



EMPLOYMENT TRIBUNALS

Claimant: Mr T Hillman

Respondents: 1) The Governing Body of Clarendon School
2) The London Borough of Richmond
3) Achieving for Children

Heard at: London South

On: 1, 2 February 2017

OPEN PRELIMINARY HEARING

Before: EMPLOYMENT JUDGE HALL-SMITH

Representation

Claimant: In person

Respondent: Ms R Tuck, Counsel

JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS THAT:

1. The Claimant was not an employee of the Respondents at all material times within the meaning of section 230 of the Employment Rights Act 1996.
2. The Claimant was not in employment with the Respondents at all material times within the meaning of section 83 of the Equality Act 2010.

REASONS

1. By a claim form received by the Tribunal on 15 August 2015 the Claimant, Mr Thomas Hillman had brought complaints of unfair dismissal, discrimination on grounds of religion and belief and financial claims involving unauthorised deductions from pay, against the three named Respondents, The Governing Body of Clarendon School, London Borough of Richmond upon Thames and Achieving for Children.
2. There has been a lengthy background to the Claimant's tribunal claims and the case has previously been listed for preliminary hearings.
3. As long ago as 11 January 2016, Employment Judge Baron listed the case for a two day preliminary hearing to determine the following preliminary issues, namely:-
 - i) ***to decide if the Claimant was an employee of any of the Respondents for the purposes of section 230 of The Employment Rights Act 1996;***
 - ii) ***to decide if the Claimant was an employee of any of the Respondents for the purposes of section 83 of The Equality Act 2010.***
4. The matter eventually came before me on 1 February 2017 to consider the issue of the Claimant's employment status. In addition there were applications by the Respondent to strike out the Claimant's tribunal claims on grounds of unreasonable conduct on behalf of the Claimant in his conduct of the proceedings. The alleged unreasonable conduct involved the Claimant in engaging in a disproportionate amount of correspondence involving e-mails and telephone calls to the Respondents.
5. For the reasons I delivered in the Tribunal during the course of this hearing, I did not grant the Respondents' applications to strike out the Claimant's tribunal claims in circumstances where I concluded that the Claimant's conduct had not crossed the threshold into aggressive or threatening behaviour and further because I considered that a fair trial of the proceedings had not been prejudiced and was possible. Accordingly the issue of the Claimant's employment status have remained a live issue.
6. At the hearing before me the Claimant attended in person and gave evidence. The Respondent was represented by Ms R Tuck, Counsel, who called the following witnesses on behalf of the Respondent,

namely: Mr John Kipps, Headteacher at Clarendon School and Ms Elaine Bruce of the South London Legal Partnership, the Respondents' solicitors. The were bundles of documents before the Tribunal, namely two bundles from the Claimant and a Respondents' bundle.

The Facts

7. The Claimant, Mr Thomas Hillman, began his association with Clarendon School ("The Respondent") in 2008.
8. The Claimant had been involved with Richmond Mencap since 2004. In 2006 the Claimant became youth development officer at Richmond Mencap. In 2008 the Claimant ceased his work for Richmond Mencap and in early 2008 he entered into discussions with John Kipps, the Head Teacher of Clarendon School.
9. The discussions were in relation to the Claimant's proposal to run a programme of holiday activities for children with learning difficulties and disabilities during the school holidays. The contact with Mr Kipps was through a parent of a pupil at the school who had attended a number of the Claimant's activities at Mencap and she enquired whether the school could develop the Claimant's activities at the school.
10. Clarendon School is a "special needs" school and at the relevant time there were about 100 students. The school develops its students' life skills in addition to their academic studies.
11. The schools lacked the resources to run the activities proposed by the Claimant but agreed to facilitate the activity or scheme proposed by the Claimant with the use of the school facilities on the basis that the Claimant secured funding for the scheme from outside sources. The holiday scheme proposed by the Claimant was not restricted to the pupils at the school but was also available to the wider community, although the school pupils had first access to the holiday scheme.
12. There was no written agreement between the Claimant and the school and the Claimant never underwent the school's recruitment process involving the employment of support staff. Such process involved placing and investment, short listing candidates, holding of interviews and the other statutory or local requirements involved in the recruitment of staff with access to responsibility for young people.
13. Having regard to the nature of the work the Claimant undertook using school facilities and his involvement with pupils, the Claimant was subject to the school's safeguarding policies and any other relevant policy imposing safeguarding obligations. The Claimant was also required to undertake training in relation to his involvement with young people with epilepsy and in relation to manual handling, pages 450-452.

