Neutral Citation Number: [2022] EAT 28

Case No: EA-2020-001090-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 December 2021

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

MR HOWARD WATERS **Appellant**

- and -

THE MOTE CRICKET CLUB
(an unincorporated members association) **Respondent**

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- -

The Appellant in Person
Mr J Bar (a Representative) for the **Respondent**

Hearing date: 1 December 2021

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

The employment tribunal was entitled to hold that the claimant was neither a worker nor an employee for the purposes of the claims he sought to bring in the employment tribunal, but was in business on his own account. The judgment was **Meek** compliant.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of Employment Judge Hargrove after a preliminary hearing on 11 September 2020. The judgment was sent to the parties on 2 October 2020. The employment judge concluded that the claimant was not an employee of, or a worker for, the respondent and, therefore, was not entitled to claim holiday pay or notice pay; and that an application to amend to claim unfair dismissal would not be permitted.

2. The respondent is an unincorporated members' club run by committee. In this appeal the claimant has represented himself. The respondent was represented by Mr Barr, a volunteer committee member. Both parties, despite their lack of legal training, have taken considerable care in researching and presenting their cases. I am grateful to them for the care that they have taken in presenting their arguments.

3. I take the key facts from the judgment of the employment tribunal. The respondent has two cricket pitches on grounds at Maidstone in Kent. It had employed a groundsman from about 2000. It was common ground between the parties that he had been an employee of the Club. As part of his contractual arrangements he had licence to live in residential accommodation at Moteside.

4. The claimant was a member of the Club and, latterly, of the committee. He had, on occasion, worked as a volunteer and/or casual worker assisting the groundsman. In 2011 the claimant started a business, Green Hand Gardens, which provided gardening and grounds services, including the maintenance of another cricket pitch.

5. The employed groundsman vacated Moteside in 2016. It was eventually decided that his

replacement was to be engaged as a self-employed contractor. The person appointed would not have a licence for the residential premises which were to be let out by the Club. A contractor was appointed by the Club.

6. The claimant obtained a short-hold tenancy of the property at the grounds. He lived and based his business there, using a shed on the property and bringing in a shipping container in which he kept tools and equipment.

7. The Club fell out with the contractor it initially appointed to replace the employed groundsman. In particular, there was a concern that he did not work enough hours on the contract. He was removed at the end of 2017 season.

8. Thereafter the claimant was approached. In his witness statement he states that he had no desire to work as a contractor, as he felt that the job was better suited to a service-occupier, as had previously been the case. He went on to state that, since he really wanted to do the job, he had no choice but to agree to the terms offered as a contractor. He stated that he was offered a contract, which he signed. At para. 3.10 of the judgment, the employment judge set out in some detail the terms of the contract which included detailed provisions as to the upkeep of the cricket pitches, particularly during the playing season to prepare for fixtures:

> "3.10. The copy of that contract is produced by the claimant at C8. It was also produced by the respondent. I was shown a signed copy. It was signed by "Howard Waters (on behalf of Green Hand Gardens)", and "Chris Back (on behalf of the Mote CC)." It is dated November 2017, and the claimant started on 1 December . In summary: 1. It contains detailed provisions as to"Cricket playing and practice surface preparation", with seven bullet points dealing with the preparation of the 2 squares and wickets for matches on them, for the care and maintenance of the outfields, the maintenance of artificial nets, and work to be done on match days. There were also provisions for the maintenance of surrounding areas with a schedule setting out the frequency when tasks were to be done; and for maintenance of machinery. 2. There was also a list of tasks which were not to be included in the contract. 3, under the heading of "expected work time and compensation – timing –" there was a specific provision " The above services would mainly be carried out during the summer months, and would include Saturday match days as required. Work is expected to be a minimum of 60 hours per week

> during the summer months, of which at least 40 should be carried out in person by Howard Waters (as the skilled groundsman). Summer months is March to October inclusive. During the winter months (November to February inclusive), it is expected that the cricket pitches continue to have some basic maintenance and oversight. This should take four hours a week". 4. Under "Machinery", "Machinery owned by the Mote CC or borrowed from Maidstone RFC should be used in the first instance. Use of machinery owned by GHG or any other entity should be approved by the head of ground and will not give rise to additional remuneration". 5. Under "compensation", – "£22,000 per annum for the summer work (16 hours per week, of which 40 by Howard Waters in person); additional £1200 for winter work (4 hours per week). This remuneration allows for an increase in the use of the squares in the 2018 season. – £22,000 Invoiced evenly over eight months (March to October 2018); £1200 invoiced evenly over four months (November 2017 – February 2018). Invoice on first day of month. Payment to be made by 15th of month. Invoice addressed to TMCC and delivered by email to the treasurer". 6."Tenancy clarification – this contract is absolutely independent and separate from any other contractual arrangement between TMCC and Howard Waters, including the existing private tenancy agreement on Moteside." 7. The contract was determinable on notice of 3 months on either side."

