EMPLOYMENT TRIBUNALS

Claimant: Mr Z Iqbal

Respondent: The Department for Work and Pensions

Heard at: Manchester **On:** 19 March 2020

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr D Mold of Counsel
Respondent: Ms R Levene of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claims of unfair dismissal and for unpaid notice pay, insofar as they are based upon the contention that the claimant was an employee or a worker, as statutorily defined, having been withdrawn, they are dismissed upon withdrawal.

2. The claimant's case that he was a contract worker as defined in section 41 of the Equality Act 2010 has no reasonable prospect of success and/or was conducted unreasonably and is dismissed.

3. The claimant is ordered to pay the sum of £1,000.00 as a contribution toward the respondent's costs, such payment to be made on or before 1 July 2020.

REASONS

1. By a claim form presented to the Tribunal on 12 July 2019 Mr Iqbal brought proceedings against the Department for Work and Pensions ("DWP") for unfair

dismissal, race and sex discrimination, unpaid notice pay and stated he was making a claim for unfair dismissal. He was represented at that time, and has been throughout these proceedings, by Liberty Law Solicitors of Luton.

2. The grounds of claim, at pages 14-23 of the bundle, indicate that particulars of the claim were prepared by solicitors with professional expertise in the field. They refer to the issue that I have had to consider at this hearing of employment status.

3. At paragraphs 25-27 the claimant asserts that: he was an employee wo worked under a contract of service and/or a contract of employment for the DWP; alternatively that he was a worker under a contract personally to provide services. He did not assert the possibility that he was a contract worker within the meaning of section 41 of the Equality Act 2010. He claimed unfair dismissal or constructive unfair dismissal. The respondent defended the claims.

4. The matter came before EJ Leach on 1 November 2019 when both parties were represented by counsel, albeit I accept the claimant was represented by a different counsel from counsel who has appeared this morning. At that hearing EK Leach set down this preliminary hearing to determine the issues of:

(1) Whether the claimant worked under a contract of employment within the meaning of section 230 of the Employment Rights Act 1996;

(2) Whether he worked under any other contract within the meaning of section 230(3);

(3) Whether he worked under a contract of employment, apprenticeship, or a contract to do work personally under section 83(2);

and he then continued:

> "If the claimant was not employed under such a contract referred to in (3) above, does any other section of the Equality Act apply including section 41, so that the Tribunal has jurisdiction to the employment claims made under the EA or are all claims dismissed?"

5. At point (5) on page 53 of the bundle there was an issue raised about the basis of fair and open competition for a civil service appointment. EJ Leach also identified the questions, if any of the claims survived after these preliminary issues, whether any claim should be struck out on the basis that it had no prospect of success or should there be a deposit order.

6. There were orders made for the preparation of the bundles and the witness statements for these proceedings, and in fact witness statements were only exchanged (as I understand it) at the start of this hearing.

7. Consideration was given to the Presidential Guidance which was issued on the day before the hearing day in respect of the COVID-19 virus, but the hearing proceeded. The respondent had proofed four witnesses who attended the hearing and the claimant brought a supporting witness.

8. Whilst I was reading the witness statements, counsel indicated that the claimant would not proceed with the employee/worker argument. That issue was withdrawn and the claims that rely upon such a finding are treated as withdrawn. However, the claimant wished to pursue the argument section 41 of the Equality Act 2010.

9. As to that, the solicitors for the claimant had served in November 2019 (pages 58 and 59) a document headed "Employment Status", asserting that the claimant would contend that he was discriminated against contrary to section 41, the respondent being the principal in question, but the document did not go on to deal with the other aspects of section 41.

10. Section 41, so far as it is relevant, provides that a "principal must not discriminate against a contract worker" (in a number of respects), nor harass them nor victimise them.

11. The terms principal, contract work and contract worker are defined in subsections (5)-(7):

> "(5) A 'principal' is a person who makes work available for an individual who is –
>
> (a) employed by another person, and
>
> (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
>
> (6) 'Contract work' is work such as is mentioned in subsection (5).
>
> (7) A 'contract worker' is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)."

12. For the purposes of the analysis the parties accepted that the claimant must be the individual and the Department for Work and Pensions would be the principal. Furthermore, the respondent accepted that if it was found that Mr Iqbal was employed by another person, and for these purposes that meant one of two companies, he would have been supplied by that other company in furtherance of contracts which came within section (5)(b).