14. The funding which the Claimant acquired was the source of the Claimant's pay for the work he undertook in organising the holiday activities. The Claimant himself dictated the amount of pay he received for the work he undertook. I found that the Claimant was very conscientious and dedicated and the scheme developed from an initial two weeks during the school's summer holiday to involve programmes in some of other school holidays and during some weekends.
15. Because of the success of the scheme and its subsequent growth, the school provided the Claimant with access to a computer and the use of the school e-mail address. In addition, the Claimant was provided with number of filing cabinets for storage of scheme related materials and he was allowed to use school minibuses, which were also available to charitable organisations and other schools.
16. The Claimant's chose which activities were run and there was no requirement that he should run them with a time table set by the school, other then avoiding a potential clash with the school's own timetable during term time. It was the Claimant's responsibility to arrange for the assistance of the staff and volunteers to work with him on the activities he organised.
17. On occasions the Claimant would use the school's own staff during school holidays in outside school hours, but payment of the use of such staff was not the responsibly of the school and was arranged by the Claimant from the funding he had obtained. Initially the Claimant submitted invoices for the work he undertook as a trigger for the school to release the amounts invoiced from the funding the Claimant had obtained. The Claimant decided how much he would be paid and he also claimed for expenses. By way of example an invoice dated 30 March 2010, page 113, including the following:-

"This is an invoice with regards to co-ordination and staffing for the Clarendon February half term scheme 2010.

Hence I hereby invoice Clarendon school for the sum of £221.99 which represents final appropriate contribution towards staffing and co-ordination costs.

I hope that this is acceptable, and look forward to receive a cheque in the near future."

18. The payment system changed in 2011 following an audit when the auditors advised that all payments to individuals should be made through the school's payroll system. Accordingly, the Claimant was paid through the school's payroll which included national insurance contributions. The Claimant e-mailed request for payments to both

himself and to the staff used by him for the activities. The staff organised by the Claimant to assist with the scheme were regarded as sessional staff as reflected in an e-mail from the Claimant dated 11 March 2014 in which he requested the following, page 211, which he requested the following:-

If it would be possible for you to put the attached February 2014 sessional pay through to payroll for Clarendon ongoing opportunities (payment in March 2014) that would be superb.

(The attachment involved the following)

Sessional staff pay Clarendon ongoing opportunities April 2014 (to be paid in May 2014)

Cathrine Ollington	£140	staffing 16-17/4
Chantal Stewart	£560	staffing 8-10/4, 14-17/4, 26/4
Ciara Haggar	£210	staffing 8/4, 10/4, 15/4
Janaina Salvaia	£70	staffing 26/4
Catherine Bellwood	£280	staffing 8-10/4, 16/4
Melissa Wassell	£350	staffing 9/4, 14-16/4, 26/4
Neil Phillips	£140	staffing 16-17/4
Reginald Clarke	£600	staffing 8-10/4, 14-17/4, 26/4, 4 hours co-ordination assistance
Thomas Hillman	£1,000	staffing 8-10/4, 14-17/4, 26/4, contribution towards the co-ordination and feedback
Natasha Naylor	£70	staffing 15/2/14."

19. The Claimant was a familiar figure within the school environment. He appeared in the school's newsletter and calendar along with individuals and professionals who were associated with the school although not directly employed through the school. The Claimant would not normally attend staff meetings but would do so when invited for reasons for involvement matters involved in the running of the scheme such as safeguarding topics.
20. Apart from the requirement to comply with the school's statutory obligations involving safeguarding and health and safety issues, the Claimant was not subject to policies such as the schools disciplinary

and attendance policies. The Claimant determined what activities he would undertake pursuant to the holiday scheme and I found that the school was under no obligation to provide him with work to undertake. The Claimant was not subject to any appraisal process and was able to select his own team in an operation of the scheme.