9. The claimant undertook the work from 1 December 2017. The claimant entered into correspondence with the Club seeking to renegotiate the terms of the agreement. The claimant was unhappy with the level of his remuneration; the requirement that he provide personal service of 40 hours per week; and the fact that he had to do extra work without additional payment.

10. The Tribunal directed itself as to the law at paragraph 4 of the decision:

> I start with the multiple test set out in the judgement in **Ready Mixed Concrete Southeast Ltd v Ministry of Pensions and National insurance** 1968 1 All England Reports at page 437. This recognises the following three questions: –
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> • Did the worker agreed to provide his or her own work and skill in return for remuneration?
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> • Did the work agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of Master and servant?
>
> • Were the other provisions of the contract consistent with its being a contract of service?
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> As was stated in the judgement of Sir John Donaldson in **O'Kelly v Trusthouse Forte**: " The tribunal must consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account". As to the test of control, I note the decision

> of the EAT in the **Commissioners of Inland Revenue v Post office Ltd** 2003 ICR page 546: – the obligations on sub postmaster is to keep accounts in a particular way, to notify the post office of various matters, including sickness, to comply with the post office's requirements in the selection of staff and to meet certain quality standards, were all consistent with a contract for services (not of service). These applications were not sufficient to satisfy the control test, meaning that the postmasters were not employees.
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> Mutuality of obligation is generally regarded as a necessary element of a contract of employment, i.e. an obligation on the part of the employer to provide work, and a corresponding obligation on the employee to accept and perform the work offered. Personal performance is also a necessary component and if there is an unfettered discretion on the part of the worker to provide a substitute, that points away from a contract of employment or service. The intention of the parties as to the status of the relationship may be relevant factor, but the tribunal must always look to the substance of the matter, even if the parties agree the label. See **Young and Woods v West** 1980 IRLR 201 CA. In that connection I was referred by Mr Howard to the case of **Autoclenz v Belcher** 2011 ICR 1157. Supreme Court. It is permissible to look behind the terms of the written contract, to see if the identification of the workers' status (in that case car valets) as self- employed was a sham."

11. At the sift stage, John Bowers QC, sitting as a Deputy Judge of the High Court, allowed the matter to proceed on the basis that Grounds 1, 3, 4, 5, 9 and 10 raise issues about obligation to work and control that he considered were arguable. In respect of the grounds of appeal that he refused permission to proceed, he stated that he considered that there had been an impeccable self-direction as to the relevant law. In his Skeleton Argument for this appeal the claimant adopted that description.

12. The judge quoted s230 ERA at paragraph 2. Whilst the holiday pay claim would arise under the **Working Time Regulations 1998**, the material statutory provisions are essentially the same. In referring to the possibility that the claimant could be an employee, a worker or genuinely self-employed, it might have been better for the judge to refer specifically to the fact that a self-employed person can still be a worker, the statutory exclusion focussing on whether the individual operates a profession or business undertaking of which the other party to the contract is in the role of client or customer. However, it is clear that test was considered by the employment judge as he referred to it in concluding that:

> "the respondent was genuinely a customer or client of the claimant's business, albeit a very significant one."

13. Section 230(3) **ERA 1996** provides:

> (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)—
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> (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;
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> and any reference to a worker's contract shall be construed accordingly.

14. It is obvious from the wording, but worth specifically noting, that a person may contract to undertake work personally but not be a worker because he does so under a contract to which the other party is a client or customer of a profession or business undertaking carried on by him. An agreement to do work personally does not necessarily make a person an employee. For a person asserted to be an employer to need to relay on the "profession or business undertaking" exception the person asserting to be a worker must have entered into a contract to do work personally.

15. The Tribunal's conclusions were set out concisely at section 5 in paragraphs. 5.1 to 6. The employment judge concluded there was a contract between the parties; work was to be done under the agreement, which the judge described as "closely prescribed", noting that it was much more "closely prescribed" than had been the case with the previous contractor. The judge concluded there was no fixed start or finish time, that the claimant was not required to report to anyone; there was no specific provision for work to be measured or assessed; or for the claimant to be subject to a disciplinary procedure. The judge concluded that the claimant was expected, from time-to-time, to provide his own tools. There was no contractual

requirement to that effect, although it was permitted under the contract. The employment judge referred to an occasion on which use was made of ladders and a trailer belonging to the claimant and to a particular item of cutting equipment. The judge noted that, at the time the contract was entered, the claimant was already running a business of a similar type and that the work for the Club could be incorporated into that business. The judge noted there was evidence of mutuality of obligation, but considered that it went no further than would have been the case in any contract between a business and a customer or client.

