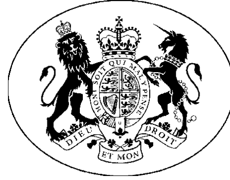

EMPLOYMENT TRIBUNALS

Claimant: Mr S TREADWELL
Respondents: A. J. LLOYD FUNERAL DIRECTORS LIMITED
MR DARREN LLOYD

Heard at: Midlands West (by CVP)

On: 18 NOVEMBER 2024

Before: Employment Judge Mr J S Burns

Representation
Claimant: In person supported by his wife Mrs S Treadwell
Respondents: Miss A Barnes - Counsel

JUDGMENT

1. The Claimant did not have two years' service as an employee
2. The unfair dismissal claim is dismissed.

REASONS

1. The above judgment followed an OPH to decide whether the Claimant was an employee of the Respondent and if so whether he had sufficient continuity of service to bring an unfair dismissal claim.

2. I heard evidence on oath from the Claimant and then from the Second Respondent and was referred a 144-page bundle of documents, and to copies of various legal authorities in a 63-page authorities bundle and one additional authority. I received written and oral final submissions from the Respondent and oral final submissions only from the Claimant.

The law

3. An "employee" is defined by section 230(1) Employment Rights Act 1996 as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

4. For an employment contract to exist, there must be mutuality of obligation or, as per the EAT in Drake v Ipsos Mori UK Ltd, referring to a description by Langstaff J in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, "a requirement of mutuality specific to contracts of employment"; and the contract has to "necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wagework bargain".'

5. Where an individual is engaged to work for specific sessions or specific assignments, it is possible that there is an overall, "umbrella" contract of employment governing the relationship. However, if this is not the case, it is possible that each assignment could be a separate contract of employment.

6. Zero hours contracts may be structured as overarching contracts (also known as "umbrella contracts"). This is where there is a continuing contractual relationship with ongoing obligations between the business and individual regardless of whether the individual is engaged in carrying out work at the time. The continuing relationship can make it easier for the business to administer holiday pay, and the individual can be provided with benefits, such as health cover, even when they are not working on an engagement.

7. A zero hours contract may state that there is no continuing relationship between engagements. However, if in practice there is a well-founded expectation of further engagements (which there is in many zero hours situations), that could be sufficient to create an overarching contractual relationship covering periods between engagements. This could be as an employee or a worker.

8. Documents which seek to regulate the relationship are not necessarily themselves employment contracts. They may be simply background documents which do no more than provide a framework for a series of successive ad-hoc contracts of service or for service. (see for example Carmichael v National Power WLR 1999 (1) 1999 at 2045G).

9. Where a Claimant's susceptibility to disciplinary procedures had been relied on in support of a contention that the Claimant was an employee, the panel in St Ives Plymouth Ltd v Mrs D Haggerty UKEAT/0107/08 wrote this in para 32 : "*We would only add that, contrary to the analysis of the Tribunal, none of us would have given any weight to the fact that the employer was choosing to introduce disciplinary proceedings. Plainly that would be of the greatest importance if they were being initiated because of a refusal to work. But it is wholly consistent with the fair treatment of a true casual, who is not subject to an umbrella contract, that he should not be struck off the bank of casuals unless he has had an opportunity to meet the charges against him. The fact that the employer affords such a fundamental right of natural justice ought not to weigh against him when determining the true nature of the relationship."*

10. The Court of Appeal decisions in McMeechan v Secretary of State for Employment [1997] ICR 549 and Cornwall County Council v Prater [2006] IRLR 362 are examples where it has been held that the individual assignments were separate contracts of employment. In Little v BMI Chiltern Hospital EAT 0021/09, the EAT upheld a decision that a hospital bank porter was not employed, even during individual assignments, because of a lack of mutuality of obligation.

