



EMPLOYMENT TRIBUNALS

Claimant

Mr Ernesto Tassi

v

Respondent

Blue Arches Ltd

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 15 June 2018

Before: Employment Judge Alliott

Appearances:

For the Claimant: Ms Julia Furley (Barrister)

For the Respondents: Ms S Bibi (Counsel)

JUDGMENT

1. The judgment of the tribunal is that:

1.1 The employment status of the claimant was that he was an employee working pursuant to a contract of service.

REASONS

Introduction

1. This open preliminary hearing was ordered by Employment Judge Manley on the 4 February 2018 to determine the following issue:

“The employment status of the claimant; whether he was an employee or a worker.”

2. In its response form the respondent avers that the claimant was engaged as self-employed independent contractor and denies that the claimant was an employee or a worker. As such, I have treated the issue for this open preliminary hearing to be to determine:-

“The employment status of the claimant; whether he was an employee or a worker or neither.”

3. By a claim form presented on the 1 November 2017 the claimant brings claims for notice pay, holiday pay and arrears of pay.
4. The claim for notice pay is a breach of contract claim for wrongful dismissal and so is dependent on the claimant establishing that he was an employee, i.e. engaged under a contract of service. (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Regulation 3 extends jurisdiction for breach of contract claims to employees for claims arising or outstanding on the termination of the employee's employment).
5. The claim for holiday pay is brought under the Working Time Regulations 1998 which would apply to the claimant whether he was an employee or a worker.
6. The claim for arrears of pay is an unlawful deduction of wages claim under section 13 of the Employment Rights Act 1996 which would apply to the claimant whether he was an employee or a worker.

The evidence

7. I heard oral evidence from the claimant and Mr Omar Shahzadah, an employee of the respondent company, and Mr Eugene Amaqui, who describes himself as a self-employed Design Consultant providing services to the respondent. In addition, I had a witness statement from Mr Hodayun Bahadur, a Director of the respondent, who is unable to attend the hearing due to it being Eid. Mr Bahadur's statements are in essentially the same format as Mr Shahzadah and did not add a great deal to it. In addition, I have been provided with a bundle of documents running to 115 pages along with a supplemental bundle with a further 132 pages. I have also been provided with a one-page schedule titled "Analysis of mobile phone calls of Mr E Tassi between July 2016 – May 2017".

The law

8. Section 230 Employment Rights Act 1996 provides as follows:-

“230 (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” ... 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.”

9. Regulation 2 of the Working Time Regulations 1998 provides:

““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;”

10. It is common ground between the parties that no single document contains all the terms agreed between the parties. In the circumstances it is for me to determine where the terms of the contract are to be found, what the terms of the contract are and how to characterise the relationship that those agreed terms give rise to. By reference to the IDS Employment Law Handbook, Contracts of Employment (November 2014) I direct myself as follows:-

- 10.1 At 2.22 “where the parties intentions have to gathered not only from documents but also from oral exchanges and conduct, the terms of the contract are a question of fact.”
- 10.2 At 2.23 “the clearest statement of the position is probably still that of Sir John Donaldson M.R. in the case of O’Kelly and Others v Trusthouse Forte plc [1983] ICR 728 CA “The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal not only to find those facts but to assess them qualitatively and within limits ...”
- 10.3 At 2.24 “in the absence of any comprehensive definition of a contract of employment, the courts and tribunals have developed a number of tests over the years aimed at helping them identify such a contract. It is now accepted that no single factor will be determinative of employee status and a number of factors must be looked at – the so called “multiple” or “mixed” test...” Nevertheless, I note that three early tests of particular importance, namely the control test, the integration or organisational test and the economic reality test remain valid considerations.
- 10.4 At 2.28 “the Court of Appeal cautioned against using a checklist approach in which the court runs through a list of factors and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision. Quoting Mr Justice Mummery in the High Court “this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by

standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole. It is a matter of the valuation of the overall effect of the detail... not all details are of equal weight or importance in any given situation.”

