EMPLOYMENT TRIBUNALS

Claimant: Mr I Moulton

Respondent: Farm Solutions Ltd

Heard at: Manchester **On:** 30 November 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J French, Counsel

JUDGMENT

The judgment of the Tribunal on the preliminary point, is that the claimant was engaged as a worker in accordance with limb (b) of the definition as contained in regulation 2 of the Working Time Regulations 1998 and section 230(3) of the Employment Rights Act 1996.

REASONS

Introduction

1. The claimant was engaged by the respondent as a Regional Manager from 11 or 13 March 2015 until the contract was terminated on four weeks' notice on 26 June 2019. The claimant alleges that he was a worker. The respondent contends that he was not a worker, but was an independent contractor in business on his own account. The claimant pursues a claim for 42 days' holiday pay to which he says he was entitled and contends that he is entitled to £4,200 as a result.

2. The hearing had been listed to deal with a preliminary issue as identified by Regional Employment Judge Parkin and confirmed in a letter of 24 March 2020, that is: the claimant's status and whether he was a worker for the respondent. At the start of the hearing it was discussed whether the hearing could go on to deal with other issues. However, as a result of the evidence and submissions heard, the

Tribunal reserved judgment, and in this Judgment only the preliminary issue is determined. The other issues will need to be determined at a final hearing.

Claims and Issues

3. At the start of the hearing the issue to be determined was confirmed with the parties. It was agreed that the definition of a worker contained in regulation 2 of the Working Time Regulations 1998 and section 230(3) of the Employment Rights Act 1996 were materially the same. The question was whether the claimant was a worker within limb (b) of the definition in each of those provisions.

Procedure

4. The claimant represented himself at the hearing. The respondent was represented by Mr J French, counsel.

5. The hearing was conducted remotely by CVP video technology.

6. A bundle of documents was provided to the Tribunal (177 pages).

7. A witness statement had been exchanged by the respondent, being the witness statement of Joseph Rowe, director. The claimant had not exchanged a witness statement. However, at the start of the hearing he confirmed that he wished to rely as his witness statement on a document he had prepared on 22 August 2019, which had previously been provided to the Tribunal and was included in the bundle. The respondent confirmed that it had no objection to the claimant relying upon that document as his witness statement. At the start of the hearing, the Tribunal read both of the witness statements, and the documents in the bundle to which it was referred, either by those statements or by the parties.

8. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative as well as being asked questions by the Tribunal. Mr Joseph Rowe gave evidence for the respondent, was asked some supplemental questions by his representative in the light of the evidence given by the claimant, was cross examined by the claimant, and was asked questions by the Tribunal.

9. After the evidence was heard, each of the parties was given the opportunity to make submissions. Both parties' submissions were made orally (no written submissions were provided). At the end of submissions, judgment was reserved and accordingly the Tribunal provides the Judgment and Reasons outlined below.

10. The Tribunal was grateful to both the claimant and the respondent's representative for the way in which the hearing was conducted.

Facts

11. From March 2015 the claimant was engaged to provide services to the respondent. Those services were provided (at least initially) under the terms of a Consultancy Agreement which was dated 12 March 2015 and was signed by both parties. The schedule which describes the services to be carried out by the claimant as a consultant, describes those services as: the placement of farm and agricultural workers with existing and new customers of the respondent; and the continuous management of those managed workers. It was common ground that the claimant's

responsibilities were primarily farm-facing (rather than candidate-facing) and that they involved placing candidates with farms and, once the candidate had been placed, managing the ongoing arrangements and addressing problems which arose with, or in relation to, those workers who had been placed at the farms.

