EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr R Saravanan	**Acculegal Solicitors (a firm)**

PRELIMINARY HEARING

Heard at: **Watford** **On:** **17 February 2017**

Before: **Employment Judge McNeill QC**

Appearances:

For the Claimant: **In person**
For the Respondents: **Mr E Lewis, Solicitor**

JUDGMENT

1. The claimant was not an employee of the respondent within the meaning of section s.230(1) of the Employment Rights Act 1996. He therefore did not have the right not to be unfairly dismissed and his claim for unfair dismissal is dismissed.

2. The claimant was a worker within the terms of s.230(3)(b) of the Employment Rights Act 1996 and regulation.2 of the Working Time Regulations 1998. His claims for unauthorised deductions from earnings and holiday pay may therefore proceed.

3. The claimant was an employee within the meaning of s.83(2)(a) and (4) of the Equality Act 2010 and his complaints of discrimination may proceed.

REASONS

1. The respondent in this case is a small firm of solicitors with two partners, Mr Bajoori and Mr Tirumala, who both gave evidence before me. The respondent

engages other solicitors from time to time, sometimes on a long term basis. Those solicitors are always engaged on the basis that they are self-employed.

2. The matter was listed before me to determine preliminary points on the claimant's employment status.

Strike-out application

3. At the start of the hearing, I dealt with an application to strike out. The claimant applied to strike out the response on the basis that some documents in relation to a Mr Pillai had not been disclosed. It appeared that Mr Pillai had been sponsored and interviewed for a job towards the end of the period when the claimant worked for the respondent. It was not clear how these documents were relevant to the preliminary issues, although they may have been relevant to the substantive discrimination claim. If they had any relevance to the preliminary issues, it was minimal. Any failure to disclose could not justify the draconian step of a strike out and I dismissed the application at the start.

Facts

4. In August 2011 the claimant first contacted Mr Bajoori. The claimant is a practising solicitor. He said he was an authorised representative of an education and manpower consultancy and he wanted to discuss referral business. Mr Bajoori gave the claimant some temporary unpaid work experience in about September 2011. The claimant was then a Tier 4 general student in the UK studying for an LLM. There was discussion between the claimant and Mr Bajoori in late 2011 in relation to the claimant potentially working for the respondent on a self-employed commission basis.

5. During 2012 the claimant sought to persuade Mr Bajoori to apply to the Home Office for a sponsor licence to become a licensed sponsor under the Tier 2 provisions. Mr Bajoori could then sponsor the claimant for further leave to remain in the UK. The standard occupational classification SOC Code required an annual salary of £39,000 to sponsor a newly qualified solicitor. The respondent was not in a position to pay this amount and Mr Bajoori told the claimant this.

6. The claimant was persistent. He wanted to remain in the UK. His children were performing well at school and he himself initiated the sponsor licence application on behalf of the respondent in August 2012. He proposed a business plan to Mr Bajoori. He said that if he was sponsored as a self-employed individual, he would use his contacts in the Indian legal market. He had worked as a solicitor in India for some 17 years. He said he would attract work with a minimum billing of £100,000. On that basis, he could earn £40,000 being 40% of the £100,000 which was required by the SOC Code.

7. In November 2012 the claimant sent an email to Mr Bajoori, referring to page 81 of the Tier 2 Sponsor Guidance, where it was stated that a Tier 2 employee could be self-employed. The claimant sought to persuade the respondent to sponsor him specifically on the basis that he would be self-employed. That was very

much at the forefront of the discussions. This would be advantageous to the claimant and is what he suggested to the respondent.

8. The sponsor licence application was made in August 2012. A copy of that application was at page 40 of what has been called the "disputed bundle". It was a dispiriting aspect of this case that, although both parties were solicitors, there was a distinct lack of cooperation in preparing for the hearing, including in the preparation of bundles.

9. The claimant was very much involved in the process of his own recruitment. He drew up or was instrumental in the drawing up of a job description for India Desk Solicitor in September 2012. It was a requirement of the certificate of sponsorship that the resident labour market test should have been met and that the relevant job should have been advertised in two places. That was done.

10. The claimant initially worked for a company called Haslaw & Co and they issued a certificate of sponsorship on 26 October 2012. However, the claimant continued to want to work for the respondent and he continued to be in contact with Mr Bajoori. The claimant made an application for further leave to remain under Tier 2 which was approved by the Home Office on 11 December 2012. He was granted leave until 11 November under the sponsorship of Haslaw & Co. The respondent advertised the India Desk post and the claimant continued to seek to persuade the respondent that they should take him on.

11. In February 2013, the claimant applied for the job that was advertised. He enclosed a CV, said why he wanted to join the respondent firm and said that he was confident that he would be billing not less than £100,000 in the first year and would be able to manage the India Desk as an excellent one. He said he would welcome the opportunity to discuss his application in person. It is noted that the claimant at no time achieved anywhere near the £100,000 billing promised.

