Case No: 2601312/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr V Weir

Respondent: Motorpoint Limited

HELD AT: Manchester **ON:** 22 and 23 February 2022

BEFORE: Employment Judge B Hodgson (sitting alone)

REPRESENTATION

Claimant: Mr F Weir, Lay Representative

Respondent: Ms R Levene, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that

1 the claimant was at all material times an employee as defined for the purposes both of the Employment Rights Act 1996 and the Equality Act 2010

2 the matter will now be listed for a further Preliminary Hearing

REASONS

Background

1. This matter came before the Employment Tribunal by way of Preliminary Hearing to determine the preliminary issue of the status of the claimant

2. The claimant has presented claims of both unfair dismissal and direct discrimination by reason of age. The preliminary issues identified to be determined are agreed to be whether the claimant was an employee of the respondent (1) within the meaning of section 230 of the Employment Rights Act 1996 and/or (2) within the meaning of section 83 of the Equality Act 2010

Facts

3. The parties had agreed a bundle of documents and references to numbered pages in this Judgment are to pages as numbered within such bundle

4. The claimant had prepared two witness statements (the second being a supplementary statement following receipt by the claimant of the respondent's witness statements) and gave oral evidence on his own behalf. The respondent called two witnesses to give oral evidence – Mr Terrence Burns, Preparation Manager, and Mr John Roche, described as a Company Director

5. The Tribunal came to its conclusions on the following facts on the balance of probabilities, having considered all of the evidence before it, both oral and documentary. The Tribunal has endeavoured to limit its findings to the facts required to determine the preliminary issues and not, so far as practicable, to stray into areas that may fall to be determined in any future substantive hearing that may follow

6. Issues of credibility arose in the course of oral evidence given to the Tribunal in that there was direct conflicting evidence regarding discussions alleged to have taken place between the parties. This is addressed in specific terms later within these facts as found but as a general comment the Tribunal, considering in particular the demeanour of the witnesses before it, found the claimant to be a more credible witness than the two witnesses who gave evidence on behalf of the respondent. That said, the Tribunal assessed the evidence in the round and came to its specific conclusions on the overall picture presented to it rather than

simply preferring the entirety of the evidence of the claimant to that of the respondent

General background

7. From approximately November 2003 the claimant was employed by a business trading under the name of Scratch King North West. The business comprised essentially car bodywork paint spraying

8. In or about August 2004, the claimant purchased the business from its then owner and traded as a sole proprietor under the same trade name.

9. Initially the business had three clients, one of which was Motorpoint Limited (the respondent). The business of the respondent is the sale of new and used vehicles. The work carried out for the respondent by the claimant is described as "Smart Repairs" – largely painting bumpers and small plastic parts of a vehicle together with other minor repair work

10. The claimant had no written contract or terms of engagement with the respondent but the terms of his work were agreed verbally with the then General Manager of the respondent

11. It was initially agreed that the claimant would work three days per week for the respondent on their Burnley site leaving him two days to perform work for two other companies. By the end of 2004 however, the days the claimant worked for the respondent on their site increased firstly to four and then five days per week so that, by the end of that year, the respondent was the only company the claimant performed work for

12. The claimant was allocated a work bay at the respondent's Burnley operation. Although occasionally, at the respondent's direction, the claimant went to a customer's home address to perform his work, essentially, throughout his time working for the respondent, he worked from that same bay

13. There were in fact two bays for spray painting within the respondent's Burnley operation and the other bay was also given over for the exclusive use of a specific business, a Mr Thompson who traded as Wheelsmart

14. On 16 January 2020 the claimant was approached by Mr Terrence Burns. Mr Burns was employed by the respondent as Preparation Manager, a role he had undertaken since approximately November 2019 following his predecessor's early retirement

15. Mr Burns told the claimant that his services were no longer required. A company called Dents 8 would undertake the work. Dents 8 had previously carried out that type of work for the respondent in or about 2014 and then again in or about 2017. The claimant was told that he would be permitted to continue carrying out

work for the respondent until 31 January 2020 and Dents 8 would take over from that point. He was told that it would not be possible for him to work alongside Dents 8

