



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101524/2022

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Held in Glasgow on 23 May 2022

Employment Judge Frances Eccles

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Mr Mohsin Ali

**Claimant
Represented by:
Ms S Mechan -
Solicitor**

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Miles Rhodes Ltd

**Respondent
Represented by:
Mr S Mackenzie -
Mortgage Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant is a worker within the meaning of Section 230(3)(b) of the Employment Rights Act 1996 and Regulation 2(1) of the Working Time Regulations 1998.

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REASONS

BACKGROUND

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1. The claim was presented on 13 March 2022. The claimant seeks to recover holiday pay and commission from the respondent. The claim was resisted. In their response, submitted on 19 March 2022, the respondent denies that any payment is due to the claimant. They deny that the claimant is entitled to annual leave on the grounds that he was self-employed. It was considered appropriate to list the claim for a preliminary hearing to determine the claimant's employment status,

2. At the preliminary hearing, the claimant was represented by Ms S Mechan, Solicitor. The claimant gave evidence. The respondent was represented by Mr S Mackenzie, Mortgage Manager. Mr Abu Choudhury, Mortgage Specialist gave evidence for the respondent. The Tribunal was provided with a Bundle of Productions (P) by the claimant and a Supplementary Bundle (SP) to which the respondent added three documents (SP 10-13).

FINDINGS IN FACT

3. From the evidence before it, the Tribunal found the following material facts to be admitted or proved; the respondent is a mortgage and insurance broker. They are regulated by the Financial Conduct Authority (FCA). On or about 20 June 2020 the claimant entered into an agreement (P4) with the respondent to provide them with services identified as “*undertaking any Regulated Activity for which (the respondent) is authorised.*” (“*the agreement*”) The heading on the agreement (P4/1) was “*Self Employed Consultants*”. The respondent advertised the role as a “*self-employed position*” (P2/12). In terms of the agreement (P4) the respondent could “*at any time prohibit, restrict, add or otherwise change the Services by written notification to (the claimant)*”.

4. The claimant provided services to the respondent as a Mortgage Advisor. The claimant is a registered individual with the respondent for the purposes of compliance with the FCA. While a registered individual with the respondent, the claimant was unable to work as a Mortgage Advisor for himself or another company. The agreement (P4/3 at clause 4.3.4) provided that the claimant could not “*conduct Regulated Activities or provide Services other than on behalf of (the respondent)*” or (P4/3 at clause 4.3.6) “*be or become an appointed representative of any person other than (the respondent).*” The claimant was not allowed to subcontract his duties under the agreement or employ any third party to carry out his duties without the respondent’s prior approval in writing. (P4/3 at clause 4.3.8). In the unlikely event that the claimant was unable to act for a potential client, he would refer them to another Mortgage Advisor with the respondent. The respondent has, on occasion, agreed to Mortgage Advisors employing administrative staff. In

such cases, staff can only provide administrative support and are not permitted to undertake the regulated activities of Mortgage Advisors.

5. The claimant sourced clients for the respondent through professional contacts and social media. He issued clients with the respondent's client fee agreement (P2/4) and terms and conditions (P2/5). In terms of the agreement (P4/3 at clause 4.1.3) all client files belonged to the respondent. Clients were charged a fee by the respondent payable on receipt of a mortgage offer. The claimant was obliged to comply with the respondent's fee structure. The respondent's fee structure was no more than £500 for standard mortgage applications and no more than £1000 for more complex mortgages including help to buy and if the client had an adverse credit rating. The claimant was obliged to obtain prior approval from the respondent before charging a fee outside the respondent's fee structure. The client paid the fee to the respondent (P2/2). The agreement (P4/2 at clauses 3.1 & 3.2) stated that in return for the services provided, the respondent would pay the claimant *"Seventy Five percent of commission received on all new business written"*. Commission was calculated on the basis of a percentage of the fee paid by a client to the respondent.
6. The respondent provided the claimant with business cards (P2/2) and paperwork including client fee agreements (P2/4) on which the respondent's name and logo are printed. In terms of the agreement (P4/4 at clause 4.4.9) the claimant was required to use paperwork that identified him as a representative of the respondent. The respondent did not provide the claimant with, or meet the costs of, any of the claimant's office equipment including a computer, mobile telephone or printer. The claimant worked from home. The claimant was required to attend regular training events arranged by the respondent. The respondent provided the claimant with training on regulatory compliance and company policy. The claimant was responsible for any travelling costs he incurred to attend training events (P2/11).
7. Clients were advised in the respondent's terms and condition (P2/5) that any complaints about the service provided by Mortgage Advisers should be made

