



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Y Subramanian Babu  
**Respondent:** Slough Children's Services Trust

**Heard at:** Reading **On: 23 November 2020**

**Before:** Employment Judge Gumbiti-Zimuto

## Appearances

**For the Claimant:** Mr T Perry (counsel)

**For the Respondent:** Mr B Large (counsel)

## JUDGMENT ON PRELIMINARY HEARING

- (1) The claimant was not an employee of the respondent.
- (2) The claimant was a worker.

## REASONS

1. The claimant's full name is Mrs Yamini Subramanian Babu and the title of the proceedings is amended accordingly. This preliminary hearing has been listed to determine whether the claimant's employment status is that of an employee, a worker or a self-employed contractor?
2. I take into account the provisions contained in section 230 (1) Employment Rights Act 1996 which defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. Section 230 (2) 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'.
3. In Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 1 All ER 433 it was stated that "A contract of service exists if three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the

performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

4. The 'irreducible minimum' without which it will be all but impossible for a contract of service to exist are control, personal performance, and mutuality of obligation.
5. However, a wide range of other factors may also be taken into account and these can serve to supplant the presumption of employee status that arises when the irreducible minimum is present.
6. It is relevant to consider where does the financial risk lay; is there payment of a regular wage or salary; payment of sick pay, holiday pay and pension; the incidence of tax and national insurance; the degree to which the individual is integrated into the employer's organisation; where the contract is made between two corporate entities; the stated intention of the parties as to the status of their working relationship.
7. The fact that the worker forms a limited company and supplied her services through that company does not affect her employment status. If the true relationship was one of employment under a contract of service, putting a different label on it makes no difference. The formation and existence of a company has to be evaluated in the context of all the other facts found.<sup>1</sup> The substance of the matter must be looked at.
8. A checklist approach should not be adopted, "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 evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation."<sup>2</sup>
9. I also have to consider whether the claimant is a worker. I have regard to the provisions of section 230 (3) Employment Rights Act 1996 which provides that "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. I take into account that the following factors are necessary for an individual to fall within the definition of 'worker' there must be a contract, whether express or implied, and, if express, whether written or oral; that contract must provide for the individual to carry out personal services; and those

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<sup>1</sup> Catamaran Cruisers Ltd v Williams and others [1994] IRLR 386

<sup>2</sup> Hall (Inspector of Taxes) v Lorimer [1994] ICR 218

services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

10. I made the following findings of fact.

11. The claimant was employed by the Slough Borough Council as a social worker from 2015 until 2017. After leaving the employment of Slough Borough Council the claimant set up a limited company called Aidkeira Limited through which she provided her services as a social worker. Using this model, the claimant supplied her services to different local authorities. The claimant subsequently wound up the first emanation Aidkeira Limited.

12. In 2019 the claimant set up Aidkeira Limited (No2) (which I will refer to simply as Aidkeira Limited) to facilitate her in providing her services as social worker to the respondent.

13. On 1 August 2018 the claimant began working for the respondent in the role of Consultant Social Work Manager in front Door. The claimant's evidence was that she used this model because her friends using the model advised her to. The advantages of doing so included the fact that she could leave the job if she was not happy and would not have to give three months' notice, it offered her a flexibility employment could not afford, there were also financial benefits in that she received a payment that might in other circumstances have gone to an agency rather than her.

14. The claimant's evidence was that the respondent put pressure on her to use this model. I do not accept the claimant's evidence on this point. Fanny Jacob denies the claimant's version of events and I accept Fanny Jacob's denial as correct for the reasons I set out below.

15. The claimant described her role with the respondent in the following way:

*"My job entailed handling initial concerns about a child's wellbeing and/or safety which were raised and deciding if contact with the service should commence. This is a very busy service as it requires my constant presence for decisions to be made in respect to the contacts/referrals that come in. I perform an integral role in this decision-making process which is done in close partnership with the Slough MASH (Multi-Agency Safeguarding Hub), where professionals with specialist training in this area make further decisions on the welfare of the child. Referrals include Early Intervention referrals and the more traditional social work cases which cross the threshold and require child protection intervention to safeguard children who have suffered harm or are at risk of significant harm."*

16. The nature of the role is such that little assistance is gained from trying to look at the way that the role was performed to divine whether there was employee status.

The legal and regulatory requirements call for significant control to be imposed on the work of social workers, including the claimant, by the respondent.

