



EMPLOYMENT TRIBUNALS

Claimant

Mr A Catt

v

Respondent

English Table Tennis Association Limited (and Others)

Heard at:

Watford (by CVP)

On: 07 July 2021

Before:

Employment Judge Bloom

Appearances

For the Claimant: Mr D Matovu (Counsel)

For the Respondent: Miss V Brown (Counsel)

RESERVED JUDGMENT

1. The name of the Respondent is amended to English Table Tennis Association Limited.
2. The Claimant was not a “worker” as defined by Section 230(3)(b) Employment Rights Act 1996.
3. The Claimant’s Claims against the Respondents are dismissed.

REASONS

1. In this open Preliminary Hearing (which was conducted using the CVP method) the Claimant was represented by Mr D Matovu of Counsel and all four Respondents by Miss V Brown also of Counsel. I heard evidence from the Claimant and the First Respondent’s non-executive Chairman Mrs Sandra Deaton (also the Third Respondent). Both the Claimant and Mrs Deaton had provided Witness Statements. My attention was also drawn to relevant pages of a Joint Bundle consisting of over 570 pages of documents. Only a few pages were relevant to the issue to be determined by me.

2. The Claimant brings a Claim against all four Respondents alleging he was subjected to detriments as a result of making twenty-seven protected disclosures. The Claims are denied by all Respondents. The Respondents do not accept that the Claimant made any Qualifying Disclosures and in any event deny that the Claimant was subjected to any detriments if in fact any Qualifying Disclosures were actually made. Before such matters can be determined the first issue to be decided is that of the Claimant's status. In order to bring any Claim pursuant to the provisions of Section 47B Employment Rights Act 1996 the Claimant must have been "a worker". The term worker is defined by the extended definition in Section 43K Employment Rights Act 1996 and the definition contained in Section 230(3) Employment Rights Act 1996. It is common ground between the parties that the extended definition contained in Section 43K does not apply to the Claimant's position in this case. The Claimant states that he was a worker as defined by the provisions of Section 230(3)(b) Employment Rights Act 1996. The Respondent does not accept that position.
3. It was agreed that the sole purpose of this Preliminary Hearing was to determine that issue alone.
4. Section 230(3) Employment Rights Act defines a worker as:

"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 expressed) whether oral or in writing whereby the individual undertakes to do or personally perform 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."
5. It was agreed that the Claimant did not enter into or work for the First Respondent under a contract of employment. The dispute is whether or not the Claimant falls within the term of worker as provided by the provision of Section 230(3)(b) of the 1996 Act.
6. On the balance of probabilities and having heard the evidence as well as considering the relevant documents, I come to the following findings of fact:-
 - (1) The First Respondent, English Table Tennis Association Limited, is commonly known by the title Table Tennis England. It is the governing body of table tennis in England and is responsible for representing, coordinating, administering, marketing and developing the sport. It operates in accordance with its Articles of Association.

- (2) The governance of the First Respondent is conducted by its Board. Article 10 of the Articles provides that the directors are responsible for the First Respondent's management. The only employee on the Board is the Respondent's CEO who has a contract of employment and receives a salary. The Board consists of three elected non-executive Directors, three independent Directors and four appointed Directors in addition to its Chairman and CEO. If elected, non-executive Directors hold their appointment for a four year term.
- (3) The roles and duties of those Directors concern five areas of work namely strategy; finance, major projects, checking, challenging, monitoring and scrutinising; and ambassadorial (page 10 of the Bundle).
- (4) The duties of the Directors as described in the Articles are to ensure compliance with the law; maintain proper financial oversights; select and support the Chief Executive; respect the role of staff; maintain effective Board performance; and promote the organisation (also page 10 of the Bundle).
- (5) The non-executive Director position is specifically set out in a document entitled "Role Description and Person Specification" (page 3 of the bundle). The Claimant accepted in evidence his knowledge and understanding of that document. The document describes the status of the elected non-executive Director as being "voluntary". It provided for "remuneration - £1,500.00 honorarium per annum plus expenses". It provided for the post holder to undertake a "Time Commitment" of 15 - 20 days per annum (including attendance at Board, Sub-Committee and other meetings and competition/events).
- (6) In the event of any non-executive Director failing to show the required expectations of such a post and the requisite level of commitment a majority of the Board are able to take a vote which effectively votes that person off the Board.
- (7) The non-executive Directors are not subject to any written contracts of employment, disciplinary or grievance procedures or the staff handbook. These documents are only applicable to employees of the organisation.
- (8) In May 2019 the First Respondent held elections for the three non-executive Director positions. The Claimant put forward himself as a candidate and he was duly elected and appointed to the Board with effect from 29th June 2019.
- (9) The Claimant attended an induction meeting on 7th August 2019 and received an induction pack. I am satisfied that at no stage did the Claimant question the First Respondent's position that he was engaged in a voluntary capacity. Article 20 of the Articles of

Association provides that, other than the CEO, any person holding a paid appointment cannot hold the position of Director.