11. Adopting the multiple test I have considered issues of control, mutuality of obligation, personal performance, financial considerations, tax and National Insurance, the intention of the parties, the ability to work for others, the extent to which hours of work and holidays are fixed and the extent to which an individual is integrated into the other parties organisation.

The facts

12. The claimant claims that he was employed by the respondent on the 8 June 2016. There has been no dispute to that as a start date.
13. The claimant has a sister called Anna Paolo Tassi. She is based in Italy and acts a Sales Representative for a number of Italian companies who supply fittings and fixtures.
14. The respondent trades under the name “Marvellous Interiors”. It designs, supplies and fits luxury kitchens and interiors. It has a showroom in Maida Vale.
15. In March 2016 the claimant was working for a company in Birmingham. He was working as an employee under a contract of service.
16. Mr Shahzadah agreed that the claimant was introduced to him by Anna Paolo in February 2016. There was some dispute as to how often Anna Paolo had dealt with the respondent. The claimant said it was frequently whereas Mr Shahzadah claimed that she had only come once or twice to his showroom. In so far as it is relevant I find that she had probably gone on numerous occasions prior to February 2016. This is because Anna Paolo asked Mr Shahzadah to check out the claimant’s CV and the three of them went out for dinner to discuss the possibility of the claimant working for the respondent. Nothing was decided at the dinner and negotiations clearly took place over the ensuing months.
17. In due course Mr Shahzadah sent proposals in writing on the 15 March 2016. This is clearly an important document. It provides as follows:-

“Date 15/03/2016

Proposals for Mr Ernesto Tassi to start working in Blue Arches Limited T/A Marvellous Interiors

Job Title: Trade Business Development Manager, Project CO-Ordinatore and sale person

On self-employed/Freelance basis

Basic salary/fee; £18,000/annum *
The above will e paid on monthly basis

Commission:

£0K - £500K: 5%

£500k +: 6%

The above apply to the whole sales figures excluding VAT and fitting charges and subject to meeting certain profit margins.

Fee payment:

50% when first deposit (50%) received (end of the same month)

50% on completion/handover of project (end of the same month)

Daily work hours:

9:30 am – 6:00 pm

Working days/week: 6 days (including Saturdays)

Day off: one day fortnightly (except Saturdays)

Main Duties and Responsibilities:

You will be responsible for promoting Flessya doors and all other Italian products we have in our list and showroom

You are required to contact our related trade industries such as property developers, architects, interior designers and builders to present our company and our available products

Your will be responsible for meeting with clients to discuss their requirements before going onto prepare detailed design drawings and quotations

We would require you to have excellent CAD software skills

To provide excellent customer service and understand your customer base

To ensure accuracy of all plans and quotations

You are required to carry out small collections and deliveries from our storage warehouses to customer houses in our showroom

To co-ordinate installations with designers, customers and contractors

Site surveys and meeting clients in their homes

Placing orders and follow up deliveries

Creating and proposing new ideas and systems to increase footfall to the shroom, specials offers, advertisements, remodelling and upgrading showroom displays to the highest standard as possible

To manage your diary effectively, ensuring deadlines are met and customer plans are completed within the agreed time scales

To have sound working knowledge of relevant building regulations

Maintain systems and records of each job. Work with office staff to improve systems already in place to improve efficiency

Make sure the showroom is always in the best possible state

To source new suppliers and products from Italy

To oversee the jobs from beginning up to the completion.

***: Should your combined basic salary (£18,000) and sales commission does not reach £25,000, Blue Arches Ltd, hereby confirms that your total income will be capped to make it £25,000/annum.**

I hope the above proposal is acceptable and I look forward to hearing from you soon.”

18. It is accepted by the claimant that Mr Shahzadah told him that he was going to be self-employed. That is clearly reflected in the response the claimant made to the proposal of the 15 March 2016. The claimant responded in an e-mail dated the 21 March 2016 in this he expressly states “and also I will be self-employed.” The claimant sets out his current position and indicates that he would like to move to London. In essence his counter proposal was as follows:-

“My proposal should be around 35K/per year, plus commissions, plus monthly expenses repayments (car allowances, transportation etc.)”

