EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 31 January 2024

Claimant: Mr Ali Mejri

Respondent: Riddledown Collegiate Multi Academy Trust

Before: Employment Judge Fowell

Representation:

Claimant In Person

Respondent Mr Ezra MacDonald of counsel

JUDGMENT

Rule 37 Employment Tribunal Rules of Procedure

1. The claim of unfair dismissal is struck out on the basis that there is no reasonable prospect of the claimant showing that he was an employee within the meaning of Employment Rights Act 1996.

2. The claim of unlawful deduction from wages is dismissed on withdrawal by the claimant.

3. The claimant's remaining claims of harassment, discrimination and victimisation will proceed to a hearing on **22 January 2025**

REASONS

Background

1. This is a public hearing, and the first hearing in this case, so there was no prior opportunity to make suitable arrangements for it. A notice of hearing was sent out simply stating that the hearing was to decide employment status, and there were accompanying orders that each side provide any relevant documents in advance of the hearing. There was no direction for the exchange of witness statements.

2. The School nevertheless took the initiative and provided a witness statement from Mrs Katie Turner, the Principal and Director of Education. Essentially this was an explanation of Mr Mejri's working arrangements and made reference

to the various documents in the bundle on which the School relies. It is not a first-hand account of any of the events in question.

3. Given that Mr Mejri had not been required to provide a statement I concluded that the hearing would have to proceed on the basis of submissions only. Preliminary hearings are usually divided into two types. Either the tribunal can hear evidence from both sides and make findings of fact and then a final determination of the issue or it can simply hear submissions on each side about the prospects of success of a particular argument.

4. Where an argument has *no* reasonable prospects of success it can and should be struck out. Where it has *little* reasonable prospects of success a deposit order, i.e. the requirement that the claimant pay a sum of money as a condition of being allowed to continue with that allegation or argument, can be made

5. It is not clear what the intended approach was when this case was listed. The School, having prepared evidence and detailed documentation, invited me to make findings of fact and to finally resolve this issue. Sympathetic as I am to that approach, there is a fundamental unfairness in proceeding on the basis of evidence from one side only. It would also be unfair and unsatisfactory to make findings of fact purely on the basis of the documentary evidence without hearing from each side. My preferred approach therefore has been to approach it as an application for a strike out. There was in fact an application for a strike out at the bottom of the response form where it states:

> "We would request a preliminary hearing to have the matter struck out should the tribunal not be inclined to strike out without such a hearing."

6. That seems to have prompted this hearing and so there appears to be no prejudice to the School in doing so.

7. The next question however is what to make of the documentary evidence. Both sides were ordered to provide relevant documents and although Mr Mejri has not supplied any of his own, there is no obvious gap in the record. The best approach, I concluded, is neither to ignore the documents nor to make definitive findings of fact based on them, but instead to make use of them as setting out the essential background to the dispute, mindful of the fact that not everything is apparent from the written page and there may be context to be provided by oral evidence in due course, or even further documents.

8. A further significant difficulty was that Mr Mejri, either through some oversight or technical issue, had not received or noticed a copy of the bundle and so was not prepared to deal with this issue immediately. Since a full day had been allocated to this hearing I adjourned until 1 pm to allow time for him to consider the contents of the bundle. This consists of about a hundred pages plus tribunal paperwork but most of the contents are familiar to him. The main items are the various email exchanges about his coming to work at the School, the subsequent invoices, and the records of the investigation into his allegations of harassment and discrimination. For today's purposes it is not necessary to go through those in any detail although the process adopted by the School is a relevant consideration.

The Factual Position

9. I will set out, therefore, the basic factual position as it appears from the documents. These are not findings of fact. Instead they are intended to be a neutral statement of the position, mindful of the need to take the claimant's case at its highest.

10. In April 2023 the School's Facilities Manager, Mr Steven Sayer, contacted Reed Specialist Recruitment (Reed) about a plumber to do some urgent jobs around the School. Reed put Mr Mejri forward [46] on the basis that he had

    a) a full UK Driving Licence,

    b) multi-trade skills,

    c) his own tools and own vehicle,

    d) a clean enhanced DBS check (which was required for a School), and

    e) a reference.

11. Mr Mejri started on Tuesday 2 May 2023 at an agreed rate of £35 per hour [42]. Mr Mejri was interested in a temp to perm contract in due course. As a temp, he was described by Reed as a temporary candidate throughout [49]. This confirmation email confirms his start date, that there was no end date, and it states that he was engaged by Reed on a contract for services. He was to be responsible for payment of his own tax and national insurance.