13. However Ms Levene, upon hearing of the concession in relation to employee/worker, nonetheless persisted in the contention that the claimant was not employed by another person, and this caused some difficulty, because it required Mr Mold on behalf of the claimant to make an application that the claimant be allowed to adduce further evidence, and the reason for that is as follows.

14. The claimant had been approached with a view to working for DWP because of his expertise in a particular kind of technology. The company that approached him, Smart Sourcing PLC, in order to put the claimant forward had to do so via another agency, which was either Capita or another agency which provided what is

called “contingency labour” for the DWP. The identity of that intermediary does not matter.

15. The claimant was told, according to his case, that he had to supply his services via a company himself. For those purposes he caused to be incorporated, on 15 December 2015, EMM Consultants Limited of which he told me, and I accepted, he is the sole proprietor and director. Indeed, page 89 confirms there is one share and that he is the holder of it, and he is also the director.

16. The contractual basis then by which the claimant came, through a series of contracts, to be supplied to work for DWP is set out in a set of terms and conditions for the provision of contractor services (pages 140-161).

17. That contract describes Smart Sourcing PLC as “the supplier” and EMM Consultants Limited as “the company”. It is a contract whereby EMM provides services to the “contracting body” (DWP) through the agency of the supplier by supplying the work of the individual.

18. It is common ground there is nothing in that contract which indicates that the claimant is other than the director of EMM Consultancy, and that emerges from his signature to the contract which he signed in his capacity as director on 7 May 2018 save to say that he is described in schedule 1 (page 159) as “the individual”.

19. The description of the services of the individual was an “MDM Administrator” and the hours of work were stated to be “8 per day” for which the supplier was to pay EMM at the rate of £500 a day. The contract stated that in consideration of the payment by supplier EMM would make the individual available to DWP to supply the services for assignments for what was described as a “Contracting Body Contract”. That is in fact what happened.

20. Although this arrangement began in early 2016 Mr Iqbal told me informally during the course of argument that a similar contract was signed at the outset and similar contracts again when the contract was renewed. For this reason I infer that the document to which I have referred covers the period between June 2018 and June 2019. I suspect it is the last in a series of materially identical such documents. Neither party suggested otherwise.

21. The difficulty that Mr Mold faced in pursuing the section 41(b) argument in the light of Ms Levene’s objection was that Mr Iqbal in his witness statement says nothing about his relationship with EMM, the company he set up in order to obtain this work. His statement is framed in terms such as these: “I received an offer letter”; “I incorporated EMM Consultants to get the job”; “I signed an agreement with Smart Sourcing who acted as a middleman” and he stated “I communicated with Smart Sourcing and Smart Sourcing communicated with Capita”. All of that may be true but it tells me nothing about the relationship that he had with EMM Consultants.

22. It is I think accepted on the claimant's behalf that no memorandum under the Companies Act was prepared and no contract between himself and EMM was set up. There is an issue as to whether the money paid to EMM was properly accounted for to HMRC, but I do not place any reliance upon that because I do not know what tax returns were filed on behalf of EMM. It appears that the tax returns filed on the

part of Mr Iqbal do not reflect the entirety of the money he earned or would have earned, but I make no precise finding to that effect.

23. It was, in effect, accepted by Mr Mold that he needed to adduce additional evidence from Mr Iqbal in order to support a submission that the claimant was employed by EMM.

24. Directors are officeholders who may be but are not necessarily employees of the company. I do not know whether the claimant knew that at the time. He may well not have done. However, it is something that would have been known or should have been known to anybody who was advising him at the time.

25. The result of this was that very late in the day Mr Mold was forced to make an application to adduce oral evidence. He did so in the face of strong objection from the respondent. Having regard to the fact that the claimant and his solicitors had clearly been on notice of the need to set out his case and establish it evidentially, I took the view that it was too late and that the balance of prejudice weighed against granting permission to expand upon the witness statement. The fact that they were so aware is best demonstrated by the fact that in November 2019 the claimant's solicitors had served a document referring in terms to s 41.

26. For that reason, Mr Mold was constrained to argue the s 41 point before me based on submissions only and upon the documents. The documents establish, in my judgment, only one thing: and that the high point of the claimant's argument is that he asserts, at least by implication, that he was an employee of EMM Consultants. Many directors make that assertion. It requires evidence in order to prove it on the balance of probabilities. This the claimant failed to do.