19. Mr Shahzadah responded on the 30 March, in effect saying he needed to think about the salary level. On the 2 April the claimant set out his current remuneration package and reiterated that he wanted to be paid £35,000. On the 1 June the claimant sent an e-mail title “Ready to move”. He indicated that he had resigned his current position and was ready to move to the respondent company. He states “As we said, can you please send me a draft contract with all the condition we already agreed?”
20. The claimant began working for the respondent on the 8 June 2016. The claimant’s evidence was that he and Mr Shahzadah had a meeting and shook hands on what had been agreed. His annual salary was to be £35,000 with 5% commission on all sales over £150,000. He was to have four weeks holiday. The claimant accepted that he was told that he would be self-employed but explained that the implications of that in English Law were not clear to him. Italian is his first language. Mr Amaqui gave evidence that once he started the claimant asked him for help in how to frame the invoices to be submitted to the respondent and Mr Amaqui gave him a template.
21. Mr Shahzadah’s evidence was that whilst negotiations had taken place nothing was ever agreed on a concrete basis. He disputed that holidays and hours of work were not agreed. In evidence he asserted that no agreement had been signed and that there was only a gentleman’s agreement. Mr Mr Shahzadah asserted that it was agreed that the claimant could deal with other companies and suppliers except kitchen companies and that the claimant would provide his services together with his sister Anna Paolo as a team.
22. I do not accept Mr Shahzadah’s evidence as to what was agreed between the parties. Mr Shahzadah struck me as a careful businessman, well capable of setting out in detail in writing issues that had been agreed. An important factor in me coming to this conclusion is an e-mail sent by Mr Shahzadah on the 6 May 2017. The background to this e-mail being sent was, according to the claimant that he was being required to do additional work such as working on Saturdays and that he wanted improved terms. The claimant’s evidence was also that Mr Shahzadah wanted him to be more committed to the company. Mr Shahzadah didn’t really dispute this or give any other explanation as to why he created the document dated the 6 May 2017.

23. This amended job description provides, where relevant, as follows:

“Duties: all in the original agreement plus below:”

“Obligations:

- Work only for employer’s companies
- Must not work for any similar, other companies or own companies
- Must not deal direct with suppliers or refer any customers to suppliers
- Must not be involved with similar or any other business activities for himself or any other individual

Hours of work:

9:30 – 6:00

Working days:

Week 1: Monday – Saturday

Week 2: Monday – Friday

Holidays:

2 weeks

Work as normal in all bank holidays and other National holidays

In addition, revised and more detailed commission rates for various different parts of the organisation were set out.

24. The claimant disputed some of the commission rates, working on Saturday and asserted that he was entitled to 4 weeks holiday.
25. The importance of this document in my judgment is that it clearly relates back to the March 2016 document, the duties are expressed as being all in the original agreement. Mr Shahzadah sought to suggest that the duties agreed were different from those set out in the March 2016 document but I do not accept this evidence.
26. I find that the agreement entered into between the claimant and the respondent was personal to the claimant. The respondent had seen his CV and I find that the expectation of Mr Shahzadah was that the claimant would be providing the work himself. The March 2016 document addresses him as “You” I find that the agreement was that the claimant would work 9:30 - 6:00 Monday to Friday and that once he began working for the respondent he was increasingly asked to work Saturdays. I find that there was an agreement as to how much paid holiday the claimant could take. Whether or not that was two or four weeks is not that important for the purposes of this open preliminary hearing. I accept the claimant’s evidence that he had to clear with Mr Shahzadah when he took holiday.