12. Unusually perhaps, Mr Mejri was not contracting with Reed directly but through a service company called Sapphire DNP Limited. Mr Mejri volunteered the fact in his submissions that they deducted his tax and national insurance.

13. Regular timesheets were then submitted by or on behalf of Mr Mejri and approved by Mr Sayer [56]. The first invoice, for the week ending 5 May 2023 [55], was for £1,520 including VAT, based on 36.2 hours work. It directed payment to Reed and provided their bank details.

14. There was then another invoice for the week ending 12 May [58] and after that, the arrangement changed. He went from being an agency worker to being engaged directly. From then on the invoices are from Mr Mejri personally, not from Reed, and payment was made directly to his bank account. The hourly rate also changed. Instead of £35 it was now £24.

15. These invoices record his hours of work. Each shift started at 8 or 9 or 10 am and ended at some time between 17.30 and 21.00 every day, usually amounting to 9 hours or more [113]. At the bottom of each invoice Mr Mejri wrote "Thank you for your business".

16. These invoices and the corresponding daily work continued throughout May and June, and the last invoice is for 29 June 2023 [118]. A row broke out that day between him and Mr Sayer. It became heated, and Mr Mejri made a

recording of it on his phone. According to the subsequent investigation report [102] Mr Sayer was swearing and irate.

17. Mr Mejri then went to see Ms Susan Sparks, who is Ms Turner's PA, and told her that he had been subject to racist language. He said this was the second time. The next day, 30 June, it seems that there was a further row, or a continuation of the same row, and he went to see her again. This time he had another recording, in which Mr Sayer was also telling him to "get out of my fucking School" [67]. For today's purposes it is not necessary to go into all the details but it led to an extensive investigation. The report [112] dated 19 July 2023 followed an interview with Mr Mejri, Mr Sayer and five other members of staff. It is clear that Mr Sayer told him to go and not to come back, and even took Mr Mejri's tools out to his vehicle.

18. The investigation concluded that there was not enough evidence of racist comments on 29 June, but [104]:

> "an alternative course of action should have been pursued to terminate ZM's ***employment*** and to provide him with clear advice about how to make any formal complaint to avoid the prolonged and heated exchange." [Emphasis added]

19. The investigation was conducted under the School's grievance procedure, which provides:

> "The aim of this Grievance / Complaints Policy & Procedure (the procedure) is to achieve fair and equitable treatment for all employees of The Collegiate Trust (the Trust) in relation to the management of grievances in the workplace. The procedure applies to all employees of the Trust. This procedure does not form part of any employee's contract of employment and it may be amended at any time."

20. The term "employee" is used throughout, together with "staff" and "member of staff".

21. For completeness, Mr Mejri was never on the School's payroll system, And he had none of the usual benefits of an employee (under the Employment Rights Act 1996) such as annual leave or sick pay. He provided his own tools and equipment and they regarded him as a self-employed contractor throughout.

22. There is also a contractor agreement [117-118] which provides that the contractor will agree his employment status with the School in advance and submit timely invoices, but it is not signed and there is nothing to show that it was ever provided to Mr Mejri. Even if it had been, it merely provides that they agree the employment status and there was no such agreement.

The relevant legal tests

Employment under the Employment Rights Act 1996

23. Section 230(1) ERA defines an employee in a rather circular fashion i.e. as:

> "an individual who has entered into works under (or, where the employment has

ceased, worked under) a contract of employment".

24. Section 230(2) defines a contract of employment as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

25. The purpose of that definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand, and self-employed individuals or independent contractors on the other; i.e. between those working under "a contract of service" and those working under a "contract for services."

26. Guidance on the approach to this question has been provided by the higher courts on a number of occasions. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433 QBD the court set out the following three questions:

    a) Did the worker agree to provide his own work and skill in return for remuneration?

    b) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of [using the language of the day] master and servant?

    c) Were the other provisions of the contract consistent with its being a contract of service?

27. Further guidance was given in **Hall (Inspector of Taxes) v Lorimer 1994** ICR 218, in which the Court of Appeal upheld the view of Mr Justice Mummery in the High Court that:

> "this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, positive appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation."

28. That case is referred to in Mr MacDonald's skeleton argument in the passage quoted from *Chitty on Contracts,* which goes on to list the sort of factors that may be relevant, including some further points:

    a) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;

    b) whether the worker was properly regarded as part of the employer's organisation;

    c) whether the worker was carrying on business on his own account or carrying on the business of the employer;

d) the provision of equipment;

e) the incidence of tax and national insurance;

f) the parties' own view of their relationship;

g) the structure of the trade or profession concerned and the arrangements within it.