to the respondent (P2/5/6). Breach by the claimant of the respondent's terms and conditions (P2/5/5-11) could result in disciplinary action (P9/26).

8. The claimant was responsible for his tax return, national insurance payments and professional indemnity. The respondent advertised on social media (P2/15) that it was open from 9 to 5.30 every weekday. The claimant was not required to work fixed hours but was expected to be contactable by the respondent and clients during office hours. The claimant did not seek the agreement of the respondent to visit family aboard or otherwise take time away from work.
9. The agreement was terminated by the respondent on 6 December 2021.

NOTES ON EVIDENCE

10. Most of the evidence before the Tribunal was not in dispute. While there were disagreements over its interpretation and application to the issue of employment status, it was not in dispute that the parties entered into an agreement (P4) in terms of which the claimant provided the services of a Mortgage Advisor in return for which he was paid commission by the respondent. There was some uncertainty over the correct title of the claimant's role for regulatory purposes, in part given the variety of titles in the agreement (P4), but ultimately there was agreement that the claimant was a registered individual for FCA purposes. The respondent's fee structure was also an area of dispute. The Tribunal accepted the evidence of the claimant that this was set by the respondent, and it was necessary to obtain the respondent's agreement to charge a client over £1,000. While the Tribunal did not accept the claimant's evidence that every fee required the respondent's approval, it did not find that Mr Choudhury's evidence was inconsistent with that of the claimant on the issue of fees. It was his evidence that "*we must follow company guidelines*" when setting fees and that the respondent "*set the fees.*" He had never sought to charge a client more than £1,000 so was unable to speak with any direct knowledge of the procedure to be followed in such a situation.

11. There was also some dispute over the hours that the claimant was obliged to work. The Tribunal preferred the evidence of the respondent in this respect. There was nothing in the agreement (P4) concerning the number of hours to be worked by the claimant. The Tribunal accepted the evidence of Mr Choudhury that Mortgage Advisors were able to work at times that suited them subject to being contactable by the respondent and clients during office hours. The Tribunal did not accept the claimant's evidence that, while he would make himself available during office hours and the respondent advertised on social media (P2/15) that it was open from 9 to 5.30 every weekday, he was required to work fixed hours. Similarly, the Tribunal did not accept that because another Mortgage Advisor stated in his profile (P2/14) that he was "*available for evening and weekend appointments as well as normal office hours*" that the claimant was obliged to work the same or similar hours.

15 **ISSUE**

12. The issue to be determined by the Tribunal was whether the claimant is a worker within the meaning of Section 230(3)(b) of the Employment Rights Act 1996 (ERA) and Regulation 2(1) of the Working Time Regulations 1998 (WTR).

20 **DISCUSSION & DELIBERATIONS**

13. The claim for payment of outstanding commission has been brought under Section 13 of the Employment Rights Act 1996 (ERA). In terms of Section 230(3) of the ERA, "*worker*" means an individual who has entered into or works 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.