17. The claimant states that as Consultant Social Work Manager in the Front Door Team position her role was the same description and designation as her previous role in employment with the Slough Borough Council (i.e. between 2015 and 2017). This is not correct. In 2018 the claimant was employed to do a different role to that performed in the period 2015-2017. In the first period of her engagement the claimant was engaged under a contract of employment that was recognised as such by both parties.
18. There was an important dispute in the evidence between the claimant and the respondent about why the claimant used Aidkeira Limited as the model for her engagement with the respondent in 2018. The claimant suggests that it was what was required by the respondent. The respondent's witnesses deny this stating that they would have preferred the claimant to be recruited in employed status not self-employed contractor status. I prefer the evidence of the respondent on this issue.
19. If the claimant wanted to be employed that is how she would have been engaged, as an employee. The market conditions favoured the claimant she could dictate. The claimant could insist on being a self-employed contractor and the respondent's need for social workers would have outweighed its desire to recruit in employed status. There were no stated advantages to the respondent in her being a contractor but there were a number of advantages to the claimant as outline above. Kate McCorrison's evidence, which I accept, is that if there was self-employed status it might make a financial difference to the individual, but it is of no benefit to the respondent.
20. The claimant was under no obligation to give notice. The claimant accepted that one of the benefits for working using Aidkeira Limited as the contracting party with the respondent was that it meant that she was able to avoid having to give the notice period that an employee would have to give if they wanted to leave employment. The model the claimant used meant that she did not have to do that she could leave straight away if she did not like it.
21. The claimant was provided with a laptop by the respondent. This was necessary because the respondent's systems are networked, they have extremely sensitive data regarding vulnerable children and their case notes are held on the system. All this information has to be kept secure.
22. The claimant was provided with mandatory training to ensure that she maintained the correct quality standards by following the correct process on the respondent's systems. If the claimant wanted other training, such as management training, the respondent required the claimant to pay for it.
23. In submissions it is said by the respondent: "*C had autonomous decision making albeit with some oversight from Ms Jacob, was answerable as a profession to the public, courts and her regulator for her work.*" In the way that the claimant worked there was no distinction to an employee. An employee in the claimant's position would have been treated no differently.

24. The respondent pays the annual registration fee for its employed social workers' membership of Social Work England but not for self-employed contractors who are responsible for their own registration and the registration costs.
25. The claimant participated in 1 to 1 supervision where she was supervised and where she carried out supervision. This was a regulatory expectation regardless of whether the social worker was employed, or self-employed.
26. The claimant produced time sheets which were checked by Fanny Jacob, the claimant's company Aidkeira Limited issued an invoice which was then paid by the respondent's finance department.
27. Fanny Jacob witness statement includes the following at paragraph 12:

*"The respondent's arrangement with the claimant was very flexible. For example, the claimant would never come to the respondent's office before 9.30am. This was a common scenario for self-employed consultants who had much more flexibility around their start and finish times than the respondent's employees. If an employee of the respondent regularly came into work at 9.30am, this would either have been addressed informally through their 1-1 supervisions or through the respondent's disciplinary procedure if the problem persisted."*

28. The claimant in answer to questions on this stated that in term time she attended work around 9.15am to 9.30 am. The claimant stated that most people started work between 9.15am and 10.00am so the hours she kept, and her working times of work were like any other employee. Employees were expected to work core hours and that it would become an issue where anyone was regularly attending work after 10.00am. I prefer the claimant's evidence on this issue. The haphazard attendance suggested by the respondent would have been a detriment to the services that was being provided by the claimant. The claimant's evidence that her work start times were consistent with other employees in my view has not been rebutted by the respondent.
29. Fanny Jacob stated that the Claimant could choose whether to work or not to work and there was nothing that she could do about this because this was an accepted element of the arrangements with self-employed individuals at the Respondent. She went on to say that from a logistical perspective it would have been desirable to have received advanced notification of any non-attendance due to the critical nature of the work, but ultimately, it was a matter for the Claimant to decide whether she would work on a particular day or not and it would have been her responsibility to ensure that someone else was able to cover the work.
30. To illustrate the point Fanny Jacob states that in August 2018, shortly after the commencement of the engagement, the Claimant informed the Respondent that she would be on holiday during the latter part of that month and would not be returning until early September 2018. Fanny Jacob stated that this would not have been permitted for an employee, because they would not have accrued sufficient holiday. This is not accepted by the claimant who says that she informed Fanny

Jacob before she started employment that she had a holiday booked to go to India but was told that she was required to start as soon as possible. I accept the claimant's evidence.