16. The claimant was unhappy with what he had been told and set out a grievance by email dated 9 February 2020 (pages 81 – 82). The respondent replied initially with a holding response dated 10 February 2021 which the claimant further followed up on 13 February (page 85}

17. A meeting was arranged between the claimant and Ms Haslam-Fox of the respondent's HR department which proceeded on 3 March. No notes of the meeting were produced to the Tribunal but Ms Haslam-Fox sent a follow-up email dated 9 March (pages 87 – 88) which is stated to set out her understanding of the background (in the light of the discussion and her subsequent enquiries) and her conclusions as to the employment status of the claimant. The claimant does not accept that the email is a wholly accurate reflection of the discussion between himself and Ms Haslam-Fox. The respondent's position was that the claimant had at all times been self-employed

Working practice

18. The claimant worked on the respondent's Burnley premises five days per week, Monday to Friday. He also worked from time to time on weekends when urgent work was required by the respondent. He did not sign in and out as ad hoc contractors are required to do There was a degree of conflicting evidence concerning Friday working. Mr Burns' position was that the claimant did not work Fridays. He however only commenced working on the respondent's Burnley site in November 2019 and even then was not exclusively on that site and he accordingly accepted that he was not in a position to comment on the claimant's working practices prior to that date. The claimant's evidence – supported by the background papers - was that he worked regularly on Fridays until towards the end of 2019 when occasionally no work was made available for him to do on those days. There was no evidence at all that he carried out any alternative work and the claimant's position, accepted by the Tribunal, was that he did not. He did not necessarily attend at the Burnley site precisely when it opened or stay until precisely when it closed but essentially worked a full five days per week – this was his full-time work

19. As stated, he did not carry out any other work. He carried out all the work for the respondent personally and at no time subcontracted or attempted to subcontract the work out. This position is in fact supported by the respondent itself. In the course of looking into his grievance, the respondent produced an IR35 Risk Analysis (page 91) said by Ms Haslam-Fox to have been completed "based on information provided by the Burnley site …" (see page 87). Question

13 of the Analysis states: "Do they have a right to send someone in their place?" to which the respondent has appended the answer "no"

20. The claimant was registered as self-employed under IR35 for tax purposes. He submitted invoices and was paid a gross figure, without deduction of tax, by the respondent

21. Up until 2014, the claimant was paid a fixed daily rate. In 2014, the respondent introduced a "Pricing Schedule" setting out a variable price for each job which the claimant used for the preparation of his invoices for the work he carried out. In the early days, he submitted a monthly invoice but this then moved to either weekly or fortnightly. The amount paid to the claimant was confirmed by a Remittance Advice form. It was suggested on behalf of the respondent that the claimant had the right to set his rates himself but this was then diluted in evidence to the prospect that the claimant had the right to seek to negotiate changes to his rates. The claimant's position was that he was working to rates set by the respondent and these two positions are not incompatible

22. The claimant's method of working was that, each day, he was handed a Preparation Dashboard sheet by one of the respondent's quality control staff (see for example page 73). Additionally there were Workshop Request sheets which related to vehicles that had already been sold and needed attention which had to be given priority so they could be ready for collection with the minimum of delay (see for example page 67). The claimant had no choice over which jobs he carried out – he was simply presented with a schedule of jobs for him to work through

23. Although necessary extraction machines were supplied across the bays by the respondent, the claimant provided all the required day to day equipment for performing his work such as PPE equipment, spray gun and paints which he largely kept on site in a locker supplied by the respondent. These were set off as business expenses for tax purposes

24. The claimant carried his own Public Liability insurance (see page 43) – his understanding was that without it he would not be permitted to work on the respondent's premises. This was because he drove his vehicle onto the respondent's site

