Case Number: 3333844/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Sivasuthan	v	BBK Partnership Chartered Accountants

Heard at: Watford **On**: 6 July 2020

Before: Employment Judge Hyams,
sitting alone

Appearances:

For the Claimant: In person
For the Respondent: Mr Gregory Hine, solicitor

RESERVED JUDGMENT

The claimant was employed by the respondent partnership as an employee from 1 September 2011 until 2 May 2018, but not after 2 May 2018.

REASONS

Introduction; the issues listed to be determined at the hearing of 6 July 2020

1 There was a preliminary hearing in this case on 22 August 2019, before Employment Judge Bedeau. He decided that there should be a further preliminary hearing, to take place on 6 July 2020. In paragraph 5 of his case management summary issued after that hearing, Judge Bedeau recorded that the issues to be decided at the hearing of 6 July 2020 were these:

(1) "Whether the claimant was an employee of the respondent or a self employed independent contractor, and"

(2) "If he was an employee, how long was he employed by the respondent before he resigned in August 2018 and would that entitle him to continue with his constructive unfair dismissal claim?"

2 On 22 August 2019, Judge Bedeau listed the claimant's claim of unfair dismissal to be decided at Watford on 5 and 6 October 2020 "if the claimant is successful at the preliminary hearing on 6 July 2020".

The facts

3 The respondent is a partnership within the meaning of the Partnership Act 1890. There are 5 members of that partnership.

4 I heard oral evidence from Mr Alan Kaye of the respondent (one of the partners), who was cross-examined by the claimant to the limited extent that I permitted. I placed limits on that cross-examination because the claimant's questions were about peripheral or irrelevant matters given the extent to which the factual background was agreed by the claimant.

5 The claimant was not cross-examined because what he said about the factual situation was not challenged by Mr Hine. What the claimant said about the factual situation was in part evident from what he had put in the claim form and the document which accompanied the claim form and in part from what he said to me during the hearing of 6 July 2020. The claimant said at the hearing (and Mr Kaye confirmed) that he (the claimant) had been an employee of the respondent from 1 September 2011 onwards. He had during that period worked part-time for the respondent and for the rest of the time he had provided services to the respondent and other parties via a company of which he was either the owner or of which he had control, by the name of P & T Management Services Limited.

6 Mr Kaye's evidence was that the claimant had asked to be employed by the respondent as from 1 November 2017 onwards on a full time basis for 35 hours and that the claimant had "asked for this arrangement because he was finding it difficult to remortgage." The claimant confirmed that that was so.

7 The claimant was then employed as an employee until the end of April 2018.

8 The claimant treated the document accompanying the claim form, stating the factual background, as his witness statement. In it, on the fourth page, he said this:

> "In May 2018, I was offered to work as a subcontractor for BBK by Alan [Kaye] and Kandee [another of the 5 partners]. They were aware I was managing my own company, P&T Management Services Limited at the time, and suggested that I should start completing their jobs only, under a subcontractor status. Alan also stated he would let Arnold and David [2 of the other partners] know about this agreement (note: Arnold was abroad in Sri Lanka for business purposes and David was not present either). They even said I would be able

to move to their Ilford branch and work as a subcontractor from there as it would be closer. They also mentioned that I could use their IT software and resources to complete P&T jobs as well as theirs. This was all agreed verbally and the date decided for me to move was 5th May 2018. I handed over all working files related to David and Arnold's clients to the Barnet office."

9 After some discussion with me about that situation, the claimant said that he had himself asked to provide his services via P & T Management Services Limited ("P & T") only, and he said that he had done so for tax purposes. It was agreed by him and Mr Kaye that the change which had occurred after 2 May 2018 was the result of an oral agreement between the claimant and the respondent.

10 The claimant said that after 2 May 2018 (he accepted that the start date was unlikely to have been 5 May 2018 as that was a Saturday, so the start date may well have been 3 May 2018), P & T had provided services not only to the respondent but also to other, unconnected, persons. The claimant had, when those services were provided by P & T, provided them himself, i.e. in person.

The relevant law

11 Section 230 of the Employment Rights Act 1996 ("ERA 1996") provides:

'(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "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 this Act "worker" (except in the phrases "shop worker" and "betting 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;

and any reference to a worker's contract shall be construed accordingly.'

12 While there is much case law concerning the status of a person who provides personally work to a claimed employer, there is less case law concerning the situation where a person who later claims to have been an employee provides

services via a limited company which he or she controls. In preparing to come to a conclusion on the facts of this case, I referred myself to the passage in *Harvey on Industrial Relations and Employment Law* ("*Harvey*") at paragraphs AI[81]-[81.08], where the author of that section of that work discusses among a number of other cases the decisions of the Supreme Court in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] IRLR 872, [2018] ICR 1511 and *Autoclenz Ltd v Belcher* [2012] UKSC 41, [2011] IRLR 820.

