any relevant issues with credibility identified or exposed in cross examination. In addition, there was no suggestion put to Mr Sipple or credibly argued in submissions that Mr Sipple's evidence was not consistent on any relevant or material point with the documentary evidence provided.

7. Findings and Conclusions

- 7.1. The claimant's representative structured his submissions by reference to specific parts of the claimant's arrangements with the respondent. For ease, these findings adopt the same approach.

7.2. *Access to the respondent's premises*

- 7.2.1. The respondent is a police force. Accordingly, there is no public access to large parts of their premises.
- 7.2.2. There is no dispute that the claimant was granted access to the respondent's premises. The claimant's representative characterised this as "*a right to roam*" the respondent's premises. The submission made was that such a right was not consistent with the claimant being a self-employed contractor.
- 7.2.3. There was no dispute that the claimant had been vetted by the respondent and then issued a pass by the respondent. The respondent described this as a contractor pass.
- 7.2.4. The fact therefore that the claimant's pass gave him access to the respondent's building in no way assists the claimant in establishing his employment status. Mr Sipple's evidence, which appears logical and credible, that any contractor who had been through the vetting process would be given access to the respondent's building, regardless of employment status, is persuasive. In short, this is not a matter that can assist with the decision at this hearing.

7.3. *The right to use the "staff car park"*

- 7.3.1. Mr Marshall made submissions on behalf of the claimant regarding what he described as the '*staff car park*'.
- 7.3.2. The evidence of Mr Sipple was that there was no "*staff car park*". There was a car park that staff and visitors could and would use. Spaces in that car park were not allocated to individuals. There was no public car park.
- 7.3.3. Mr Sipple's evidence was that any vetted contractor would have access to and be permitted to park in that car park when attending the respondent's premises. This evidence was not disputed.

7.3.4. Accordingly, this is not a matter that can assist with the decision at this hearing.

7.4. *Access to the on-site "staff" canteen*

7.4.1. There is no dispute that the claimant had access to the canteen at the respondent's premises.

7.4.2. The claimant's representative submitted that the claimant's access to the this canteen, which was characterised by the claimant as a "staff canteen" was indicative of the claimant being more than self-employed.

7.4.3. The respondent's position is that the canteen can be used by anyone with access to the building, which includes visitors and persons issued with contractor passes. The claimant's evidence did not contradict this position.

7.4.4. Whether the canteen was called a "staff canteen" or it was given a different name is of no assistance. The fact that the claimant, who had been vetted and given access to the respondent's building, could use the canteen if he wished is not a matter that can assist with the decision at this hearing.

7.5. *Administrative Support*

7.5.1. There was a clear dispute regarding what administrative assistance the claimant was given by the respondent.

7.5.2. The claimant initially suggested that he was given extensive administration support by the respondent. The claimant in his evidence regarding payment was quite clear, when it was put to him that after he had concluded the sessions booked on a particular day he was free to go, that he might on such occasions stay back to do his own paperwork. In effect, to do his own administration. During cross-examination, however, it transpired that the only administrative support he referred to was assistance with dealing with cancelled appointments and any subsequent rebooking of appointments.

7.5.3. It is noted that these appointments are all appointments made by, and for, staff of the respondent organisation to receive therapy. The evidence regarding who arranged the timing of rebooked appointments was in dispute. That being noted, even accepting the claimant's account in relation to this issue, namely that all bookings and cancellations were organised by the respondent, it is of no assistance.

7.5.4. The fact that the respondent's staff when seeking to cancel an appointment would phone the respondent rather than the claimant in no way assists the claimant in establishing his status. These individuals were officers and staff of the respondent who were managed by the respondent. Any therapy sessions had to fit around their duties and obligations to the respondent. It is entirely logical for the staff involved to select times that suited them after liaising with the respondent, and then for the respondent to confirm those times to the claimant. There is nothing in such an approach that suggests

that the claimant was not self-employed. Accordingly, this is not a matter that can assist with the decision at this hearing.