16. The employment judge concluded that the agreement was not a "sham" and was as set out in the contractual terms. The employment judge noted that there was no provision in the agreement for holiday pay, sick pay, or for deduction of tax and National Insurance. The employment judge noted that the claimant was responsible for the submission of tax returns, although an example was not provided to the Tribunal in the bundle of documents. The judge noted that the turn-over for the claimant's business was approximately £40,000 per annum, which included earnings of £22,000 from the respondent. The judge specifically noted at paragraph 5.8 that a factor that caused particular concern was the requirement in the contract that the claimant personally undertake 40 hours of work per week in the summer months, there not being a similar requirement off-season. The employment judge also noted that in the summer approximately 60 hours of work was required each week that would require the use of workers in addition to that of the claimant.

17. The employment judge concluded that there was no evidence that the number of hours worked by the claimant was specifically checked; that the claimant did engage others (including his partner) to work, and that he was in a position to continue to carry out his own business. The employment judge concluded that the claimant was not a worker or an employee.

18. Shortly prior to the hearig, having considered the Grounds of Appeal that were permitted to proceed, I asked the EAT associates to send the parties a copy of the recent decision of the Court of Appeal in **DPP Law v Greenberg** [2021] IRLR 1016, having regard to what is stated at paragraph 57 about the general approach to be adopted by the Employment Appeal Tribunal when considering judgments of the employment tribunal and, at paragraph 58, where the Court of Appeal stated that if the employment tribunal has correctly stated the key legal principles to be applied, an appellate tribunal or court should be slow to conclude that it has not applied those principles and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found.

19. The claimant considered **Greenberg** with care and directed me to para. 73, in which Popplewell LJ noted that there was no allegation that the judgment was not **Meek** compliant. The claimant referred me to a section of his Notice of Appeal after the numbered Grounds, in which he stated in general terms, without reference to any specific part of the judgment, that failure to deal with the points of evidence meant that he could not know why he had won or lost. He argued that contrary to the situation in **Greenberg** he was asserting **Meek** non-compliance.

20. The claimant also referred me to the recent judgment of HHJ Auerbach in **Windle v The Chief Constable of West Yorkshire Police** [2021] EA-2020-000406-LA, in which consideration was given to **Greenberg**, and it was noted that if there is an issue which forms an essential element of a cause of action that is not addressed at all by the tribunal this can constitute an error of law, whether such an error is best characterised as a **Meek** non-compliance issue or a more straightforward error of law.

21. The claimant had also considered Rule 62 of the **Employment Tribunal Rules of Procedure 2013** that requires the tribunal to give reasons for its determination of disputed issues. I noted that that was a matter that had recently been considered by the Court of Appeal in the case of **Dray Simpson v Cantor Fitzgerald** [2020] EWCA Civ 160 in which Bean LJ, at paragraphs 29 to 32, concluded that the issue is always one of substance and a breach of Rule 62 does not of itself give rise to a ground of appeal.

22. **Meek** compliance requires that a party should be able to understand why they have won or lost; it does not require that they know why every factual allegation was determined in one way or the other, or that the decision must refer to every legal argument advanced. The EAT must be satisfied as Sedley LJ put it in **Anya v University of Oxford** [2001] ICR 847 the the employment tribunal has "covered the correct ground and answered the right questions". Employment tribunal judgments should not be so broadly read as to make them appeal proof. That said concission is to be welcomed. **Meek** compliance appears to be raised in the majority of appeals to the EAT, often as a subsidiary ground together with perversity, but it is an argument that seldom succeeds. That is because there is a misconception about the degree of detail that is required for a party to know why they won or lost. The parties must be able to see the wood, but not necessarily all of the trees.

23. This case involved an assessment of the statutory test of whether the claimant was a worker. That assessment requires some assessment of the key factors that may be relevant to the determination, such as control or, where relevant, mutuality of obligation; it does not mean that a decision that fails to deal with every fact or argument advanced on those issues fails through a lack of **Meek** compliance.

24. The judgment of Employment Judge Hargrove was concise. Judgments of the employment tribunal are generally considerably more detailed than those which are provided in many courts or tribunals in the UK. Employment judges have to try and make sure their judgments are sufficiently brief that they will be read, while being sufficiently detailed that parties can understand in broad terms why they have won or lost.