25. From the time he had purchased the business of Scratch King North West had used a vehicle with that livery, that is with the name and contact details of Scratch King on the side. His evidence, which was unchallenged and accepted by the Tribunal, was that he had perhaps received a handful of speculative telephone calls from the public to that number in the very early days but he did not carry our any work as a consequence. He had not had any such calls for many years

26. The staff at the respondent's premises wore uniforms identifying them as employees but the claimant was not given an actual uniform to wear. He was not client facing but other staff employed by the respondent in non-client facing roles were given or at least offered elements of clothing supplied by the respondent. The claimant was supplied with a high-vis top and a Motorpoint branded jacket

27. The claimant had no access to the respondent's computer systems – any policies he was required to follow were physically handed to him

28. The claimant was a key holder for the building in which his bay was situate but not for the overall premises of the respondent

29. When it came to holidays, the claimant liaised with the business he worked alongside (namely Wheelsmart) to ensure so far as possible that there was no overlap between them and then sought approval form the respondent's management. The claimant was never asked to arrange holiday cover, nor did ever do so. In his witness statement (paragraph 6), Mr Burns suggests that he was told by the claimant *that "when he took holidays, he had a contact who would cover for him, and we would just inform the contact when they were needed. I don't remember the name of that individual, but they worked under the trading name of 'Wheelsmart' …".* The Tribunal rejects that evidence which, even though pursued in the submissions on behalf of the respondent, is at best disingenuous. As indicated, Wheelsmart (Mr Thompson) had worked alongside the claimant at the respondent's Burnley site for a number of years. It was not for the claimant to arrange cover by bringing Mr Thompson in. Mr Burns suggested in evidence that at the time of making his statement he had forgotten the detail of Mr Thompson but that is not a cogent explanation for the attempt to portray a situation which purports to assist the respondent's argument but is removed from the facts

Discussions

30. There was a clear conflict of evidence between the parties as to possible discussions said to have occurred prior to the meeting on 16 January 2020 referred to above which had to be determined by the Tribunal

31. The evidence of Mr Burns was that he had a number of discussion with the claimant form December 2019 including specifically requiring him to engage further staff if he wished to continue working with the respondent. Mr Roche supported this evidence. Mr Burns' evidence however was that he had held these discussion inside the bay in which the claimant worked and no-one else was present. The claimant categorically denied any such discussions took place. Mr Burns accepted that he did not keep any written record of any such discussions notwithstanding their clear significance as portrayed by him. The Tribunal finds, taking full account of its conclusions as to credibility, that at no time did Mr Burns indicate to the claimant a requirement to take on additional

staff. The Tribunal limits itself to this conclusion as to the alleged discussions for the purposes of the preliminary issues

The Law

32. Section 230(1) Employment Rights Act 1996 defines an "employee" as:

"an individual who has entered into or works under (or,where the employment has ceased) a contract of employment"

33. Section 230(2) Employment Rights Act 1996 provides that a "contract of employment" means:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"

34. Section 83(2) of the Equality Act 2010 provides that "employment" means:

"employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

35. In ***O'Kelly & others v Trusthouse Forte plc [1983] ICR 728 CA***, it was said by Sir John Donaldson that, in approaching the question of whether a claimant was an employee, 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 in his own account"*

36. The Tribunal must therefore consider all relevant factors in the relationship between the parties. Guidance is given in this regard by the various caselaw to which the Tribunal has been referred. They will include the degree of control exercised by the respondent over the claimant (for example: whether the claimant was under an obligation to follow direction; who had control over working hours; the issue of supervision; the mode of working; who provided equipment). The Tribunal will also note however that many employees, by virtue of their skill and expertise, may be subject to very little control or supervision

37. The Tribunal must also take account of organisational factors such as the degree to which an individual is integrated into the respondent's organisation, such as being subject to the likes of a disciplinary policy or included in any scheme for occupational benefits. The Tribunal must also have regard to the economic reality of the relationship between the parties and whether the claimant can be said to be in business on his own account