27. The next submission that Mr Mold made on behalf of the claimant was that the agreement to which I have referred at paragraph 16 above and following should be treated as a sham. He submitted the claimant was therefore acting on behalf of EMM and because it was sham it effectively showed there was a contract of employment between the claimant and Smart Sourcing PLC.

28. Without referring to specific passages of the authority Mr Mold referred to the Supreme Court's decision in **Autoclenz Ltd v Belcher & Ors** [2011] ICR 1157. Mr Mold accepted that the facts of **Autoclenz** (which I need not recite) are far different from these. In rejecting the submission of sham I take into account the following sections of the contract.

29. Section 9 provides for the company to indemnify the supplier and the contracting body. Section 8 identifies EMM as an independent contractor and states that nothing shall create a contract of employment, a relationship of agency or partnership or joint venture between the company or the individual and the contracting body. Perhaps most significantly in this regard, section 19 on transfer, subcontracting and substitution permits the company to provide an alternative named individual who has appropriate skills and expertise.

30. It was put to me that Mr Iqbal was the equivalent of Mr David Beckham, the world-renowned footballer, and how a contract for Mr Beckham to open a shopping mall could not be a contract of anything other than employment because nobody

else could be Mr Beckham. Whilst I bow to nobody in my admiration for Mr Beckham, nor indeed necessarily to Mr Iqbal in his particular form of technology, it seems to me that whilst his unique status would certainly be well-known to the contracting parties in the Mr Beckham situation, there was absolutely no evidence before me that it was known to Smart Sourcing, or DWP that the claimant was his technological equivalent.

31. Even if I were to accept that Mr Iqbal, may be the only person provide this particular service for DWP, in my judgment nothing turns on that. There is nothing in this arrangement, which is a requirement apparently by Smart Sourcing, that they would only enter into a contract with the claimant's own company, that suggests that that is anything other than a normal process.

32. The mere fact that in reality the clamant might not have been able to provide a substitute if he had been unwell does not, in my judgment, elevate this to anything like the position in **Autoclenz** or suggest that the contract was a sham.

33. Moreover, Ms Levene makes the reasonable submission that it had never previously been suggested in this case that the claimant was ever potentially an employee of Smart Sourcing PLC.

34. I think it is fair to say, although I have not canvassed this with counsel, that Mr Mold would have needed permission to amend in order to succeed in this argument. I did not deal with it in that way because I considered there was nothing in the point. However, I record that even if I had thought there was something in the point, I would not have been minded to grant an amendment in these circumstances and at this stage, particularly without any notice to the respondent.

35. So for those reasons I am driven to the conclusion that Ms Levene's submission on section 41 of the Equality Act is right and the claimant was not employed by the supplier. She relies in support of this on the document at page 226, which is an email from Mr Iqbal on 14 February 2019 to (I believe) workers or employees of the DWP. It is headed "To whom it may concern" and the relevant passage bearing in mind that this was around the time when the claimant either resigned or his assignment was terminated, said this:

> "As a contractor, I fully appreciate that being self-employed doesn't give you a contractual security and hence why services from contractors are used to work on specific projects, without increasing overheads on an organisation. So it is not my lack of understanding around my status or role within the organisation which I am questioning, rather the manner in which it has been handled."

36. Ms Levene submits that this in effect undermines fatally any of the claimant's assertions that he was an employee. It seems to me that that is a relevant consideration in considering whether the claimant has satisfied me that he was in fact or in law an employee. As to whether it bears other significance in the light of the application for costs to which I now turn I am less persuaded.

37. The claimant having failed to establish any basis upon which this tribunal has jurisdiction to determine his claims, the respondent made an application for costs.

38. It does not seek them all. Ms Levene asked me to award under the relevant rules, £5,000 as a contribution towards the costs of the respondent. She informed me that at this stage of the proceedings i.e. in the preparation for this hearing she has spent some 20+ hours (maybe 25 hours I estimate because she had not included her time at the hearing itself) which, as a Government instructed lawyer, she charges out at £110 plus VAT. That would represent in broad terms three fifths of the £5,000 that that she seeks to have me award. She points out that they have had to have four witnesses attend at the hearing and there was clearly a lot of late correspondence with regard to the adequacy of evidence and disclosure, including the claimant's tax return to which I have already referred which had only previously been provided in redacted form. It may be a matter for other bodies as to whether that is relevant and the significance to be attached to that.

