EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104873/2019

Held in Dundee on 27 September 2019

Employment Judge I Atack

Mr Matthew Horner	**Claimant** **In person**
JML Contracts Ltd	**Respondent** **Represented by** **Mr J Langley,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that the claimant does not have sufficient continuous service as an employee to bring his complaint of unfair dismissal which is dismissed.

REASONS

Introduction

1. This was a preliminary hearing to determine the issue of whether the claimant had sufficient qualifying service to bring his claim of unfair dismissal. The respondent alleged his employment with them commenced on 9 January 2017 and that any time the claimant worked for them before that date was on a self-employed basis. The claimant alleged he had been employed by the respondent before 9 January 2017 and had sufficient service to bring his claim.

2. The claimant gave evidence and John Langley a director of the respondent also gave evidence.

3. The parties lodged productions at the commencement of the hearing. The claimant lodged two documents, C1 and C2 and the respondent lodged 16 documents, R1-R16.

4. From the documents to which I was referred and the evidence which was led I found the following material facts to be admitted or proved.

Facts

5. The claimant operated a business known as DM Fencing. That was operated as a partnership with another person.

6. That business had operated since May 2013.

7. In the winter of 2015 the claimant saw a job advertised working on a hydroelectric scheme with the respondent on a self-employed basis.

8. He applied and was successful. The correspondence the claimant had with the respondent about the work on the Hydroelectric scheme was carried out in the name of his partnership.

9. It had been intended that when the claimant came to work for the respondent he would bring a specialised piece of equipment used for travelling over rough ground.

10. That piece of equipment did not come due to a dispute between the claimant and his former partner.

11. The claimant supplied some tools for fencing and hand tools for stonework.

12. Other tools were supplied by the respondent.

13. The claimant provided guidance to others on site. He considered himself more experienced and capable than others including the foreman.

14. In about May and June 2016 the claimant did not carry out any work for the respondent for a period of about five weeks.

15. During that period of time he did not take other work for himself or his own business.

16. The claimant accepted a lift to the Hydroelectric site in Glen Lyon from an employee of the respondent rather than using his own transport. The reason was that the employee lived in the same street as the claimant. This arrangement saved the claimant using his own transport and following the employee to the site.

17. The claimant's partnership owned a van which was sold in early 2017.

18. The claimant was paid by the respondent subject to a Construction Industry Scheme (CIS) deduction of 20% in respect of tax. That arrangement continued until the end of 2016.

19. The claimant had a CIS certificate, R6.

20. The claimant completed self-assessment forms for income tax purposes until 2017.

21. In early 2017 he had a meeting with HM Revenue and Customs to resolve all outstanding tax issues in respect of the self-assessment forms he had completed.

22. After January 2017 the claimant was subject to PAYE and National Insurance deductions from the respondent.

23. The claimant did not ask the respondent if he could take on other jobs whilst working with them prior to 2017. His position was if he had taken such work he did not think he would be able to return to work for the respondent.

24. The claimant accepted that if he had obtained other work he could have sent his partner to work for the respondent in his place.

25. In December 2017 the respondent offered the claimant a position as a skilled labourer ground worker, R4, with a start date of 9 January 2017.

26. The claimant accepted that offer, R3.

27. The claimant returned to the respondent a completed employee information form, medical questionnaire and proof of eligibility to work in the UK.

28. On 9 January 2017 the claimant was given an employment contract which he signed, R1.

29. On 19 January 2017 the claimant was sent a payslip. That showed that PAYE and National Insurance had been deducted from his salary, R2.

30. The respondent put the claimant through various training courses in the period from January up to June 2017.

31. These courses involved significant expense for the respondent.

32. The claimant had not been sent on any training course prior to January 2017.

33. Prior to the end of 2016 there had been discussions with the claimant about his being offered employment with the respondent, C2.

34. The respondent in an email sent on 20 December 2016, C2, set out the financial scenarios for the claimant if he remained self-employed (as they saw the relationship) and on becoming an employee.

35. The hourly rate as a self-employed person under the CIS regime was £12 per hour which would produce an annual average of £23,460.00. The hourly rate as an employee with the respondent would be £10 per hour

producing an annual salary of £22,100. Mr Langley informed the claimant that it was up to him whether the benefits of employment were worth the difference of £25 per week to him.