14. The claim for holiday pay is brought under Regulation 14 of the Working Time Regulations 1998 (WTR). In Regulation 2 of WTR, “*worker*” is given the same meaning as in Section 230(3) of ERA.
15. It is the claimant’s position that he is a worker in terms of limb (b) of the above definitions. It was not in dispute that there was a contract between the parties (P4) in terms of which the claimant undertook to provide services for the respondent. The respondent submitted that their contractual relationship with the claimant was one of self-employment in terms of which there was no obligation on the claimant to undertake any work for them. They did not however seek to show that by virtue of the agreement (P4), they were either a client or customer of the claimant.
16. The Tribunal was referred by the parties to ***Pimlico Plumbers Ltd & another v Smith 2018 ICR 1511, SC*** and ***Uber BV & others v Aslam & others 2021 ICR 657, SC***. In the case of ***Pimlico Plumbers***, Lord Wilson (at paragraph 20) emphasised that the obligation of personal performance is a necessary constituent of a contract of service. In terms of the agreement (P4), the claimant was not allowed to subcontract his duties or employ any third party to carry out his duties without the respondent’s prior approval in writing. (P4/3 at clause 4.3.8). It was not in dispute that given the regulatory environment in which the claimant worked, any right of substitution, if it existed at all, was limited. Mr MacKenzie submitted that the obligation on the claimant of personal performance was a consequence of the regulatory environment in which the respondent operates. He relied on the manner in which the respondent advertised for Mortgage Advisers as a “*self-employed position*” and that the agreement (P4) was for “*Self Employed Consultants*”.
17. It was not in dispute that the regulatory framework prevented the claimant from working as a Mortgage Advisor for any other company, or for that matter himself. while a regulated individual with the respondent. From the evidence

before it however, the Tribunal was persuaded that in terms of the agreement (P4) between the parties the claimant was obliged to perform services for the respondent. The agreement between the parties provided that the claimant could not subcontract his duties or employ any third party to carry out his duties without the prior approval of the respondent. This was not a case in which the identity of the person who does the work is of limited interest to the respondent provided only that the work gets done. Both the claimant and Mr Choudhury described a situation where, for example due to other commitments, they were unable to act for a potential client. In such a situation, which they both regarded as highly unlikely, they described referring "a lead" to another of the respondent's Mortgage Advisors rather than arranging a substitute to do their work. Once someone became a client there was no evidence of any rights of substitution without the claimant obtaining the respondent's prior approval. What the claimant and Mr Choudhury both recognised as being a more likely situation was the appointment of someone to provide administrative support as opposed to the regulated activities of Mortgage Advisors. In terms of the agreement (P4), such an appointment also required the prior approval of the respondent.

18. Mr MacKenzie submitted that there was no obligation on the part of the respondent to provide the claimant with work. He could work at times to suit himself. It was for the claimant to find clients in his own time and for which he would be paid commission. The Tribunal concluded however that when the claimant did work, factors such as identifying himself as a Mortgage Advisor of the respondent, using the respondent's paperwork and issuing the respondent's terms and conditions to clients were more consistent with being a part of the respondent's business and a worker than an independent contractor. There was no evidence of the claimant paying the respondent under, for example, a franchise agreement or of taking financial risk consistent with being in business on his own account. The claimant's commission was calculated in accordance with the respondent's fee structure (P2/4) and, without the prior approval of the respondent, was limited by the fee he was

5 allowed to agree with a client. In terms of control, including how the claimant delivered services, it was not in dispute that he could be subject to disciplinary action by the respondent and clients were advised to direct any complaints about the service provided by the claimant to the respondent. The fact that the respondent did not provide the claimant with travelling expenses, office space, a computer and telephone, while consistent with someone carrying out a business on their own account was not sufficient to lead the Tribunal to conclude that the claimant was in business on his own account as opposed to being a worker. Likewise, the claimant's tax and national insurance arrangements were not factors that led the Tribunal to conclude that the claimant was not a worker when providing services to the respondent.

CONCLUSION

15 19. Having had regard to all the relevant evidence, including the terms of the agreement (P4) and how the parties conducted their relationship, the Tribunal was satisfied that in all the circumstances the claimant is a worker within the meaning of Section 230(3)(b) of the Employment Rights Act 1996 and Regulation 2(1) of the Working Time Regulations 1998.

20 Employment Judge: Frances Eccles
Date of Judgment: 22 June 2022
Entered in register: 01 July 2022
and copied to parties

25 *This document should be treated as signed by me – Employment Judge F Eccles – in accordance with the Presidential Practice Direction of 1 May 2020.*