12. The Consultancy Agreement contains many standard terms which the Tribunal will not reproduce in this Judgment. The Agreement stated that the respondent engaged the claimant as a consultant and the consultant should provide the services on the terms of the Agreement. The claimant had certain duties and obligations under the terms of the Agreement. The key provisions are as follows:

> *"3.3 The Consultant may, with the prior written approval of* [the respondent] *subject to the following proviso, appoint a suitably qualified and skilled Substitute to perform the Services on his behalf, provided that the Substitute shall be required to enter into direct undertakings with* [the respondent]*, including with regard to confidentiality. If* [the respondent] *accepts the Substitute, the Consultant shall continue to invoice* [the respondent] *in accordance with clause 4 and shall be responsible for the remuneration of the Substitute."*
>
> *"3.9 The Consultant may use a third party to perform any administrative, clerical or secretarial functions which are reasonably incidental to the provision of the Services provided that:* [the respondent] *will not be liable to bear the cost of such functions; and at* [the respondent's] *request the third party should be required to enter into direct undertakings with* [the respondent]*, including with regard to confidentiality."*
>
> *"6.1 Nothing in this agreement shall prevent the Consultant from being engaged, concerned or having any financial interest in any Capacity in any other business, trade, profession or occupation during the Engagement provided that: such activity does not cause any breach of any of the Consultant's obligations under this agreement; the Consultant shall not engage in any such activity if it relates to a business which is similar to or in any way competitive with the Business of* [the respondent] *without the prior written consent of* [the respondent]*; and during the course of the Engagement, the Consultant shall spend as much time as is reasonably required upon the provision of the Services."*
>
> 12 contains post-termination restrictions which will not be re-produced in this Judgment, save to note that they apply to the Consultant personally only, and do not contain any comparable restriction upon any substitute or employee engaged by the Consultant to provide the services; and
>
> *"13.1 The relationship of the Consultant to* [the respondent] *will be that of independent contractor and nothing in this agreement shall render him an employee, worker, agent or partner of* [the respondent] *and the Consultant shall not hold himself out as such."*

13. It was common ground that the claimant's role was a tough job which required responsiveness from him to client calls, including at Bank Holidays and outside of normal working hours.

14. The claimant's evidence was that, in or around 2017, the arrangements were no longer reflected by the terms of the Consultancy Agreement. In practice, this related to two things: the way in which the claimant was remunerated for candidates who were placed at farms was changed from being an arrangement where a defined lump sum was paid for each placement (and the continuation of each placement) to being one where the claimant was paid a percentage; and the claimant's evidence was that the degree of control placed on him by the respondent, and the scrutiny undertaken, increased.

15. It is not necessary for the Tribunal to reproduce all of the evidence that was heard by it. However, in terms of the factors which may assist in determining whether or not the claimant was a worker, the Tribunal heard the following evidence:

(1) At the outset of the arrangement, both parties thought that the claimant was not a worker, and was an independent contractor. It was not in dispute that clause 13.1 of the Consultancy Agreement described the understanding of both parties when the contract commenced.

(2) The claimant's own witness statement emphasised that, when he started being engaged by the respondent, he did so with the belief that he could build a business alongside any other work commitments.

(3) The claimant himself paid his own tax and national insurance. He was paid by the respondent based upon invoices without any such deductions, as an independent contractor.

(4) Invoices were presented by the claimant for payment by the respondent, however these were in fact at first prepared for him by the respondent. The claimant confirmed in evidence that he would check they were accurate and challenge them if they were not.

(5) The claimant was required to have his own insurance in place under the terms of the Consultancy Agreement and, for at least one year, he did so.

(6) There was no dispute that the claimant was not normally paid sick pay.

(7) There was no dispute that the claimant could work for anyone else whilst employed by the respondent, albeit that the claimant's evidence was that this was not practically possible in the light of the time required to undertake work for the respondent.

(8) There was a degree of shared risk between the parties. The claimant received no payment save for those payments arising from candidates who had been assigned to a place of work. The respondent's case was that this was shared risk and that the amount was split 70/30, with the claimant effectively receiving 30%.

(9) The clients were invoiced by, and made payments to, the respondent (not the claimant).

(10) The claimant had to spend a significant amount of extra time in undertaking work without additional reward. This included: picking up workers at airports; chasing clients for payment; and addressing direct debit failures. The claimant was rewarded the same amount for assignment, whether or not such issues arose. He was not paid for assignments, if the client did not pay the respondent.

(11) The claimant met the costs of his own equipment, evidenced particularly by the fact that he took out a loan to pay for a laptop. The respondent did reimburse expenses, such as mileage.