13 The cases discussed in that part of *Harvey* are, however, only of peripheral assistance here. That is because the claimant was probably not even a worker within the second limb of the "worker" test in section 230(2) of the ERA 1996, given that even in the absence of P & T as the vehicle by means of which he provided services, he was providing services not only to the respondent but also to other parties. It seemed to me that if that was the case then that was the end of the matter, since the involvement of P & T meant that the claimant was plainly not an employee of the respondent.

14 I therefore considered whether I should go behind the oral agreement of the claimant and the respondent to see whether the reality was that the claimant was an employee. In doing so, I took into account the factors referred to in the following passage in the notes in *Harvey* to section 230 of the ERA 1996:

> "How the parties themselves label the relationship is a relevant but not a conclusive factor: *Massey v Crown Life Insurance Co* [1978] IRLR 31, [1978] ICR 599, CA (genuine agreement intended to establish employee as self-employed); *BSM (1257) Ltd v Secretary of State for Social Services* [1978] ICR 894, QBD. But the parties cannot alter their true relationship by putting a particular label on it: *Young and Woods Ltd v West* [1980] IRLR 201, CA; *Tyne and Clyde Warehouses Ltd v Hamerton* [1978] ICR 661, EAT; *Davis v New England College of Arundel* [1977] ICR 6, EAT; *McMeechan v Secretary of State for Employment* [1995] ICR 444, EAT. This may be particularly important in a case where a person was content to be (and to be labelled) self-employed while working, but now wishes to be classed as an employee, having been 'dismissed', for the purposes of bringing an unfair dismissal action; the tribunal is not bound by the label and may decide that he was an employee all along, but if it does so it should inform the inland revenue of this decision so that he can be reassessed as a self employed trader and back tax recovered: *Young and Woods Ltd v West* (above). An 'entire agreement' clause in a contract stating that no employment relationship is created is not necessarily conclusive; if there remains ambiguity a court or tribunal may still have to look at all the facts: *Bushaway v Royal National Lifeboat Institute* [2005] IRLR 674, EAT."

15 Under the heading "Categorisation by the parties", there is this passage in paragraphs AI[46]-[47.1] of *Harvey*:

> "[46] How the parties themselves label their relationship is a relevant but not conclusive consideration, but even such a neutral statement may

have to be treated with caution. The status of the worker is to be decided by an objective assessment of all the factors, and the label attached by the parties is but one of those factors. The parties cannot change the nature of the contract by attaching the 'wrong' label. That is to say, if on reviewing the whole of the evidence the court or tribunal concludes that the worker is definitely an employee (or, as the case may be, definitely an independent contractor), then it will so hold, despite the fact that the parties themselves may have agreed the opposite: *Davis v New England College of Arundel* [1977] ICR 6, EAT; *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817, [1976] 1 WLR 1213, CA; *Young and Woods Ltd v West* [1980] IRLR 201, CA; *Narich Pty Ltd v Pay-roll Tax Comr* [1984] ICR 286, PC. To that extent the parties are not free to decide the nature of the relationship for themselves.

[47] On the other hand, there may be cases where it goes beyond merely a label used by the parties, so that their own interpretation may at least be a factor in determining the true intent of their dealings; two examples are suggested. First, in a borderline case where, apart from the label attached by the parties, it would be equally reasonable to conclude that the worker was an employee or that they were an independent contractor, then an express declaration by the parties may be conclusive. In particular, 'if the parties deliberately arrange to be self-employed to obtain tax benefits, that is strong evidence that that is the real relationship': *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] IRLR 31, [1978] ICR 590, CA, per Lord Denning MR; *O'Kelly v Trusthouse Forte plc* [1983] 3 All ER 456, [1983] IRLR 369, [1983] ICR 728, CA. So in *Massey's* case an insurance agent who elected to be treated as an independent contractor for tax purposes could not later turn round and claim to be an employee for the purposes of unfair dismissal. In *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99, CA (in which a lapdancer who had accepted contractually that she was self employed could not claim unfair dismissal) Elias LJ cited Lord Denning's judgment in *Massey* and also that of Ralph Gibson LJ in *Calder v H Kitson Vickers Ltd* [1988] ICR 232, CA and summed the overall position up as follows:

> "It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…"

[47.01] Secondly, there may be cases where it is not just the wording of the arrangements but aspects of the parties' dealings that could be a pointer to the true relationship. In *Tilson v Alstom Transport* [2010] EWCA Civ 1308, [2011] IRLR 169, CA an agency worker failed to