27. Between June 2016 and March 2017, the claimant regularly invoiced for £2,917 per month which equates to an annual £35,004. In April, May and June the monthly amount rose for reasons not given to myself.
28. I accept the claimant's evidence that he was working full-time for the respondent. When he was not in the showroom he would be out supervising fittings.
29. The respondent has sought to characterise the claimant as being self-employed on the basis that his sister Anna Paolo often undertook his work for him and in his stead, that he had long telephone calls in Italian to business in Italy which shows that he was running his own business on his own account and that e-mails subsequently discovered demonstrate that he again was conducting business on his own account whilst working for the respondent. The claimant has acknowledged that his sister did regularly attend at the respondent's showroom but states this was in her capacity as a salesperson for Italian companies. I accept that evidence. I do not consider that Mr Shahzadah would have accepted Anna Paolo doing the job that the claimant was expected to do. It is true that on one occasion Anna Paolo supervised the installation of a kitchen in Italy. This was a kitchen that had been designed by the claimant. The design and supply of that kitchen in Italy was invoiced through the respondent. Normally the claimant would be expected to supervise the installation but the fact that it was in Italy was something of a one off. As such it was expedient to get the claimant's sister to supervise the installation as she was there. I find that this was agreed by Mr Shahzadah and the commission due was paid in cash by Mr Shahzadah to the claimant for onward remission to Anna Paolo. Had this been an instance of the claimant discharging his obligations as a self-employed contractor then there would have been no reason to pay Anna Paolo direct. The commission could have been paid to the claimant in one of his normal invoices. I find that the claimant was not able to substitute another individual pursuant to his agreement with the respondent.
30. Considerable effort has been made by the respondent to try and demonstrate that the claimant was working on his own account at the same time as providing services for the respondent. Disclosure of his mobile calls was sought and has been given. An analysis of mobile phone calls by the claimant has been undertaken. It was only provided to the claimant on the morning of the hearing. In my judgment this analysis does not demonstrate anything. It is clear that the claimant made a large number of calls both from the UK to Italy and whilst he himself was in Italy. No distinction has been made as to calls made at the weekends or after working hours which would probably be accounted for by calls to friends and family. The respondent has been able to identify numbers that correspond to its existing suppliers in Italy. However, what I do not have is any analysis of telephone calls to other suppliers in Italy. I note that one of the claimant's job duties was sourcing new suppliers and products from Italy. Even if the respondent was able to demonstrate that the claimant was calling other suppliers in Italy, that is a far cry from establishing that the claimant was conducting his own business as a self-employed designer and supplier of kitchens. I found the evidence of the mobile telephone numbers to be of no use whatsoever.

31. The respondent has retrieved from its server a number of e-mails sent and received by the claimant whilst working for the respondent. These were in Italian and have been translated into English. Again, I found these e-mails of limited value. This is because Mr Shahzadah accepted they were only some of the e-mails available and, as such, may well have been taken out of context. As it was, the claimant was cross-examined quite extensively on them. The purpose of the cross-examination was to try and establish that the claimant was conducting business on his own account and therefore a self-employed contractor. However, the first point to note is that all these e-mails went through his e-mail address with the respondent. As such, it cannot be said that he was trying to hide anything.
32. The claimant was cross-examined about a number of specific alleged private clients but in my judgment had a satisfactory answer and explanation in relation to each of them. Mandy Chiu was the General Manager of the London Lodge Hotel. Contemporaneous e-mails demonstrate that Mr Shahzadah was copied in to exchanges with her. The claimant said that all work was invoiced by the respondent. Rolph was the commission referred to the respondent by Anna Paolo and it concerned installation in Italy. I accept the claimant's evidence that Mr Shahzadah agreed that Anna Paolo should be paid commission direct if she introduced a customer. The Venice Project and Pancotti Project were examples of the claimant seeking to develop business for the respondent. These projects did not lead to a contract. The e-mails certainly do not establish that the claimant was conducting business on his own account. Similarly, Progetto Dell'Atreium was a project referred by Anna Paolo which did not come off. Woodlands-Sharnobrook is in the same category.
33. The claimant did accept that he visited a customer of Flessya (the supplier in Italy) in the UK, namely Pinal Gandhi. He did this a favour to Flessya in order to maintain a good relationship with that company. This company regularly supplied the respondent and had done so prior to the claimant's involvement. I find that this does not demonstrate the claimant working on his own account.
34. I find that the claimant was based at the respondent's Maida Vale showroom until becoming involved in opening a second showroom (the Binova Showroom). He worked regular full-time hours for the respondent. He did have a degree of flexibility but this was obviously necessary in that he had to go and supervise the fitting of kitchens and go to Italy on occasions to meet suppliers. Developing suppliers in Italy was part of his specific job description.
35. The claimant had a respondent company e-mail address and was provided by the respondent with a laptop which had the software to calculate prices from a design.