31. The respondent needed the claimant to accept the role and was willing to allow the claimant to take a significant period of leave early on in her engagement. I do not consider that the respondent's approach would have been any different if the claimant to be engaged as an employee or as self-employed.
32. Fanny Jacob states that "in principle, the Respondent would have had no objection to the Claimant sending a substitute to cover her work for periods when she was unavailable." There is no suggestion that it ever happened in the claimant's case or in comparable circumstances involving others. There is no suggestion that it was ever discussed by the claimant and the respondent as an option. The basis of the arrangement between Aidkeira Limited and the respondent was the understanding that the claimant would perform the role. If there truly was a theoretical possibility of substitution, from a practical perspective it was neigh on impossible. As Fanny Jacob recognised, "clearly, given the heavily regulated nature of social work, the Respondent would have to be satisfied that any substitute was a registered social worker with appropriate DBS checks etc". Such a theoretical possibility has nugatory impact in practise because of the reality of the legal and regulatory requirements for the role and was never in fact contemplated by either party.
33. In determining whether the claimant is an employee or a worker I have taken into the following matters.
34. The claimant by her own design was setting up a limited company to provide her services as a social worker. This is a strong indicator that she was not an employee. The claimant was intending to avoid entering into a contract of employment. While the respondent would have liked to enter into a contract of employment it was well aware that the arrangements it was entering into were not employer and employee but arrangements with a self-employed contractor. Likewise, at the time of contracting, if asked, I think it likely that the claimant would have said she was not an employee at all. I note that the claimant denies that in these proceedings, but I find that her evidence about the way she entered into the contract with the respondent is wrong and therefore feel able to come to this conclusion. I also take into account that the claimant started using the Aidkeira Limited model on her own initiative after being advised of its benefits by other social workers who shared with her the template of documents such as invoices and time sheets which she adopted and used in various engagements. These documents use language that is alien to the idea of the claimant being an employee but rather refers to a supplier and client relationship. The claimant was fully aware of these matters and used the model for a significant period of time with more than one employer. She employed the services of an accountant for the purposes of producing accounts for her company and incorporating Aidkeira Limited. The claimant had no intention of entering into an employer employee relationship.

35. The absence of any notice period in my view which points away from a contract of service. Avoiding the need to give notice was something that the claimant was consciously wanting to achieve.
36. Bearing in mind the legal and regulatory context the provision of a laptop, i.e. equipment to perform the role, is not significant in determining status of the claimant.
37. The training requirements and lack of distinction between the claimant and other employed social workers suggests a level of control consistent with employment rather than a self-employed contractor because of the element of compulsion, it is not clear that the training mandated was purely that required to ensure that the claimant was compliant with statutory or regulatory requirements, rather it complied with the respondent's requirements.
38. The respondent did not pay for the claimant's social work registration this is consistent with her being self-employed as opposed to employed. There is no requirement for an employer to pay the registration fee, the payment of the registration fee is the type of benefit that might be conferred on an employee.
39. The claimant's participation in 1 to 1 supervision, in the circumstances, is an entirely neutral factor. The legal and regulatory context of social work requires that this takes place in some form.
40. The provision of invoices from Aidkeira Limited for the payment in respect of the claimant's services is consistent with self-employed contractor status.
41. The claimant kept working hours that aligned with the other social worker employees at the respondent. This does not suggest that the claimant was able to come and go as she pleased in a way that a contractor might be able to where an employee cannot.
42. The claimant told Fanny Jacob of her holiday plans before she started. This does not assist in determining her employee status. The claimant was in a position to dictate terms and so the respondent agreed to the claimant's requirement. In the market conditions it would have been the same whether she was an employee or self-employed.
43. The absence of the right to substitution does not support the respondent's contention that the claimant was self-employed contractor.
44. I have come to the conclusion that the claimant was not an employee but was a worker for the following reasons. There are factors which point to both employment and self-employment, however, on balance the evidence overall does not allow me to conclude the claimant was an employee. The factors that point to self-employment in my view outweigh the factors that point towards employment. Factors like incorporation into the respondent's organisation, lack of any financial risks, supervision of the claimant, performance of role and provision of equipment which ordinarily point to employment in the legal and regulatory environment of this

case carry less weight. Other factors like the hours worked, the requirement for the claimant to provide personal service, and the requirement for training carry some weight in my consideration of whether there was employment or self-employment in favour of employment, however, these factors are outweighed by the arrangements which the parties consciously entered into with the express purpose of avoiding the employment under a contract of service. The factors that in my view have added weight in the context of this case are based on the fact that the claimant created and insisted on the Aidkeira Limited model for entering into her engagement with the respondent. This model came with a number of benefits for the claimant including the avoidance of the need to give any notice for the termination of the engagement. These were arrangements entered into in good faith by both parties and in my view carry significant weight in considering whether there was a contract of service. My conclusion is that the claimant was not an employee.

45. The claimant was however a worker because all the factors that are necessary for an individual to fall within the definition of 'worker' were present. There was a contract that provided for the claimant to carry out personal services as social worker and those services were for the benefit of the respondent, who was a party to the contract who was not a client or customer of the claimant's profession or business undertaking. In coming to this conclusion, I also take into account that the claimant did not advertise herself to the world as an independent person and did not provide services to others whilst engaged by the respondent.

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Employment Judge Gumbiti-Zimuto

Date: 16 December 2020

Sent to the parties on: ....21/12/2020.....

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For the Tribunals Office

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