> establish that he had become the direct employee of the end user (for the purposes of an unfair dismissal claim); while the case is mostly about the rules on agency workers (see para [187] below) one factor was that, not only had the parties dealt with him as an agency worker, but the facts showed that the end user had offered him permanent employment which he had *refused* because the agency arrangement was more lucrative – the Court of Appeal said that, while it is not the case that a contract cannot be implied against the understanding of the parties, 'the parties' understanding that there is no such contract in place explaining the terms of their relationship, and their inability to reach an agreement on the terms which such a contract should contain, are extremely powerful factors militating against any such implication'. [Original emphasis.]

16 I also referred myself to the decision of the Court of Appeal in *MHC Consulting Services Ltd v Tansell* [2000] ICR 789, where it was held that an employee who provided services via a company was able to rely on the protection of the Disability Discrimination Act 1995. However, I noted that that decision was based on the particular terms of the protection in that Act (which are repeated at least in substance in the Equality Act 2010) afforded to contract workers and the proposition that Parliament must have intended that protection to extend to the situation in that case.

My conclusion on the questions listed for determination on 6 July 2020

17 Given my findings of fact and the case law to which I refer above, I came to the clear conclusion that whatever the claimant's relationship with the respondent was, after 2 May 2018 it was not one of employment within the meaning of section 230(2) of the ERA 1996. That was because

17.1 the claimant provided his services via a limited company, albeit that he controlled it;

17.2 even if one ignored that company, the claimant was providing services not only to the respondent but also to third parties, and he was doing so during the working week;

17.3 the respondent and those third parties were plainly customers or clients of P & T;

17.4 but even if the respondent and those third parties were properly to be regarded as customers or clients of the claimant, the fact that the claimant was on that basis in business on his own account was incompatible with him being employed by the respondent under a contract of employment; and

17.5 the claimant himself had asked to cease being an employee and to become an independent contractor.

18 As a result, while the claimant was plainly an employee of the respondent up to and including 2 May 2018, he was not an employee after that date. The claimant's claim to the Employment Tribunal was presented on 3 October 2018. The early conciliation period was from 2 September 2018 (when ACAS was notified by the claimant of his claim) to 4 September 2018, when the early conciliation certificate was issued by ACAS. Accordingly, the 3-month time limit in section 111 of the ERA 1996 expired on 1 August 2018 and as a result of that section the claim is outside the tribunal's jurisdiction unless time can be extended on the basis that it was not reasonably practicable to make the claim by 1 August 2018 and the claimant made it within a reasonable period of time after then.

19 However, that did not mean that I could answer the questions posed by Judge Bedeau at the hearing of 22 August 2019 in a way that disposed of the claim. Rather, it seemed to me that, given my conclusions stated in the preceding paragraph above, it was necessary to decide whether or not time should be extended. I did not see that issue as having been listed to be decided at the hearing of 6 July 2020. When writing this reserved judgment, it occurred to me that I could have interpreted the second of Judge Bedeau's questions ("If he was an employee, how long was he employed by the respondent before he resigned in August 2018 and would that entitle him to continue with his constructive unfair dismissal claim?") as extending to the jurisdictional time limit question. However, it was not at all clear that that question was in issue, and certainly no reference was made in Judge Bedeau's second question to the "reasonably practicable" test in section 111(2) of the ERA 1996. As a result, the claimant had not come to the hearing of 6 July 2020 in the knowledge that the question of reasonable practicability was going to be determined at that hearing.

20 Having said that, I should record that the respondent had, via Mr Hine's skeleton argument, understandably taken the time limit point and that at the hearing of 6 July 2020, the claimant responded by saying that the respondent had given him a P45 dated 5 June 2018 (it was at page 290 of the bundle put before me for the hearing of 6 July 2020) and that therefore his employment ended on that date. In fact, the P45 stated that his last day of employment was 2 May 2018. The claimant then implied that if the claim was out of time then he had been misled by the fact that his P45 was dated 5 June 2018.

21 I see that it is the claimant's case that he "decided to leave BBK on 20th August 2018" and that he sent an email to that effect on the following day, 21 August 2018. That suggests strongly that there was no impediment to making the claim by 1 August 2018.

22 Nevertheless, as I say above, I do not believe that I could fairly decide the time issue at this stage.

23 The case is currently listed to be head in full on 5 and 6 October 2020. I have therefore made some further case management orders, which are recorded in a separate document.

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Employment Judge Hyams

Date: 13 July 2020

Sent to the parties on:16/07/2020

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Jon Marlowe
For the Tribunal Office