29. The House of Lords subsequently endorsed the view in **Carmichael v National Power plc** 1999 ICR 1226 that certain elements form part of an irreducible minimum – control, mutuality of obligation and personal performance.

Employment under the Equality Act

30. The definition of an employee under the Equality Act 2010 is at section 83(2). By section 83(2) employment means:

> "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

31. This is very similar to the test of a worker under the Employment Rights Act 1996. That provides:

> (3) In this Act "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 or any profession or business undertaking carried on by the individual."

32. The Supreme Court held quite recently in **Pimlico Plumbers Ltd v Smith** [2018] ICR 1511 that there was no difference between the two tests, so it is helpful to look at cases on 'worker' status.

33. Instead of referring to the test for employees under the two different Acts therefore I will simply refer to employees and workers as far as possible. They are also referred to as limb (a) and limb (b) workers respectively, given the two sub-paragraphs in the above definition.

34. To illustrate the difference, in the case of **Byrne Brothers Ltd v Baird & others** [2002] IRLR 96 (EAT) Mr Recorder Underhill (as he then was) gave the following guidance on the position of such workers:

> "The intention behind the regulation [the Working Time Regulations, which have the same definition] is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand cannot in some narrower sense be regarded as carrying on a business. The policy behind the

> inclusion of limb (b) can only have been to extend the protection accorded by the Working Time Regulations to workers who are in the same need of that type of protection as employees in the strict sense – workers, that is, while viewed as liable, whatever their employment status, to be required to work excessive hours. The reason why employees were thought to need protection is that they are in a subordinate and dependent position vis-à-vis their employers. The purpose of regulation 2(1)(b) is to extend protection to workers who are, substantively and economically, in the same position. Thus 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 arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

35. Many of the cases in this area involve written contracts between the parties which state or purport to state that the individual is not an employee or a worker but is self-employed. This is not such a case as there was no such written agreement.

Contract workers

36. An issue is also raised about Mr Mejri's initial status as a contract worker, provided by Reed. In such cases there is no direct relationship with an employer and so section 41 provides very much the same level of protection between what it refers to as contract workers and the Principal, i.e. the de facto employer at the place where they work. A Principal is defined as:

> (5) … 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).

37. So the contract worker has to be provided by an agency and has to be employed by that agency, i.e. employed in the broad sense of a worker.

38. It is not suggested that there was no contract between the School and Reed, so the only remaining question is whether Mr Mejri was a worker provided by Reed.

39. Mr McDonald referred me to the case of **London Borough of Camden v Pegg and ors** UKEAT/0590/11, an unreported case, in which case a worker supplying their services to an end-user through an employment agency, and who was not under an obligation to accept an assignment, was held to be "employed" for discrimination purposes from the point at which he accepted the assignment. But that case depended on the close connection Ms Pegg had with the agency.

40. He makes the point that Mr Mejri cannot be regarded as employed by Reed if he chose to provide his services through a service company like Sapphire. And if he was not employed by Reed he cannot be a contract worker for the purposes of section 41.

Conclusions

Employment Rights Act

41. It is not necessary to say very much about the application of the test for employment under the Employment Rights Act 1996. None of the usual hallmarks of employment are present. Mr Mejri was not provided with a contract of employment or regarded as an employee by the School. He continued to provide his services on a daily basis, charging by the hour and accounting for his own tax and national insurance. That is a fundamental difference between him and, say, teaching assistants or catering staff paid monthly through the payroll. He was no doubt under some control as to the jobs he did but that is usual for any contractor, and he was brought in because he had the specialist skill and knowledge, together with the appropriate equipment, to tackle plumbing jobs around the School. It seems unlikely that he was under any direction from Mr Sayer or anyone else about how we went about those tasks. Consequently there was a lack of control and little integration by Mr Mejri into the School organization. He also volunteered the fact that he was the only one, unlike other long serving contractors, not to be provided with a pass or ID card to get in every day.

42. The fact that he made an extra charge for dealing with a leak on an emergency basis is a further indication that he regarded himself as independent and operating at arm's length from the School. In those circumstances, principally the lack of any obvious degree of control over the way in which he did his work, I conclude that there is no reasonable prospect of him satisfying the tribunal that he was an employee under the Employment Rights Act 1996.