7.6. *The room or rooms allocated to the claimant*

- 7.6.1. The claimant's evidence was that he only ever provided therapy services using two specific rooms at the respondent's premises. The claimant's representative submitted that this was indicative of the claimant being more than self-employed.
- 7.6.2. There was no evidence to the effect that the claimant had been allocated an office that was exclusively his. Such an arrangement would be unlikely, noting that the respondent operates 7 days a week from their premises and the claimant only provided therapy on, when increased, two days per week.
- 7.6.3. Evidence was presented by Mr Sipple that there had been disquiet on the claimant's part when Mr Sipple had started to use a room that the claimant had until then been in the habit of using to deliver therapy. This suggests that the claimant was in the habit of using specific rooms, and also that the claimant had no rights to use such specific rooms.
- 7.6.4. Even if true, the fact that the claimant always used the same two rooms in the respondent's premises when providing therapy does not assist the claimant. The respondent's representative makes a comparison to a self-employed music teacher who provides instrument lessons on school premises to pupils. Such a person will often provide the lessons in the same classroom. That does not make any difference to their status.

7.7. *The lack of payment for use of the respondent's premises*

- 7.7.1. The claimant's representative submitted that the fact that the claimant did not have to pay for the use of the respondent's premises to provide therapy to the respondent's staff was a strong indicator that he could not be self-employed.
- 7.7.2. The respondent's representative compared the claimant to a instrumental music teacher attending schools to provide music tuition to the pupils. He submitted that it would be nonsensical for the school to seek to charge the music teacher for the right to use a room to provide tuition for their pupils. On the same basis he submitted it is far from unsurprising that the respondent did not seek to charge the claimant for the right to use part of their premises to deliver therapy sessions to their staff. This is a persuasive submission.
- 7.7.3. The fact that the respondent did not seek to charge the claimant for the use of the respondent premises when providing therapy to the respondent's staff is not a matter that can assist with the decision at this hearing.

7.8. *The lack of capital risk by the claimant*

- 7.8.1. The claimant's representative submitted that the fact that the claimant had risked no capital and had no financial outlay generally in order to provide the therapy was indicative that he was not self-employed. It was suggested that if he was self-employed some form of capital outlay or investment would be expected to have been incurred when the claimant set himself up in business.
- 7.8.2. The evidence before the hearing was that very little, if anything, in the way of equipment or facilities beyond the use of premises was supplied by the respondent. No particular equipment was provided. The claimant may have been permitted to use the respondent's photocopiers on occasion, but there was no evidence that he had been issued with a photocopying card or similar. The claimant was not given a computer or a phone, he was not put on the intranet or given a staff email address.
- 7.8.3. It was agreed that to provide therapy services the claimant was required to maintain a professional accreditation. This required the claimant to have a professional supervisor, who would need to provide 1½ hours of supervision per month to maintain accreditation. It was not disputed that the respondent did not assist the claimant with this requirement. The evidence was that the claimant had sourced external accreditation himself. It is not credible to suggest that such an investment of time by a fellow professional would be without cost, which was not met by the respondent. Accordingly, it does not appear to be factually correct that the claimant was not incurring any costs or outlay in order to be able to provide the therapy sessions he did.

7.9. *Supervision of the claimant*

- 7.9.1. A substantial part of the claimant's evidence related to the level of supervision which he was subjected to by the respondent. There was no dispute that the claimant attended regular meetings with the respondent, around once a month. Those meetings were characterised by the claimant as supervision meetings. There was very limited evidence regarding what actually took place at these meetings.
- 7.9.2. Documentary records of the meetings suggest that there was an exchange of information at the meetings. The claimant's representative referred to the supervision at these meetings being a "light touch".
- 7.9.3. To have "light touch" supervision once a month is more consistent with a self-employed contractor than with an employee or worker, although it is not strongly indicative either way. A contractor would logically be required to meet and provide regular updates as to the current position, how things were going, whether there were any issues and similar information. That appears to be consistent with what occurred at these meetings. Accordingly, this is not a matter that can substantially assist with the decision at this hearing.