21. There were a number of individuals who provided services to the school, namely a counsellor who Mr Kipps described as freelance and a number of therapists who provided services at the school who were employed by Richmond Healthcare Trust. There were also individuals who Mr Kipps described as peripatetic staff and whom he alleged were not employees of the school but were funded by Richmond.
22. The funding for the holiday schemes organised by the Claimant was provided by a number of organisations including Coutts' Charitable Trust, Aiming High and lately, Achieving for Children.
23. Achieving for Children withdrew its funding for the Claimant's holiday schemes in 2014 following an investigation into an incident involving a young person on the scheme. The investigation revealed concerns about the Claimant's management of the scheme as a result of which the funding was withdrawn. The issue of whether there was any justification for concerns relating to the Claimant has in my judgment no relevance for the issues involved in this preliminary hearing, apart from the fact that alleged concerns led to the withdrawal of funding and led to the school undertaking its own investigation.
24. The investigation carried out by the school resulted in the school invoking its disciplinary procedure in relation to the Claimant and he was invited to attend a disciplinary hearing.
25. A disciplinary hearing took place on 20 March 2015 and by letter to the Claimant dated 24 March 2015 from John Kipps, the Claimant was informed that he was to be dismissed, pages 260-262.
26. Mr Kipps' letters to the Claimant set out allegations involving the Claimant and the conclusions of the disciplinary hearing. The letter concluded with the following:-

“The disciplinary procedure has been followed to ensure the implementation of best practice and natural justice, which has allowed you the opportunity to fully respond to the above allegations. Based on your submission, evidence and any mitigation and the evidence provided by management it has been decided to terminate your work relationship with the school. As you are a casual member of staff and do not have an employment contract with the school the termination of any work agreement is with immediate effect.

The reason for terminating the work agreement was due to following:

- **Following your misconduct with Achieving for Children issues the funding for the scheme is being withdrawn and there were no moneys to continue any work agreements with you**
- **You failed to follow management instruction and continued to sent inappropriate and high volume of e-mails to Achieving for Children officials, local authorities' offices, Clarendon staff, of other schools, parents of young people accessing the scheme and other people on your contact list not directly related o the scheme. These e-mail included references to colleagues that breached confidentiality and professional boundaries.**

As indicated above I do not believe you were ever technically an employee of the school and you acknowledged at the meeting that you were not "employed" in the conventional sense. However, to the extend that you considered yourself deemed to be employee please treat this as a letter of dismissal with the termination date of 24 March 2015 bringing any employment to an end.

27. The Claimant was afforded the right to appeal against its dismissal. An appeal hearing took place on 19 May 2015 and by letter to the Claimant of 23 June 2015, the Claimant was informed that his appeal had not been upheld, pages 280-282.
28. In the letter informing the Claimant about the outcome of his appeal pointed out that the appeal on that panel was minded to agree the original disciplinary panel that the Claimant was not an employee.

Submissions

29. I heard submissions from Ms Tuck, Counsel on behalf of the Claimant and from the Claimant. The parties' submissions are not repeated in these reasons.

The Law

30. The substantive issue to be determined by the Tribunal was whether the Claimant was an employee of the Respondent at all material times within the meaning of section 230 of the Employment Rights Act 1996, or whether he was in employment under section 83 of the Equality Act 2010. Section 230 of the 1996 Act provides:-

- 1) ***In this Act “employee means an individual who has entered into works under (where the employment has ceased worked) a contract of employment.***
- 2) ***In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.***

31. Section 83 of the Equality Act 2010 provides:

(2) “Employment” means –

(a) *Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*

32. The starting point for the issue of employment under section 230 of the ERA 1996 is ***Ready Mixed concrete (Southeast) Ltd the Minister of Pensions and National Insurance [1968] 2 QB 497*** in which McKenna J defined a contract of employment as the following:

A contract of service exists if three conditions are fulfilled:-

- (i) a servant agrees that, in consideration of a wage or other remuneration, you invite work and skill in the performance of some service for his master;***
- (ii) he agrees, expressly or impliedly, that in the performance of that service he would be subject to the others control in a sufficient degree to make that other master;***
- (iii) the provisions of the contract are consistent with a contract of service.***

33. The issue of employment status has been considered on a number of occasions by the courts but the essential requirements involve an intention to create a legal relationship between the parties, a requirement to perform services personally for the employer and mutuality of obligations involving the obligation on the employer to provide work and an obligation on the perspective employee to perform the work when offered, C ICR1226(Ho.

34. In ***Hall (Inspector of Taxes) v. Lorimer 1994 ICR 218***, the Court of Appeal (Nolan LJ) approved the approach of Mummery J at first instance, namely:-

In order to decide whether the person carry out his own business on his account, it is necessary to consider many

different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list 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, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in every individual case.