38. Other factors to be considered by the Tribunal include: whether there was a requirement for personal performance or whether the claimant had the right to

send a substitute or subcontract the work; whether there was mutuality of obligation, namely to provide work and perform work respectively; any other factors consistent with the existence of an employment relationship

39. In summary, there is to be an "irreducible minimum" of control, personal performance and mutuality of obligation

Submissions

40. The claimant and the respondent's representative prepared and spoke to written submissions which, being on record, the Tribunal does not propose to repeat in this Judgment but full account was taken of all that was put forward including the references on behalf of both parties to case law

Conclusions

41. As is often the case in issues such as this to be determined by the Tribunal, there are factors which point in each direction. The Tribunal's role is to balance those factors and determine upon which side the balance lies

42. The Tribunal firstly considered whether or not the claimant falls within the definition under the Employment Rights Act before moving on to the wider definition under the Equality Act

43. The claimant paid tax on a self-employed basis. He drove a liveried van. He had his own Public Liability insurance. He provided, essentially, the tools and materials necessary for the job himself, which were set off for tax purposes as business expenses. He did not wear a uniform supplied by the respondent when on their premises. He had no access to the respondent's internal intranet system. He did not have paid holidays. These are all factors that point towards a conclusion that the claimant was not an employee but are not in themselves conclusive

44. The fact is however that for over sixteen years the claimant worked exclusively for the respondent on a full-time basis. He had his own allocated bay within the respondent's premises to which he had key access. He had a locker on site in which he stored clothing, materials and equipment. These are factors that point towards a conclusion that the claimant was an employee but again not conclusively so

45. The method of working was that the claimant attended the respondent's premises and was allocated work. He did not have the right to choose the work he did. From time to time, he was directed to perform work off the respondent's premises. He was paid a rate dependant on the type of work he carried out, having earlier in the arrangement been paid a fixed daily rate. The method of working did not change when the calculation of the rate paid changed

46. The respondent's position is that the claimant had the right to substitution, described as unfettered. There is no written contract between the parties. To support this contention, the respondent relies largely upon the holiday arrangements. The Tribunal has made its findings of fact in this regard. Those findings show that the respondent's position is untenable. It is not correct as they assert that the claimant brought in cover for any holiday absence. The fact is that the respondent organised its own resources to cover the claimant's holiday absence. At no point is it alleged that the claimant sought to offer a substitute. It is clear to the Tribunal that the requirement was for the claimant himself to perform the work allocated to him

47. The basic arrangement was that the claimant was required to attend the respondent's premises with the expectation of performing work allocated to him. The Tribunal is satisfied that this arrangement passes the test of mutuality of obligation

48. In terms of supervision, it is correct to say that essentially the claimant was left to his own devices in the performance of his work. This however would not be unusual in a skilled trade such as this. The work was allocated and the finished job was inspected by the respondent and needed to meet its standards

49. The claimant had a degree of flexibility over this precise hours of work but this would not be unusual in what can essentially be described as work on a task and finish basis, paid for dependent upon the work completed. The Tribunal has rejected the respondent's assertion that the rate of pay was in the control of the claimant This arrangement is neutral in terms of whether or not the claimant was an employee

50. On a general analysis of all of the facts, and in particular the above factors, the Tribunal concludes that the claimant does fall within the definition of an employee under the Employment Rights Act

51. That conclusion means that the claimant also falls within the definition of an employee under the wider definition under the Equality Act. Were the Tribunal to be wrong in its conclusion under the Employment Rights Act, the Tribunal is entirely satisfied – again, on the above analysis - that the claimant would fall within the wider definition of an employee under the Equality Act, namely employment under a contract personally to do work

52. The matter will now be listed for a Preliminary Hearing to consider any further Case Management Orders and list the matter for a Final Hearing

Case No: 2601312/2020

Employment Judge B Hodgson

Date: 5 July 2022

JUDGMENT SENT TO THE PARTIES ON

6 July 2022

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