7.10. *Flexibility in the arrangements*

- 7.10.1. The claimant's representative made submissions on a number of points that can be collectively referred to as the 'flexibility' the claimant had in his

arrangements with the respondent. Specifically, this included how much the claimant was permitted to charge for the work he did, how he was paid for that work and whether he was obliged to do the work requested.

- 7.10.2. In regard to how much the claimant was paid for the therapy service he provided, there was no dispute that this was a fixed and non-negotiable amount. It was payable per session undertaken, albeit the claimant suggested it was per hour. The fact that the amount which the claimant was paid was at a set rate (either per session or per hour) in no way implies anything other than that is the rate the respondent was prepared to pay.
- 7.10.3. The claimant sent to the respondent regular invoices for the work he had done, which were then paid by the respondent. The fact that the claimant sent the respondent regular invoices is indicative of someone who is self-employed. Employees do not normally send their employers bills for work done. This is not, however, of itself decisive.
- 7.10.4. There was no dispute that the claimant had never turned down or refused to do therapy sessions.
- 7.10.5. The claimant initially suggested that he had done the same fixed number of therapy sessions every week throughout the engagement. Under cross examination the claimant conceded this was not correct and that the number of sessions he had provided had fluctuated. This is strongly indicative of there being no obligation on the respondent to offer any particular amount of therapy work to the claimant. The fact that the claimant always wanted to do whatever therapy work was available does not change the position.
- 7.10.6. The respondent accepted that the claimant was not permitted to send a substitute therapist to conduct a session for a member of the respondent's staff if he was partway through a series of therapy sessions with that staff member. He was expected, and it was hoped, that he would complete the series of sessions with that staff member himself. The parties were in agreement that switching therapists part way through a series of sessions would generally be inappropriate given the nature of the therapy work being undertaken. The claimant was not cutting lawns or cooking meals; he was providing therapy to staff who had suffered workplace traumas or similar. In providing such therapy, continuity is clearly a critical factor, enabling the therapist and the staff member to build trust. Accordingly, in this context, the fact that the claimant was expected to finish courses of therapy sessions which he had started is of little assistance. If it was taken as an indication of employment status, it would suggest that therapists were precluded from ever having self-employed status, which is plainly not the case.
- 7.10.7. There is no dispute that the claimant paid his own tax and national insurance contributions. There was no evidence of employer national insurance being paid. Whilst not determinative, this is indicative of the parties believing at the time that the claimant was self-employed.

7.11. *The parties understanding of the position*

- 7.11.1. It is a persuasive factor that the claimant, in his own words at the conclusion of his evidence stated that he had “*genuinely believed that he was self-employed*”. The claimant went on to explain that he both believed and intended his relationship with the respondent to be on the basis that he was self-employed.
- 7.11.2. Mr Sipple in his evidence was clear that the respondent’s belief and intent was the same, that the claimant was working for the respondent as a self-employed person.
- 7.11.3. This belief, as stated in evidence by both parties, appears to have been entirely consistent with what was actually occurring. The claimant only appears to have changed his belief and intent at the point where he was informed that his services were no longer required by the respondent. At this point the claimant appears to have sought to re-characterise the arrangements between himself and the respondent to assist his changed belief.
- 7.11.4. The relevant findings are in relation to what was actually happening and what the parties believed and intended at the time, not a retrospective change to that belief. Whilst not of itself determinative, if the parties mutually believed that the claimant was self-employed, and the relationship between them operated and had effect in a way that was entirely consistent with the claimant being self-employed, it is difficult to justify retrospectively re-characterising the relationship to be anything else. The evidence presented at this hearing does not support such a re-characterisation.
- 7.11.5. The claimant has not discharged the burden of proof on him to show that he had the status of either an employee or a worker for the respondent. The evidence at this hearing is strongly suggestive that the claimant was, as he and the respondent intended, self-employed. This means that the claimant is not entitled to pursue his claims in the Employment Tribunals, and all his claims must be dismissed.

Employment Judge Buzzard
31 July 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 August 2023

FOR THE TRIBUNAL OFFICE

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