11. In Autoclenz Ltd v Belcher and ors 2011 ICR 1157, the Supreme Court held that the written agreement is not decisive in determining employment status, and the relative bargaining powers of the parties must be taken into account. A decade later, the Supreme Court has gone even further, holding in Uber BV and ors v Aslam and ors 2021 ICR 657, that 'worker' status is a question of statutory, not contractual, interpretation, and it is therefore wrong in principle to treat the written agreement as a starting point. The key question is whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work. Equally significant was the Court's decision that any term purporting to classify the parties' legal relationship or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract must be disregarded.

12. Section 108 of the ERA provides that Section 94 (the right to claim unfair dismissal) does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination.

13. Section 210(5) of the ERA provides that "[a] person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous". The burden of rebuttal lies on the employer.

14. Section 211(1) of the ERA provides that an employee's period of continuous employment "begins with the day on which the employee starts work". In General of the Salvation Army v Dewsbury [1984] ICR 498, the EAT held that the reference to the day on which the employee starts work "is intended to refer to the beginning of the employee's employment under the relevant contract of employment." It is not intended to be interpreted literally as referring to when the employee first undertook the duties of the employment.

15. Where an employee claims unfair dismissal, the period of employment terminates on the effective date of termination, being the date on which the notice expires (Section 97(1)(a) of the ERA).

16. Section 212 of the ERA provides (as relevant):

    "(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
    [...]

    (3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—
    (a) incapable of work in consequence of sickness or injury,
    (b) absent from work on account of a temporary cessation of work,[or]

    (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, [...]
    [...] counts in computing the employee's period of employment."

17. A week is defined as "a week ending with Saturday" (Section 235(1) of the ERA).

18. There are three elements to consider in relation to a "temporary cessation of work" (as derived from the leading House of Lords case Fitzgerald v Hall Russell & Co Ltd [1970] AC 984: (1)

whether there was a cessation of work and whether the employee experienced a cessation of work (2); (2) whether the employee was away from work due to the cessation; (3) whether the cessation was temporary.

Findings of fact

19. The Claimant was engaged by the First Respondent as a Funeral Attendant/Casual Funeral Bearer.

20. In November 2021 he entered into an (oral) arrangement with the First Respondent which provided for him to work on an ad-hoc basis for the First Respondent, which provides funeral services.

21. By the end of November 2021 he had been issued with a uniform and his name had been added to a “crewing” Whatsapp group.

22. It was arranged that he would provide his availability on a weekly basis and then would be offered work which he could either accept or decline. He would be paid for the work he did - for example £31.50 for attending as bearer at a funeral lasting not longer than three hours. He would not be paid on days or hours he did not work. The First Respondent was not obliged to offer him work. The Claimant did not work fixed hours or days. He submitted time-sheets and was paid monthly in arrears and was issued payslips operated under the PAYE system, and finally a P45.

23. In May 23 the Claimant was issued with a Respondent letter (page 128 of the bundle et sec) which he was asked to sign. The Claimant did not sign it but he accepted in evidence that he had received it at that time and it described accurately reflected the terms of his work throughout.

24. The letter states in opening “I am pleased to confirm the conditions under which we may be able to offer you casual work as Casual Funeral Bearer with effect from 1/12/21”.

25. In fact the Claimant did not start work until 15/12/21.

26. The letter states in terms that it does not constitute a contract of employment, that the Claimant will work for a series of individual assignments, and that “there will be no relationship between you and the Company” (in between assignments). The letter also stated that “if the company offers you work on one or more occasions, that gives you no legal rights and does not mean that you have entitlement to regular work from the Company” and “The Company reserves the right to end an assignment at any time”.

27. The letter provided for holiday pay, statutory sick pay and the giving of notice in the event of termination.

28. A section of the letter entitled “Company handbook” states that “,,,,many of the policies in the company handbook will apply to you ….such as Data Protection, Confidentiality, Equal Opportunities …” .