12. The Certificate of Sponsorship from the Home Office, filled in by the respondent, referred to normal weekly hours of 37.5 and gross 'salary' of £40,000 per year. It was said that the job was not on a client contract and that the resident labour market test had been met. Mr Bajoori said, and I accepted, that there was no place on that online form to say if the job was going to be on a self-employed basis, although it was common ground between the claimant and the respondent that an individual engaged under a Certificate of Sponsorship may be self-employed. This was confirmed, amongst other places, in an email sent from the business help desk at the Home Office to the claimant in November 2013. It stated in relation to Tier 2 and the guidance: "If the migrant is working on a self-employed basis there must be a contract for employment/services between you and the migrant. This contract must clearly show…" and then it refers to names and signatures, staff mandates, the contract details of the job and an indication of how much the migrant will be paid and then there is a reference to reporting duties and the importance that if the individual is to be self-employed, then the engaging organisation must still be able to meet the reporting duties.

13. The application for a Certificate of Sponsorship was approved on 9 May 2013 in a letter from the UK Border Agency. That approval was confirmed. It said: "Positions given for the employment detailed below"; there was reference to the

respondent's job title "solicitor" and a salary of £40,000. The claimant wanted to start the job straight away. I was taken to a document in the joint bundle, page 67, which set out various options including an Option 1: "self employed". It was a document prepared by the claimant. It set out the advantages for him of being self-employed, the advantages for the employer and then it referred to the documents to be maintained for the UK Border Agency. The claimant wrote at the top of this document: "I prefer Option 1 as it is good for both the firm and me." It was very clear that the claimant's preference was to be self-employed.

14. There was a dispute between the parties as to whether that document was produced by the claimant in around May 2013 or, as the claimant said, around March to April 2014. I concluded, having looked at all the documentation and accepting that it was important to the claimant from as early as 2012 that he should be self-employed, that it probably was produced in May 2013.

15. I was taken to a written agreement which was a standard form agreement. It was dated 16 May 2013 and on the final page of the agreement there were two signatures: Mr Bajoori and the claimant. There was a dispute between the parties in relation to this document. The respondent said that the claimant signed it in May 2013 and was given a copy at that time. The claimant said that he only signed the document on the final page. He was not given a full copy of the agreement and only signed the final page in 2016 about two months before his engagement terminated.

16. It was surprising that two solicitors should give such different versions of events in relation to a contract and it would have assisted if there had been witnesses to the signatures or indeed a signature on each page or something confirming that the contract had been read in its entirety. I weighed up the evidence in order to determine whose account was more probable and concluded that the claimant did sign the contract in around May 2013. It may not have been as early as the respondent said but I concluded that it was close to when he started working for the respondent. The terms of the contract specifically stated that it was for a three year term and that the claimant would be self-employed: the respondent would engage the claimant "on a self-employment basis". Later in the contract there was reference to employment and indeed termination of employment.

17. There were general terms set out at paragraph 2 of the contract that the claimant would work under the supervision of the firm. Clients introduced to the firm by the claimant would be the firm's clients. The claimant would be responsible for the conduct of all clients and clients' matters subject to supervision. There was reference to the billing of a minimum of £40,000.

18. The claimant continued to work for the respondent from 16 May 2013 to 21 May 2016 when his engagement terminated. During the time he worked for the respondent, he brought in a significant number of his own clients. He was not paid any regular salary but payments were made to him from time to time. He said in his ET1 that he was paid a total of just over £59,000 over the three years, which he said was about half of what he was due to be paid. He worked in the office but his attendance was sometimes erratic: he did not work a regular five days a week during normal office hours.

19. At page 113 of the joint bundle I read an email from the respondent to the claimant of 1 April 2016. In the context of locks being changed and the claimant not having a key, it was stated: "you are neither the first person to come to the office nor the last person to leave. On the contrary your attendance has been very irregular and erratic to say the least." and then there was reference to not staying in the office when requested.

20. If the claimant was sick he would phone in; his holidays would be agreed with the respondent; he would let the respondent know to an extent what he was doing on a day to day basis, for example if he had been in court he would let them know when he finished. He was supervised by the respondent in accordance with their regulatory responsibilities and was covered by their professional indemnity insurance. Client care letters to the clients that he had brought in would go out in the respondent's name. The claimant could not sub-contract his work to anyone outside the firm.

21. The claimant had a degree of autonomy, beyond autonomy in the normal professional sense. He only worked with clients that he had brought in to the firm. He did a significant amount of marketing on his own behalf and for his own benefit: although successful marketing also benefitted the respondent. He went to India in June/July 2015 for a marketing visit and requested and was given permission to go on those dates. He was there for at least a month it appeared, although the respondent's view was that no work came in as a result of that visit. In short, there was a degree of control exercised by the respondent but the claimant essentially carried out his own work as he thought fit. If he did not have any work to do, he did not have to attend the office.

Law

22. Under s. 230(1) of the Employment Rights Act 1996 (ERA), an "employee" is "an individual who… works under (or…worked under) a contract of employment.

23. Under s. 230(3)(b) of the ERA, a "worker" includes a person who worked under a contract of employment or: "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". Regulation 2 of the Working Time Regulations 1998 (WTR) is in identical terms.