(12) Clothing was provided to the claimant which carried the respondent's insignia to be worn sometimes by the claimant, and he was also photographed at a show where he was held out as being part of the respondent organisation

(13) It was up to the claimant when he worked or how much he worked, or on what days he worked. There was a dispute about who decided when the claimant would need to pick up workers from the airport.

(14) From an unidentified date, the claimant was required to attend Skype calls on Tuesday of each week to discuss the position with the respondent. The claimant objected to the calls being on Tuesday (for reasons he explained) but he was still required to attend those calls on that day.

(15) The claimant reported to a manager within the respondent organisation, which was stated in the Consultancy Agreement and reflected in the evidence.

(16) The claimant emphasised the degree of control under which he said he was placed, which he said increased significantly from 2017.

(17) There were some KPIs prepared by the claimant's manager and these were used to assess the claimant's performance on a general basis.

(18) The claimant was required to provide the respondent with information about the services he provided and the placements achieved.

(19) There was no dispute that the claimant had to submit certain documentation to the respondent promptly, albeit Mr Rowe's evidence was that this was about the requirements of the clients and indeed about filling the clients' vacant roles promptly.

(20) In his evidence, Mr Rowe emphasised that this was a genuine business relationship, which he particularly felt was evidenced by how the relationship ended and why that occurred. His evidence was that the relationship with the claimant was ended as it was not profitable

enough for the respondent to continue with it. The claimant was given four weeks' notice in accordance with the Consultancy Agreement.

(21) It was the claimant's evidence that the reason he was given by his direct manager for the termination of the engagement was that he had not met KPIs in a specific month. Mr Rowe denied that was the case, but he was not present at the meeting at which the claimant was informed (and therefore the claimant's evidence is accepted about what he was told).

(22) After he left, the claimant was not replaced. The respondent contended that this evidenced that his role was not a role that was intrinsic to, or required by, the respondent organisation.

16. The Tribunal also heard some evidence about substitution. The relevant evidence heard was as follows:

(1) Ms Welch provided administrative support work to the claimant. She was not paid for this by the respondent.

(2) There was no suggestion that Ms Welch, or anyone else, actually did undertake any of the services required of the claimant under the contract (with one exception addressed below), save for the administrative support work.

(3) Due to illness, Ms Welch once drove the claimant to a particular client and undertook the meeting with him.

(4) The claimant personally had to undertake the Skype calls on a Tuesday.

(5) Due to the requirements of the Gangmasters Licence, the claimant had to undertake certain parts of the work personally, such as collecting the workers from airports, as this was not something that anyone else could undertake.

(6) The claimant could take leave when he wished to do so (and had done so on at least one occasion) without arranging a substitute. The respondent's office took over receiving his calls.

(7) There was a substitution clause in the contract of employment as cited above, which does suggest that the claimant could have provided a substitute to undertake the services, albeit that also required the substitute to also enter into direct undertakings with the respondent.

(8) Mr Rowe's evidence in his statement was that the claimant had the right to appoint a substitute to perform the services. When he was asked about this in evidence, Mr Rowe focussed upon the particular arrangements/circumstances with Ms Welch and did <u>not</u> give evidence that the claimant had a genuine ability to send someone else to undertake the work; and

(9) The post termination restrictions in the Consultancy Agreement are specific to the claimant personally, they do not extend to anyone else who is engaged to undertake the services.

The Law

17. It was the position of both parties that it was the facts of the case that were important, and looking at the facts of the claimant's engagement was the way to determine the case, rather than the background law.

18. Section 230 of the Employment Rights Act 1996 provides the following:

> "*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*"

19. Identical wording to subsection (b) is also found in the definition of worker in Regulation 2 of the Working Time Regulations 1998.

20. In the respondent's submissions, the respondent's representative provided a brief recap on the development of the law as it applies to employees and workers and referred to: the control test; the economic reality test; and the multiple test as outlined in **Ready-Mix Concrete (south East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433**. The respondent's representative cited the usual test outlined in that case by McKenna J:

> (1) Did the worker undertake to provide their own work and skill in return for remuneration?
>
> (2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?
>
> (3) Were there any other factors inconsistent with the existence of a contract of employment?