29. In his evidence the Second Respondent confirmed that the R1 disciplinary policies and confidentiality requirements set out in the handbook would have applied to the Claimant throughout and not just during the time when he was engaged in a particular assignment.

30. When working on a particular assignment the Claimant had to provide the work personally, wearing the uniform and driving the First Respondent's vehicles, and carry out his work as directed and under the control of the Respondents.

31. The Claimant made himself available for most week-days each week but was not always able to do so and did not always offer work each week.

32. The Respondent kept records, the salient points of which were summarised in the Respondent's written submissions in paragraphs 30-32, the accuracy of which are not disputed. These show numerous gaps in the Claimant's service which exceed one week each, and the reasons for the gaps include such matters as the Claimant's unavailability; the Claimant's holiday; the First Respondent having no work for casual workers and work being simply dealt with in house by permanent staff; and finally the Claimant's services no longer being required and/or termination of the engagement. No temporary cessation of work, sickness, injury, arrangement or custom as contemplated by section 212(3) ERA 1996 has been alleged or proven.

33. In November 2023 the Claimant and the Second Respondent fell out and on 14/11/2023 the latter issued a letter of termination giving the Claimant 30 days' notice of the fact that "his services were no longer required". The 30 day period expired on 14/12/23. However the First Respondent did not offer and the Claimant did not perform any work for the Respondents during this notice period.

Conclusion

34. I find that during particular assignments the Claimant was an employee of the First Respondent because having accepted an assignment and while an assignment continued the Claimant was obliged to do the work personally under the First Respondent's control and direction while dressed in the First Respondent's uniform and using its vehicles and equipment. There was sufficient mutuality of obligation, control and personal service.

35. However each assignment was short and there were numerous weeks when the Claimant did not work and which "gap-weeks" are not able to be covered by section 212 ERA 1996, for the reasons already given.

36. Hence the Claimant cannot succeed unless he can show that there was an overarching arrangement which lasted at least two years and which was itself a single and continuous employment contract.

37. I have considered whether the arrangement evidenced by the letter which was issued in May 23 constituted such a contract and have concluded that it did not.

38. It states in terms that it is not an employment contract. That self-description is not decisive. The Tribunal must look at the reality of the situation, but the Claimant accepted that it accurately describes the work conditions.

39. Under it there was no obligation on the First Respondent to offer the Claimant work, and he was under no obligation to accept work in relation to a particular period. The First Respondent was not obliged to send out requests for availability to the Claimant or to give him any work at all. The Claimant was not obliged to agree to do any work by offering availability. In between assignments, the obligation to work and to provide and pay for work, ("the wage work bargain") were absent.

40. Furthermore the letter stated in terms that "if the company offers you work on one or more occasions, that gives you no legal rights and does not mean that you have entitlement to regular work from the Company." Hence even if the Claimant did expect further work as a matter of right, that was not well-founded.

41. I find that the letter was a background document explaining accurately how the individual ad-hoc assignments would operate, but that it was not itself an employment contract.

42. I considered whether the ongoing confidentiality obligations etc in the Company handbook (which covered both assignments and the period between assignments and after termination) were sufficient to bridge all the gaps so I could construe a single continuous employment contract, but concluded that they were insufficient. Confidentiality obligations can arise in many contexts and do not in themselves point to employment.

43. I have considered the same point with regard to the Claimant's ongoing susceptibility to the disciplinary procedures, but as stated in the St Ives case referred to above, no or little weight should be given to that.

44. Therefore, even though the Claimant was an employee of the Respondent during the currency of numerous successive assignments, he was not an employee between assignments and he is unable to rely successfully in section 212 ERA 1996 to bridge the gaps.

45. His arrangement with the First Respondent started in November 2021 and ended during December 2023, which is longer than two years, but he did not achieve two years' continuous service as an employee for at least two years, and so the Tribunal does not have jurisdiction to hear his unfair dismissal claim as identified in the previous case management order.

Employment Judge J S Burns
18/11/2024