43. Before leaving this topic, a further obstacle is that Mr Mejri did not in fact have the necessary two years' service. That is an alternative basis on which the claim of unfair dismissal could be struck out but he was not given any warning about that possibility ahead of this hearing and so I have dealt with it solely on the basis of his employment status. The tribunal file shows that it has been treated as raising a whistleblowing claim but there is no clear mention of any such allegation in the claim form, although there is a suggestion of a victimisation claim, i.e. that he complained about discrimination on 6 June 2023.

Equality Act

44. The picture is less clear-cut when considering if he was a worker. The definition does not require any degree of control, simply that he provides this work personally. There was no suggestion by the School that he was able to provide a substitute and so (again, mindful of the need to take his case at the highest) this was a contract under which he was providing his work personally.

45. The remaining question is whether his relationship with the School was sufficiently arm's-length that he can be regarded as a genuinely independent contractor i.e. was the School his client or customer?

46. I have of course heard no evidence about Mr Mejri's working pattern before and after the two-month period he spent with the School, although that probably not help a great deal on the question of his relationship with the School. The first point to note is that this was a substantial period. There was also discussion at the outset about whether this would be a temp to perm arrangement. That is permissible under the Agency Workers Regulations 2010 where someone is assigned to a client for 12 continuous weeks. Various provisions are made for gaps in the assignment but the key point is that after their period of time no temp to perm fee can be charged by the agency. That is some indication at least this was always intended to be an arrangement lasting months rather than a week or two. As far as I can judge there was no shortage of work for Mr Mejri up to the time when his services were terminated and it had lasted two months at that point.

47. The next point of note is that the School investigated his complaints under its grievance procedure which is a procedure adopted for complaints by employees of other members of staff. It is a significant point because ultimately the question is whether this is the sort of working arrangement in which the individual should have statutory protection from discrimination. The fact that his complaints about discrimination at work were investigated, and investigated thoroughly, is an indication that the School at least regarded it as entirely appropriate that he should not be exposed to such treatment. That may of course be an excess of caution or generosity on their part but it does not follow that had he simply attended to carry out some plumbing work on a given day they would have given the same consideration to his complaints. It is also noteworthy that he reported his concerns to the School and expected them to be dealt with them, indicating that he too felt that some protection was due.

48. Some of the language used in that investigation including references to his employment also support his case. As a general rule the terms or language used by the parties is of much less relevance than the daily reality of the working relationship in deciding whether a person is a worker, since they generally use terms like contractor or self-employed to avoid any such conclusion, but it becomes more significant where it is used in day-to-day contexts such as in the course of a grievance investigation, and is used to indicate that there is a closer collection than previously stated.

49. There do not seem to be any other particularly significant aspects of the relationship to consider. The fact that Mr Mejri provided his own tools and submitted invoices do not take the matter very much further.

50. I was also referred to comments made by Lady Hale in the case of **Bates van Winkelhof v Clyde LLP** [2014] ICR, 730. At paragraph 32 she quoted from a decision of the ECJ - **Allonby v Accrington and Rossendale College** [2004] ICR 1328 and said that in that case:

> … the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a "worker" for the purpose of an equal pay claim. The court held, at para 67, …
>
> "there must be considered as a worker a person who, for a certain period of

> time, performs services for and under the direction of another person in return for which he receives remuneration."
>
> However, such people were to be distinguished from "independent providers" of services who are not in a relationship of subordination with the person who receives the services" (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account.

51. These comments are very similar to the passage from **Byrne** already quoted. Subordination or dependency is therefore an important consideration but it is also a question of degree. The fact of having worked for two months for one "client" creates its own degree of dependency and hence subordination. Inevitably, Mr Mejri will not have been able to maintain a separate client base. Following his dismissal he will have had to cast around for other work rather than having filled his diary, and this itself puts it in a different practical position from someone who comes in as a contractor for a specific job.

52. Overall therefore it certainly appears to me arguable that Mr Mejri was a worker rather than an independent contractor during this extended period working at the School. The fact that it is perfectly arguable is sufficient for today's purposes. It must follow that it has some reasonable prospects of success and so there is no basis for a strike out order or a deposit.

53. The final point is whether he was at any time a contract worker. On this, I agree with Mr McDonald's submission that he cannot be regarded as employed by Reed, even under the more extended definition of the Equality Act, features to provide his services through a service company. However that does not prevent him being an employee during the subsequent period, and in fact all the allegations he raises are in that subsequent period.

54. Accordingly, on that basis the claims of harassment, discrimination and victimisation can proceed to the final hearing.

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Employment Judge Fowell
Date:31 January 2024

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