24. Under s. 83(2)(a) of the Equality Act 2010 (the EqA), "employment" means: "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

25. I was referred to the case of **Autoclenz Ltd v Belcher** [2011] ICR 1157and to **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51.

26. In **Autoclenz,** the Supreme Court held that in determining employment status, the essential question was: "what was the true agreement between the parties?". A written contract might not reflect the true agreement between the parties.

27. In **Pimlico Plumbers v Smith,** the Court of Appeal considered the principles for determining whether an individual was a 'worker' within the meaning of the Employment Rights Act s. 230(3)(b) and regulation 2 of the Working Time Regulations and whether a particular working situation fell within the definition of 'employment' in s. 83(2)(a) of the Equality Act 2010.

28. At paragraph 84 of the judgment, the Court set out the principles applicable to determining whether there was a requirement for personal performance.

Submissions

29. The claimant submitted that there was no written contract between him and the respondent. There was an implied contract. He relied on the Certificate of Sponsorship document and to the references in that document to normal working hours and the salary of £40,000 as giving rise to an implied contract.

30. The respondent disputed that the claimant was employed under a contract of employment or a worker.

Conclusions

31. I could not imply a contract from the Certificate of Sponsorship. The claimant did not refer to any of the usual tests for implication of a contract, such as the tests of necessity or the officious bystander test, in submitting that I should imply a contract from a document that was plainly not intended to have contractual effect but was, as it said on its face, a Certificate of Sponsorship.

32. In any event, there was a written contract in this case which provided that the claimant would be self-employed. The labelling of the arrangement as self-employment was not, in itself, determinative. As in **Autoclenz**, it might not reflect the true agreement between the parties.

33. However, the respondent never paid the claimant a salary and the claimant never asked for salary. The claimant said that his salary was only due at the end of the year but, even at the end of the year, he never asked for salary. The claimant registered as self-employed in early 2014 for tax purposes. Again, this was not conclusive as to the claimant's employment status but it pointed to the understanding of the parties as to the nature of their arrangement.

34. The claimant was expected to and did bring in his own clients. He was not provided with clients by the firm. Although there was some degree of control by the respondent, as set out in the findings of fact above, the claimant had a high degree of autonomy, both in relation to marketing and to the hours that he worked.

35. The Home Office document did not prohibit self-employment. On the contrary both parties accepted that the claimant could be self-employed.

36. The claimant relied on an email at page 70 of the joint bundle which referred to how much the migrant would be "paid". He submitted that this indicated that he was employed under a contract of employment. I rejected that submission. Being paid was equally consistent with self-employment and indeed £40,000 billing was referred to in the written agreement.

37. In all the circumstances and taking into account all the above factors, I concluded that the claimant was from the start engaged by the respondent on a self-employed basis. That was what both parties intended and understood. The claimant was not employed under a contract of employment within the meaning of s. 230(1) of the ERA and his unfair dismissal claim failed and was dismissed.

38. I then considered whether the claimant was a "worker" within the meaning of s. 230(3)(b) of the ERA and regulation 2 of the WTR and whether he was employed under a contract "personally to do work" within the meaning of s. 83(2)(a) of the EqA.

39. Dealing with the EqA definition first, I concluded that the claimant was employed under a contract personally to do work. He was required to carry out his work himself, subject to being able to delegate work within the firm, and this was not work that he could sub-contract to anybody else or supply a substitute.

40. As to whether the claimant was a worker under the ERA and the WTR, the claimant was working under an express contract under which he undertook to do or perform personally work for the respondent. The respondent was not his client or customer and he was not carrying on some separate professional business undertaking.

41. On that basis, the claimant was entitled to bring his claims for unlawful deductions and holiday pay under the ERA and WTR.

42. On the basis that the above claims would proceed, after discussion and after agreeing that the provisional dates listed for the hearing would be vacated and that the hearing would take place on 25th to 28th September 2017 inclusive at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP to deal with issues of liability, and remedy if appropriate, the following orders were made.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Further information**

   1.1 The respondent will disclose to the claimant by **3 March 2017** the CV interview notes and letter of offer to Mr Pillai together with email correspondence in relation to his recruitment.

2. **Bundle of documents**

2.1 By **7 August 2017** the claimant will send an index to the proposed joint bundle to the respondent. The respondent will notify anything they wish to add, to the claimant, by **14 August 2017**.

2.2 The claimant will send the respondent a full, indexed, paginated bundle to arrive on or before **21 August 2017** and will bring six copies of the bundles to the hearing.

3. **Witness statements**

3.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

3.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

3.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

3.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

3.5 It is ordered that witness statements for the main hearing will be exchanged by **4 September 2017**.

Judicial mediation

1. I raised the possibility of this case being considered for an offer of judicial mediation. I explained how the process operates and provided a note giving a full explanation of the judicial mediation scheme. I emphasised that this was just an enquiry as to whether the parties would be interested in the Regional Employment Judge considering whether the case would be suitable for an offer of judicial mediation.

2. The parties will notify the tribunal jointly if they wish to proceed to judicial mediation, such notification to be given by **17 March 2017**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be

struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

_____

Employment Judge McNeill QC

Sent to the parties on**:**

8 March 2017…….

For the Tribunal:

……..