35. Under the Equality Act 2010 the scope of 'in employment' is wider than under the Employment Rights Act 1996 but section 83 does required the existence of a contractual relationship.

Conclusion

36. In the circumstances of this case the working arrangement between the Claimant and the school had been initiated through an enquiry from a parent whether the Claimant would undertake some of the activities he had undertaken with Richmond Mencap at the school. There was no issue that John Kipps considered that the Claimant's schemes would be of benefit to the school.
37. Thereafter the Claimant arranged funding for the schemes he organised and continued organising schemes for a significant period until the funding ceased and the Claimant's involvement with the school was subsequently terminated. Although there came a time when the funding was processed through the school's payroll, in my Judgment this was an administrative process and did not reflect a situation where the Claimant was being paid by the school from its own resources to an individual with whom it had a contract of employment or any contract.
38. It was the Claimant who decided the appropriate level of payment both to himself and to the individuals who supported him in the operation and running of the various schemes he undertook. I concluded on the evidence that there was no mutuality of obligations in the sense that there was an obligation on the part of the school to provide work to the Claimant and no obligation on the Claimant's part to accept any work that was offered.
39. It was the Claimant who pioneered and subsequently organised and ran the holiday schemes. Although the school was a beneficiary of the schemes in the sense that they provided a very beneficial activity for

the students at the school to enjoy and to take part in, the school did not provide the Claimant with work. It was the Claimant who decided upon the amount of time and work he would devote to the schemes, which were matters to be decided between the Claimant and the funding organisations he was involved with. The fact that the Claimant was required to comply with statutory health and safety issues did not in my judgment reflect the degree of control involved in a contractual relationship, because individuals working with or involved with children and young people are required to undergo CRB checks and to comply with health and safety requirements.

40. The normal paperwork trail and formalities involved in the recruitment of staff by the London Borough of Richmond for the school, which were all pre-conditions for the issuing of a contract of employment, were absent in the Claimant's case. The other features of an employment relationship were also absent, such as sick pay or holiday pay.
41. The school provided the framework and facilities in which the Claimant operated to organise the holiday schemes. However I do not consider that the provision of such facilities to the Claimant by the school involved the existence of a contractual relationship. The Claimant operated the scheme primarily for the benefit of the pupils at the school although the scheme was accessible to children from the wider community, subject to funding and availability of places in circumstances where the school pupils enjoyed priority.
42. Further, although from time to time John Kipps, the school head teacher, laid down requirements, I considered that any directions or requirements which the Claimant was obliged to comply with reflected a situation in which the Claimant had the benefit of the use of school premises and through the operation of the schemes had very close involvement with the school's pupils who were in many cases vulnerable because of learning difficulties. Training in health and safety issues, was required because the schemes organised by the Claimant were for the benefit of young people, and such training was not pursuant to the existence of a training contract or any contract with the Respondents.
43. I found that the involvement of the disciplinary process by the Respondent which led to the termination of the Claimant's engagement with the school was because of the Claimant's long association with the school, its recognition of the Claimant's involvement with the school and as alleged by John Kipps to be fair to the Claimant and to implement best practice and natural justice. The involvement of the disciplinary process was not because it was considered that the Claimant was an employee of the school.
44. In my Judgment there was no mutuality of obligations between the parties and accordingly I find that there was no basis for concluding

that there were grounds justifying the existence of the implied contract of employment. I was referred to **Halawi –v-WDFG UK Limited T/a as World Duty Free [2014] EWCA Civ 1387, CA** on appeal from the judgment of Langstaff P in the EAT. The Court of Appeal (Arden LJ) of the situation and having regard to the analogy drawn in **Hall-v-Lorimer**, of standing back and painting a picture, it is my judgment that the Claimant was not an employee of the Respondent within the meaning of s.230 of the Employment Rights Act 1996.

45. In the absence of a contractual relationship governing the relationship of the parties, I concluded that the Claimant was not in employment with any of the Respondents within the meaning of section 83 of the Equality Act 2010. The Claimant was not a job applicant and was not subject to a training contract. The only involvement as I found of the Respondents, the London Borough of Richmond and Achieving for Children was in relation to funding for the Claimant's schemes pioneered and run by the Claimant.

Employment Judge Hall-Smith

Date: 10 May 2017