



EMPLOYMENT TRIBUNALS

Claimant: Mr N Duckworth

Respondent: Nottingham Squash Rackets Club Limited

Heard at: Nottingham

On: 17 August 2021

Before: Employment Judge Butler (sitting alone)

Representation

Claimant: Mr R Hignett, Counsel

Respondent: Mr T Carter, Counsel

JUDGMENT

The Judgment of the Tribunal is that the Claimant was an employee of the Respondent from 1 July 2018 until his dismissal with effect from 30 November 2020.

REASONS

The Issue

1. The only issue before me at this open preliminary hearing is to determine the employment status of the Claimant during his engagement by the Respondent. I briefly set out below the reasons for my decision

The Evidence

2. I heard oral evidence from the Claimant and, for the Respondent, from Mr N Hargreaves, General Manager, and Mr R O'Connor, the Bookkeeper. There was an agreed bundle of documents.

3. Due to the Claimant's disabilities, adjustments were made when he gave evidence which were requested by Mr Hignett and readily agreed by Mr Carter. These involved asking short questions, allowing the Claimant to begin his answers in cross-examination again if he stuttered or lost his train of thought and allowing his father to sit next to him to find the page numbers in the bundle that

the Claimant was referred to (on the understanding, imposed by me, that his father at no time spoke to the Claimant while he was giving evidence).

The Factual Background

4. The Claimant began working for the Respondent undertaking fairly menial tasks in 2016. Initially, there can be no doubt he was indeed a casual worker. He worked a few hours each week and there were long periods of sometimes several months where he did no work at all. This was very much an ad hoc arrangement although it is unfortunate that the Respondent failed to record this arrangement in written or any other form. In July 2018, the Claimant's hours of work, and as a consequence his earnings, increased substantially along with the responsibilities he undertook. Again, there was no formality to this arrangement.

5. In January 2019, it was agreed that the Claimant would enter into an apprenticeship agreement. After a false start with the first skills and training provider, this commenced in around March 2019 and finished in around June 2020 (page 46). A contract of employment was given to him by Mr Hargreaves for the first proposed apprenticeship which did not get off the ground (page 52) and an amended contract was produced in the bundle for the second provider (page 59) and there is a dispute as to how this contract came into being. The Claimant says Mr Hargreaves gave it to him and there was an allegation that the Claimant took it upon himself to prepare this by gaining access to Mr Hargreaves' office and computer. This was investigated by the Respondent and it was determined there was insufficient evidence to substantiate the allegation. In any event, I do not consider it to be particularly pertinent to the issue before me.

6. The apprenticeship agreement was signed by the Claimant and, for the Respondent, by Mr Hargreaves (page 46). It required a contract of employment to be in force between the Claimant and Respondent (page 50). At the end of the apprenticeship, the Claimant remained at the Respondent and continued to carry out the same duties as before. There was no discussion with the Respondent about his employment status after the apprenticeship terminated.

7. In November 2020, as a result of the pandemic, the Respondent decided redundancies were necessary to save costs and its three casual workers, one of which the Claimant was deemed to be, were put at risk of redundancy. The Claimant was at this time on fairly long term sickness absence and could not attend any of the consultation meetings. Nonetheless, he was treated as a casual worker, "as before" and formally made redundant with effect from 30 November 2020.

8. In the bundle, there were schedules of the Claimant's hours worked (although he disputed these) (page 199) and his earnings (page 193). Mr Hargreaves explained that he had himself prepared a schedule of hours worked by the Claimant but could not explain why it was not included in the bundle or whether it differed from the one in the bundle. He said that he allocated shifts to the casual workers and they completed time sheets and submitted them by the 20th of each month. Mr O'Connor said there was some leeway in the submission of the time sheets which might occur at any time between the 17th and 23rd of each month. Whilst this might account for the Claimant's suspicion that not all hours were paid for, the schedules were worthless in reaching any conclusion on the point.

9. I found the evidence of the Claimant to be reliable. Despite his disabilities, he answered the questions put to him in a straightforward manner and was quick to acknowledge a mistake in his evidence as to the date on which he says he became a permanent employee. I have no reason to doubt his evidence about his responsibilities while working at the Respondent which included being a key holder and setting the alarm.