21. In reaching its decision, the Tribunal has been mindful of the Judgments of both the Court of Appeal and the Supreme Court in the case of **Pimlico Plumbers v Smith [2018] UKSC 29** and **[2017] IRLR 323**.

22. In terms of the test on substitution, the Tribunal has taken account of what is said by Etherton MR in the Court of Appeal Judgment. He says at paragraph 66:

> "*In the context of the legislation relevant to this appeal, a distinction is to be drawn between (1) persons employed under a contract of service; (2) persons who are self-employed, carrying on a profession or a business undertaking on*

their own account, and who enter into contracts with clients or customers to provide work or services for them; and (3) persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else: cf Lady Hale in the Bates van Winkelhof *case at [25] and [31]. The persons in (3) fall within s.230(3)(b) of the ERA and reg. 2 of the WTR and their employment falls within the definition of 'employment' in s.83(2)(a) of the EA. I shall for convenience refer to them as a 'limb (b) worker'"*

23. At paragraph 84 he says (in relation to substitution):

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

24. The Tribunal has also, in particular, considered carefully the section of Lord Wilson's Judgment in the Supreme Court at paragraphs 35-49 dealing with the question of whether someone is a client or customer. He introduces that section by highlighting the difficulty with the provision:

"*It is unusual for the law to define a category of people by reference to a negative – in this case to another person's lack of a particular status. It usually attempts to define positively what the attributes of the category should be. In* Byrne Bros (Formwork) Ltd v Baird [2002] IRLR 96 *(para 16) Mr Recorder Underhill QC (as Underhill LJ then was) described as clumsily worded the requirement that the other party be neither a client nor a customer. It is hard to disagree*."

Conclusions – applying the law to the facts

25. The Tribunal would emphasise that the question it needs to determine is whether the claimant was a worker as defined in limb (b) of the two tests, not whether the claimant was an employee.

26. The first question for the Tribunal was whether there was a right to substitute someone else to undertake the work, and whether that, of itself, meant that the relationship could not be one of worker status.

27. The terms of the document do provide a right to substitute, however this is not an unfettered right. The right was fettered in the document, see clause 3.3 quoted above ("*If* the respondent *accepts the substitute*"). Accordingly, the first of Etherton MR's five principles in **Pimlico Plumbers** quoted at paragraph 23 does not apply. The second principle says that a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It depends on factors such as the extent to which the right of substitution is limited or occasional

28. In this case, the right to provide a substitute in practice was occasional. It was clear to the Tribunal from the evidence heard that the parties did not envisage the claimant genuinely having limited involvement in the provision of the services, he was expected to be central to them and to provide them himself. There was no suggestion that the claimant could substitute someone else to undertake the Tuesday Skype calls. As identified at paragraph 16(5) above, the claimant's own evidence was that a substitute could not undertake some of his duties because of the rules which relate to Gangmasters Licences. In practice, the Tribunal finds that the right to substitution was one that was available but only sparingly, and in practice it was likely to only be utilised if the claimant needed emergency cover for his role. The issue identified at paragraph 16(6) was also considered important, the claimant did not need to find a substitute when on holiday, the respondent organisation took on the responsibilities.

29. The Tribunal has considered carefully the impact that Ms Welch has upon this part of the test. The evidence which the Tribunal heard suggested that Ms Welch was not a potential substitute, but rather someone who undertook the type of administration, clerical, or secretarial functions addressed at paragraph 3.9 of the Consultancy Agreement. That is, she was not a substitute but a support worker able to support the claimant. In considering whether or not the claimant was a worker generally, this was a relevant factor to be taken into account. However, the fact that Ms Welch undertook such tasks and exchanged emails with the respondent (as was evidenced by the bundle) did not otherwise undermine a worker relationship.

30. The second question for the Tribunal was whether or not, by virtue of the contract entered into, the respondent was a client or customer of any profession or business undertaking carried on by the claimant. As explained by Lord Wilson as quoted at paragraph 24 above, this is a clumsily worded test.

31. In considering this issue, the Tribunal has considered all the factors outlined above, including those which relate to substitution.