36. In May 2016 there were three operatives working with the respondent under the CIS regime, including the claimant. Of the three, two accepted employment with the respondent. Only the claimant refused.

37. The last CIS payment to the claimant from the respondent was made on 23 December 2016.

38. The claimant did not do any work for the respondent from 23 December 2016 until he commenced work in terms of the contract of employment on 9 January 2017.

Decision

39. Only an employee can bring a claim of unfair dismissal. The Employment Rights Act 1996 defines “employee” at section 230(1) as “individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment”.

40. To bring such a claim an employee must have been continuously employed for a period of not less than two years ending with the effective date of termination, section 108 (1) Employment Rights Act 1996.

41. In this case it is not disputed that the claimant was employed by the respondent from 9 January 2017. The question is whether any part of the period prior to that can be regarded as employment. If not then the claimant’s case must fail as he will not have sufficient service as an employee to bring a claim of unfair dismissal.

42. There is no one single factor which can be determinative of employment status and the issue requires to be approached by examining a range of relevant factors.

43. One necessary element is mutuality of obligation – ***Nethermere (St Neots) Ltd v Gardiner and Another*** 1984 ICR 612. This will usually be expressed as an obligation on the employer to provide work and a

corresponding obligation on the part of the employee to accept and perform the work offered. Relevant considerations include whether there are any notice requirements or whether a worker is free to leave at any time in favour of alternative work. If there is no mutuality of obligation between the parties it is highly unlikely there will be a contract of employment in existence.

44. Here the claimant accepted he could have taken other jobs if he had chosen and could have sent his partner in his place to work for the respondent. That did not happen but the claimant accepted in evidence it could have done.

45. In the case of ***Hall (Inspector of Taxes) v Lorimer*** 1994 ICR 218 the Court Of Appeal cautioned against using a checklist approach when considering whether there is a contract of employment, 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. In so doing, it upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who stated that "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 by 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".

46. The claimant applied for work with the respondent in 2016, in response to an advertisement. All correspondence in connection with that application was in the name of the claimant's business, DM Fencing. The claimant regarded himself as self-employed and completed self-assessment forms for tax purposes each year. He was paid under the CIS regime and not under the PAYE scheme. He was responsible for his own national insurance contributions.

47. He was not sent on any training courses until after 9 January 2017. The claimant provided some but not all of his tools.

48. He accepted in evidence that if he had gone to another job prior to the end of December 2016 he could have sent his partner to work for the respondent on the Hydroelectric scheme in his place. It appeared, in cross examination, that his only objection to that suggestion was that his partner was 12 years older than him.

49. Under the CIS regime a worker requires to have a certificate to avoid being taxed as an employee and the CIS regime requires the employer to detect tax currently at the rate of 20%. The worker is required to account to HM Revenue and Customs for his tax liability by declaring the award in a self assessment.

50. In this case the claimant had applied for work with the respondent through the medium of his own business. He was paid as a self-employed worker under the CIS regime. He accounted for his tax by competing self-assessment forms until 2017. He was also able, even if he did not exercise the right, to take alternative jobs and send someone else in his place to work for the respondent.

51. He was advised that if he became an employee of the respondent he would be paid £10 per hour rather than the £12 per hour he was earning at the time, C2. He chose to accept that lower rate, with the benefits set out by Mr Langley in his email of 20 December 2016.

52. The claimant's status changed from 9 January 2017. From that date there was no doubt that he worked under a contract of employment and I was satisfied that until then he had been a self-employed worker, working for the respondent under the CIS regime.

53. In reaching that conclusion I took into account the evidence presented in the case and the overall effect of it. It was clearly also the parties' intention at the outset that their relationship was not that of the employer and employee. The claimant was treated as a self-employed worker under the CIS regime and completed tax returns as a self-employed person.

54. The degree of control over the claimant was not explored in depth but it was the claimant's position that he was more capable and experienced than others including the foreman. He provided guidance to others on the site.

55. For all these reasons I consider that viewing the matters overall the claimant did not work under a contract of employment prior to 9 January 2017. Accordingly, he does not have sufficient length of service to present a claim of unfair dismissal and his claim is dismissed.

Employment Judge: **Ian Atack**
Date of Judgment: **08 October 2019**
Date sent to parties: **09 October 2019**