Conclusions

Labelling

36. The claimant accepted and I find that both parties referred to the agreement for the claimant to work for the respondent in terms that it was a self-employed

basis. However, this is not determinative. As per IDS Contracts of Employment at 2.50 “The parties stated intention as to the status of their working relationship in law maybe a relevant factor but the courts will always look to the substance of the matter, even if the parties expressly agreed on a label ...”

Control

37. I have found that the agreement was that the claimant would work 9:30-6:00pm on five days a week. The claimant had a holiday entitlement and had to ask Mr Shahzadah as to when he could take his holiday. I find that the claimant worked at the direction of Mr Shahzadah as to his day-to-day activities.

Mutuality of Obligation

38. The claimant’s evidence was that he was expected to work every day Monday to Friday. Indeed his evidence, which I accept, was that he was invariably required to work on Saturdays. There was clearly always work for him to do. I find that the respondent was under an obligation to provide work and did so. Further, I find that the claimant was required to attend every day for work.

Personal Performance

39. I find that the claimant agreed to provide his own work and skill. I do not consider that he was free to send a substitute in his place. I find that the claimant did not substitute his performance with that of his sister. His sister may well have been at the respondent’s premises on a regular basis on the occasions that she was in the UK from Italy but this was in her capacity as a salesperson for Italian suppliers. The only instance of her doing a job that the claimant might have done was when she supervised the installation in Italy, a one off that Mr Shahzadah agreed to pay commission to her for.

Financial Considerations

40. The claimant was in regular receipt of the monthly amount of £2,917. As per IDS Contracts of Employment at 2.45:-

“A person in business on his or her own account will carry the financial risk of that business. Thus, payment by commission only or lump sum payment “by the job”, or the right to set the rate charged or to participate in the profits (or the bearing of responsibility for losses), will usually point towards self-employment. Conversely, payment of a regular wage or salary is a strong indicator of employment.”

41. In this case, the claimant was paid a regular amount of £2,917. Above that level of pay he could earn commission. I find that the degree of financial risk he took was limited.

Tax and National Insurance Payments

42. I accept that the fact that the claimant was responsible for arranging his own Income Tax and National Insurance arrangements is a pointer towards self-employed status. However, as per IDS Contracts of Employment at 2.48 “This factor is not generally regarded as strong evidence”.

43. The June 2018 amended job description expressly prohibited the claimant from working for others. In any event I find that he was working full-time for the respondent and did not in actual fact carry out work for others at the same time.

Integration

44. The claimant had his own e-mail address at the respondent company and was supplied with a laptop. He worked full-time in the showroom save when he was out supervising the installation of kitchens and/or dealing with suppliers in Italy, I find that he was integrated to a significant extent in the respondent's business.

45. Lastly, from everything that I have seen, in my judgment the respondent cannot be characterised as a client or customer of any professional business undertaking carried on by the claimant.

46. Having addressed each of these specific issues that I must do under the multiple test I turn to consider the position in the round. In my judgment the nature of the agreement between the respondent and the claimant has all the hallmarks of a contract of employment and I do not consider that the claimant was performing his services as a person in business on his own account. Consequently, in my judgment the claimant's employment status is as an employee working pursuant to a contract of service.

Employment Judge Alliott

31/7/18

Sent to the parties on:

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For the Tribunal:

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