39. The respondent's application is that this was a case that could not have properly have got off the ground. As to the argument of being a contract worker, there was no evidence of employment with EMM or Smart Sourcing. There was no disclosure on the point, and the claim should have been properly seen by solicitors as exceptionally weak. She relies on the claimant's own email which I have quoted above. She submitted that the claimant had known of his true status throughout and accordingly the claim was unreasonably or misconceived.

40. She raised the possibility of an order for wasted costs but that was put to one side while I first considered whether an application for costs against the claimant might succeed. Ms Levene described the whole basis of the claim as being misconceived and the claimant and his advisers had acted unreasonably in the bringing of the proceedings. She submitted the claimant was a man of means as his earnings of £500 a day over a number of years showed, and therefore an order should be made in the sum claimed.

41. On behalf of the claimant Mr Mold submitted if the respondent had really thought there was nothing in this case it would have sent a warning letter. It would have prepared a costs schedule. There was no correspondence between the solicitors with regard to the merits of the case and the claimant's email was not a definitive document for the purposes of deciding whether the claimant had acted unreasonably.

42. I gave Mr Mold an opportunity, primarily to take instructions on the claimant's means. He told me directly that there was no reason based upon want of means for not making an order up to the sum that Ms Levene had advanced.

43. Mr Mold also informed me that that he had checked with Mr Iqbal's solicitors who confirmed that the claim was insurance backed covered by household insurance and the claimant had been advised on a 51%/49% test that he had prospects of success, and he proceeded on that basis. Mr Mold (who had not previously been instructed) took a different view and advised the claimant accordingly. At this point Mr Mold had seen the witness statements for the respondent, although he did not suggest that there was anything in the respondent's witnesses' statement that was germane to the advice he had tendered.

44. I suspect that, had he been instructed at an earlier stage, Mr Mold's advice to the identical effect would have been tendered at an earlier stage. He submitted that

the claimant should not be criticised for unreasonably conducting the proceedings when he had received advice to that effect.

45. Ms Levene in reply repeated her earlier arguments.

46. The proper basis for determining this application is to consider the relevant rules. The Employment Tribunal Rules of Procedure 2013 rules 74-78 and 84 are relevant. I do not need to quote them in full. Rule 76 provides:

> "A Tribunal may make a costs order and shall consider whether to do so whether it considers that a party or the party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted, or any claim or response has no reasonable prospect of success."

47. The costs order may be for a specified amount not exceeding £20,000 and the Tribunal must, in deciding whether to make an order, and, if so, in what amount, have regard to the paying party's ability to pay.

48. I have the rule squarely in mind.

49. I do not think that it is open to me to go behind counsel's submission that the claimant has received different advice and the advice on a later occasion has been less fortunate as far his case, and indeed the respondent's position, is concerned, However, there is always the risk when you come to the Tribunal, whether it be the court or the Tribunal, that you will succeed on some of your claims but not on others. You must be prepared to establish all of them.

50. The reality of this case is that on the state of the evidence as prepared by Mr Iqbal and his solicitors I take the view there was no reasonable prospect of success of ever establishing the basis upon which the claim has been argued. Although I have only been required to consider in detail the section 41 argument, it reveals that the withdrawal of employee or worker status was correct for, on the basis of the documents that I have seen, I should have been likely to come to the same conclusion.

51. It is right to say that the later reliance on section 41 would not have added very much in actual cost to the respondent but it has had some effect. The amount of costs that I could award, if I considered that there should be an order, will not mathematically match the time spent on dealing with the argument, nonetheless it must bear some proportion to it. I accept that in preparing the case it is a matter that the respondent will have had to engage with even though the claimant did not. The failure to prepare properly to establish the facts to pursue a part of a case is also unreasonable conduct of proceedings.

52. Looking at these matters overall I conclude the respondent is entitled to an order for costs. Whilst I can see that the claim in respect of employment worker status might now be said in retrospect to have had no reasonable prospect of success, and whilst that would have been an issue which was really encompassed in the employment status issue, it is not so clear to me that I can say that a costs order

on that basis alone should have been made. However, I take into account the fact that the claimant has late in day, albeit with different advice, withdrawn those aspects of the claim.

53. I think that my discretion is certainly triggered in my judgment by the total lack of prospect of success of the section 41 claim. I think it is right to make a costs order but to make it in a lower figure than that sought by the respondent. I therefore order that the costs to be paid by the claimant as a contribution to those of the respondent be limited to and shall be in the sum of £1,000.

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Employment Judge Tom Ryan

Date: 2 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
2 June 2020

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