10. I did not find the evidence of Mr Hargreaves to be entirely reliable. He was confused about the schedules in the bundle and about his own schedule which was not produced. Indeed, there was no evidence as to who produced the schedules before me, Mr O'Connor confirming it was not him. Mr Hargreaves gave a statement in connection with the investigation into the source of the second contract of employment before me (page 128, paragraph 2). In that statement, he said quite clearly that the apprenticeship agreement was just that and the Claimant was not an employee as a consequence; this despite having signed the apprenticeship agreement after confirming he had read it and had gone through it with someone from the training company. In his oral evidence before me, however, he readily admitted the Claimant was an employee from the moment the apprenticeship agreement was signed. He said that the first contract of employment given to the Claimant by him was a template provided by a committee member with HR experience and was "deemed null and void" when the first proposed apprenticeship fell through and there was no requirement to provide a contract of employment for the second apprenticeship which did proceed. There is no evidence of any discussions to this effect with the Claimant. I view Mr Hargreaves' evidence with some circumspection.

11. Mr O'Connor's evidence, whilst helpful in some respects, was not really relevant to the issue before me.

12. For the above reasons, where there was a dispute on the facts, I preferred the evidence of the Claimant.

Submissions

13. Mr Carter and Mr Hignett made oral submissions which I took full account of in reaching my conclusions.

Conclusions

14. It is quite clear that for the duration of the apprenticeship agreement the Claimant must have been an employee of the Respondent. It was a condition of the apprenticeship that the Claimant was employed under a contract of employment and two versions, both unsigned on behalf of the Respondent, were produced. But whether either were signed or not is immaterial. It does seem that the Respondent accepts the Claimant was an employee for the duration of the agreement and I must find that he was.

15. When the apprenticeship agreement ended, the Claimant remained at the Respondent undertaking the same duties. On the evidence before me, nothing changed. The Respondent's argument that the Claimant reverted to being a casual worker is unsustainable. The Respondent had no discussion with him and

there is no written evidence that his contract of employment ended. I find, therefore, that he remained an employee until his dismissal.

16. The real crux of the issue before me is the Claimant's employment status before the apprenticeship agreement became effective. I have already remarked that the schedules produced on behalf of the Respondent and included in the bundle are not totally reliable. But what they do show is that from July 2018 the Claimant's hours of work increased dramatically, as did his earnings. Mr Hignett rightly referred to mutuality of obligation and control. Certainly, the text messages (page 211 onwards) show that, from March 2019, the Claimant was able to swap shifts with other staff subject to the agreement of Mr Hargreaves. He was also able to take days off when requested, again, subject to Mr Hargreaves giving permission which he did not always give (see page 222). Unfortunately, however, there is no such evidence covering the period before the apprenticeship began.

17. In this regard, the evidence of the Claimant is that the situation did not change and he was able to swap shifts accordingly. This was not, however, an arrangement where the Claimant could simply swap or change shifts when he wanted to. He was always subject to Mr Hargreaves being agreeable to any change and this illustrates a degree of control by the Respondent. I also note that, throughout his engagement with the Respondent, the Claimant was paid by through the payroll and tax and NIC's were deducted when his earnings reached the appropriate level. He was also paid holiday pay as long ago as November 2017.

18. I have also considered the letter sent by email from Mr S Payne to the Claimant dated 19 November 2020 (page 189). This refers to the Claimant as a member of the casual staff and then proceeds to refer to redundancy consultation and payment, notice pay, holiday pay and "your employment". A strand of the Respondent's argument appears to be that the Claimant's employment came to an end on the completion of his apprenticeship and he automatically became a casual worker. I have found that did not happen but, if the Claimant was an employee and the Respondent argues he reverted to his former status, there is equally an argument that he was an employee before the apprenticeship.

19. I prefer the evidence of the Claimant in this matter for reasons already given. From 1 July 2018 onwards, I find he was allocated shifts by Mr Hargreaves on a regular basis which he was obliged to undertake himself unless given permission by Mr Hargreaves to swap shifts or not attend for them. I accept the Claimant's evidence that he worked a number of shifts regularly. There was a sufficient degree of mutual obligation and control to satisfy the requirements of employment status.

Employment Judge Butler

_19August 2021_____