25. Considering the specific Grounds of Appeal: at Ground 1 it is asserted there was a failure to have regard to material evidence, the key component of which was the claimant's contention that he had to conduct additional work on the cricket pitches without additional remuneration. His contention is that he did so particularly when additional fixtures were added to the calendar. While that is not a matter that is specifically referred to in the judgment, I do not consider that the failure to do so demonstrates a failure to take account of material evidence, or comes close to constituting a lack of **Meek** compliance. The employment judge referred in detail to the fact that there were a series of tasks that had to be done under the terms of the contract. They necessarily would have to be done before matches were played. The fact that those tasks might vary from time-to-time and might result in the claimant having to do additional work or using a member of the Green Hand Gardens team to do additional work was not a key factor in determining whether he was a worker or not.

27. The claimant's contention at this hearing was that requiring additional work was "controlling", because he had to do it himself. That was not necessarily the case; the work could be done by others. The fact that a person has entered into a contract under which it may be necessary to do additional work for which there is no additional remuneration is not something that points in the direction of the person being a worker or an employee; it is equally consistent with the truly self-employed, in the sense of those in business on their own account. Such people may enter into contracts in which they are paid for the amount of work done or

for the completion of specific tasks. In the latter case the amount of time the tasks take may vary from time to time.

28. The claimant refers at Ground 1F to the significant requirement for his personal service for 40 hours per week. That was a factor that the employment judge clearly took into account. It is apparent from paragraph 5.8 of the judgment that it was a factor that he thought was significantly in the claimant's favour, as a matter to be taken into account in the overall factual assessment of whether the claimant was a worker or not. Howevever, there is nothing fundamentally incompatible with a person being in business on their own account and being required to do a significant part or all of the work personally.

29. At Ground 3 it is suggested that there was a failure to take evidence into account in respect of the nature of the control of the work. The judge specifically noted that the contract provided considerably more detailed requirements as to how the work was to be done than had been the case with the previous contractor, setting out the relevant contractual terms and noting the obligation for 40 hours work by the claimant himself during the summer season. The employment judge did not fail to take the evidence into account.

30. At Ground 4 the claimant challenges the finding that there were no fixed start or finish times. The claimant contends that because pitches must be prepared for cricket matches that have been fixed, that necessarily involved prescription as to when the work was to be done. While that may be true to an extent, the employment judge was referring to fixed start or finish times, as might be common in employment; such as working 9 to 5. To the extent that work might have to be done at specific times when preparing for a fixture, there was nothing that prevented the claimant from providing those services through another member of the Green Hands Gardens team.

31. At Ground 5 it is asserted that the employment judge failed to take into account a requirement to report to the Head of Grounds. Necessarily, there was some reporting requirement in that there was a contract in which there had to be some assessment of whether the duties under it had been performed. The employment judge was referring more generally to the type of day-to-day control that might be expected in the case of a person who is not in business on his own account.

32. At Ground 9 the claimant again raised the issue of the 40 hours of personal service under the heading "failure to have regard to material evidence". It is clear that the judge did have specific regard to that evidence and it gave him the greatest pause for thought.

33. At ground 10 there is a contention that there was a failure to have regard to material evidence in respect of checking the number of hours the claimant worked. While there may have been some overall assessment of the number of hours the claimant worked, to ensure that the claimant was coming within the 40 hours required during the playing season, the employment judge was referring more specifically to the type of monitoring on a day-by-day basis of time and duration of work that might be expected of a person not in business on his own account.

34. I consider the claimant seeks to undertake a minute factual analysis of the judgment in a manner that is not permissible on appeal. The claimant accepts that the employment judge correctly directed himself as to the law. The employment judge made an overall assessment of the facts and applied the law to the facts he found. That was what the judge was required to do. It was not an error of law for him to fail to refer to every piece of evidence raised by the claimant, or every argument advanced by him.

35. Core to the determination was the assessment of whether the claimant was genuinely in business on his own account and whether the respondent was a customer of that business. The employment judge concluded that was the case, despite the fact that the respondent was substantially the major customer of that business. The employment judge noted that the financial contribution of the respondent to the annual turnover was £22,000 out of a total of £40,000. The judge was entitled to conclude that there was not a "sham" agreement. The claimant has referred in his submissions to inequality in bargaining power but that was not raised as a specific ground of appeal. In any event, it is clear that the judge did consider the possibility of a "sham" arrangement that did not reflect the reality of the situation and gave detailed consideration to the circumstances in which the contract had come into existence. The employment judge noted the fact that the claimant would have preferred not to enter into this type of contract. Notwithstanding this, the employment judge permissibly concluded that the contract was genuine and that, under the terms of the contract, the respondent was the customer of a business undertaking operated by the claimant. That was a factual determination for the Tribunal. In **Hospital Medical Group v Westwood** [2012] EWCA Civ 1005, Maurice Kay LJ noted that the determination of whether a person is a worker is particularly fact-sensitive. Those factual issues are matters for the employment tribunal.

36. I conclude that there was no error of law on the part of the employment tribunal, with the consequence that the appeal is dismissed.