- (10) During his appointment with the First Respondent the Claimant held a full-time position as a Compliance Consultant with an unconnected business namely T C Compliance Service Limited.
- (11) As noted above the Claimant received an honorarium of £1,500.00 per annum. This was payable to him in monthly instalments of £125.00 per month. Such payments were identified in payslips provided to the Claimant in which he was described as an "employee". He was also given a specific employee number. The Claimant was not entitled to sick pay, holiday pay or any pension benefits.
- (12) As a non-executive Director the Claimant was part of the Finance Committee and brought to that Committee a degree of specific expertise in that role. He was able at all times to offer his experience or opinion on any matter relevant to the First Respondent's organisation. There was no obligation upon the Claimant to attend any Finance Committee meetings or indeed any Board meeting, save that any failure to engage in the activities of the Board to which he was elected would have inevitably led to the Board taking a vote to expel him from it.
- (13) Although the Chairman of the Board (Mrs Deaton) set the agenda for Board meetings and led the overall strategy of the organisation she held no management control over the Claimant.
- (14) The Claimant was expected to undergo a certain amount of training in order to be able to carry out his role although he was free, as was the actual case, to decline any invitation to attend any training course if his own personal commitments made that difficult or impossible. The Claimant accepted that the Respondents could not do anything to make him attend any such course.
- (15) At any Board meeting the Claimant was free and able to express any personal view as to the running of the organisation. Indeed he frequently did so.
- (16) The Claimant was free to resign his post at any time without the requirement to give notice.
- (17) In his role as a non-executive Director the Claimant was not able to provide a substitute for himself if he was, for example, unable to attend any meeting.
- (18) After a number of issues the First Respondents met on 7th February 2021, a move which ultimately led to the Claimant's removal as a Director of the Board.

7. As stated the term “worker” is defined by the provisions of Section 230(3)(b) Employment Rights Act 1996. In addition to the statute I have given due note to a considerable number of authorities on the point including, but not limited to, the Judgments of the Supreme Court in Uber and Others v Aslam and Others, Gilham v Ministry of Justice and a more recent authority of the Employment Appeal Tribunal in Nursing and Midwifery Council v Somerville UKEAT/0258/20. As identified by Lord Leggatt in Uber (paragraph 41) the statutory definition of a worker’s contract has three elements namely (1) a contract where an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any professional business undertaking carried on by the individual.
8. In this case it is agreed that the Claimant undertook to carry out the duties of a non-executive Director personally. It is not suggested that the First Respondent was a client or customer of the Claimant. The crucial issue therefore in this case is whether there was a contract between the Claimant and the First Respondent whereby the Claimant undertook to perform work or services for the First Respondent.
9. In such cases due consideration must be given not only to the written contractual terms (if any) but also the surrounding circumstances as to how the Claimant was to carry out his duties as a non-executive Director of the First Respondent. This requires me to consider the term “worker” as a matter of statutory interpretation and to then go on to consider the relevant factors of the case. The position of the Claimant in this case was not one that could be described in any sense of a person who was a vulnerable individual in a position of subordination and dependence. Such persons are required to rely on the protection of the law in enforcing their individual rights. The Claimant carried out his duties as a non-executive Director without having to resort to other members of the Board and was free at all times to express any individual view that he held on any given topic. In all senses I find that he was not a “vulnerable individual”. He was not in a position of “subordination”. He was independent of other Board members including the Chairman and CEO.
10. It is the case that even though the Claimant was free to attend Board meetings when he chose to do so and to provide whatever input into the First Respondent’s organisation as he saw fit, he owed no contractual obligation to the First Respondent but that does not in itself preclude a finding that the Claimant was a worker. The labelling used by the parties does not in my judgment provide determinative evidence as to whether or not the statutory definition of worker in Section 230(3)(b) has been met. The description of “volunteer” in the role specification or the use of the word “employee” in payslips does not assist. I find the fact that the Claimant undertook a full-time consultancy role for another organisation to be of no significance.

11. The Claimant's role as a non-executive Director was to provide his personal input into strategic matters only involving the running of the First Respondent's organisation. He was not involved in operational matters as a consequence. I have noted Lady Hale's Judgment in Gilham v Ministry of Justice where she states (paragraph 43 of her Judgment) – "it would not be difficult to include within limb (b) (i.e. Section 230(3)(b) of the 1996 Act) an individual who works or worked by virtue of appointment to an office whereby the office holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a professional business carried on by the office holder".
12. As I have found the Claimant was not subordinate to anyone else within the First Respondent's organisation and was free to undertake his activities with complete independence. Terms such as "volunteer" and "employee" are useful in considering the actual relationship between the Claimant and the First Respondent but they are not determinative. The written terms used by the parties are not to be the starting point when determining whether or not the Claimant was a worker. As is made clear in Uber I must determine the issue of the Claimant's status in accordance with the statutory provisions set out in Section 230(3)(b) Employment Rights Act 1996. As Lord Leggatt (paragraph 69 of Uber) stated – "the primary question was one of statutory interpretation not contractual interpretation".
13. As Lord Leggatt went on to say in Uber (paragraph 71) – "the primary purpose of the legislation is to protect vulnerable workers from being subjected to forms of unfair treatment (such as being victimised for whistleblowing)". He cited the Employment Appeal Tribunal Judgment of Mr Recorder Underhill QC (as he then was) in Byrne Bros (Formwork) Limited v Baird (paragraph 17 (4) of that Judgment) – "the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arms-length and independent position to be treated as being able to look after themselves in the relevant respects".
14. In my judgment crucial to determining the status of the Claimant in this case is the degree of subordination or not exercised by the First Respondent over the Claimant and/or the degree, if any, of dependency of the Claimant upon the First Respondent. In my judgment neither existed in this case. To paraphrase Mr Recorder Underhill QC in Byrne Bros the Claimant was able to look after himself in all relevant respects. As the authorities remind me I must take a purposive approach to such matters. Looking at the true agreement, whether express or implied, I do not consider that it was intended for the Claimant to be given the status of worker nor did it result as such.

15. In my judgment the Claimant was not a “worker” as defined by Section 230(3)(b) of the 1996 Act. As a consequence the Employment Tribunal does not have jurisdiction to hear his Claims and, as a result, they are hereby dismissed.

Employment Judge Bloom

Date: 19 July 2021

Sent to the parties on: ..06/08/2021.....

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For the Tribunal Office