32. The Tribunal considered the following factors from paragraph 15 to be particularly indicative of worker status: (4) and the fact that the respondent first prepared the claimant's own invoices; (9); (12); (14) – whilst a client or customer might require regular meetings, the regularity of the meetings and the insistence on when they occurred, suggests this was not such a relationship; (15); (17); and (21).

33. Issue (1) of the factors at paragraph 15 particularly supported an argument that the claimant was not a worker. The Tribunal has been mindful that the description used by the parties and the views of the parties is relevant, but not determinative. The Tribunal does accept that the parties considered the claimant to be an independent contractor. However an erroneous agreement that the claimant was not a worker, was not determinative of the limb (b) definition.

34. Issue (2) of the factors at paragraph 15 was also a factor which the Tribunal has considered carefully, being evidence that supported the respondent's case. However, the claimant's belief that he could build a business does not necessarily mean that the respondent was the claimant's customer or client, but it was a factor to be considered which on its own leant weight to the respondent's case.

35. The Tribunal finds that, taking all the factors together, they do not evidence that the respondent was a customer or client of the claimant. This finding is made considering all the factors and reaching a conclusion, no one factor being determinative. The terminology used by the witnesses in describing the relationship (and the arrangements with clients), the arrangements in place for supervision and control, the fact that the claimant worked only for the respondent, and the way in which the claimant was presented to the respondent's clients, were not consistent with a relationship where the respondent was a customer or client of the claimant. The Tribunal's conclusion is that the claimant fell into category (3) as described by Etherton MR in **Pimlico Plumbers** at paragraph 22 above, but not category (2). That is, he was a person who was self-employed and providing his services as part of a profession or business undertaking carried on by the respondent; not someone who was self-employed carrying on a profession or a business undertaking on their own account and who entered into contracts with clients or customers to provide work or services for them.

36. The claimant submitted that the change in the relationship from 2017 and the factors that led to the termination of his contract, were things which meant that he became, at that time, a worker. The Tribunal does not find that the claimant's status changed over time. The Tribunal does not find that the change in remuneration or supervision, or the reason for termination, somehow (and at some hard to define point) altered the relationship. The Tribunal's finding is that at no time during the engagement was the respondent genuinely a customer or client of the claimant. The factors identified which evidence the respondent's control and supervision, are indicative and evidence of the true relationship, not evidence that the relationship changed.

37. As a result, the Tribunal finds that the claimant was a limb (b) worker (but not an employee).

Summary

38. For the reasons explained above, the Tribunal has found that the claimant was a worker.

39. As a result, there will need to be a final hearing to determine the other issues, including: what was the claimant's entitlement to annual leave; how much leave he was entitled to; whether he was able to take such leave and when leave was taken; what entitlement he had under regulation 14 of the Working Time Regulations;

and/or if there was any unlawful deduction from wages (and if so when and how much was unlawfully deducted).

40. The parties must provide to the Tribunal, within 14 days of the date upon which this Judgment is sent to them, any dates to avoid in the period of nine months from the date of this Judgment. The parties should also say how long they believe will be required for the final hearing. If there is no alternative time estimate provided, the Tribunal will list the case for a final hearing with an estimated length of two hours (before an Employment Judge sitting alone).

41. If there are any further documents upon which either party wishes to rely, which have not been included in the bundle previously prepared by the respondent, those documents must be sent to the other party within 28 days of the date on which this Judgment has been sent to the parties. If there are any such additional documents, the respondent must prepare a new bundle to be put before the Tribunal at the final hearing (or prepare a revised bundle to be copied and provided to the Tribunal for the final hearing). A copy of that bundle must be sent to the claimant by no later than 35 days after the date this Judgment is sent to the parties.

42. No later than 14 days before the date upon which the final hearing is listed, the parties are to send each other witness statement(s) containing all and any evidence to be given by any witness called by that party at the final hearing (including the claimant). The claimant must prepare a separate and new statement which outlines why he says he is entitled to annual leave and/or payments in lieu of annual leave, the dates when he says leave was taken, and how he has calculated the sums which he says are due.

Employment Judge Phil Allen
7 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 December 2020

FOR THE TRIBUNAL OFFICE