



EMPLOYMENT TRIBUNALS

Claimant: Mr P Nsamu

Respondents: Lewis Coaches (1)
Elam Garages Ltd (In Liquidation) (2)
G. W. Facilities Ltd (3)

Heard at: London South Employment Tribunal

On: 21 July 2022

Before: Employment Judge L Burge

Representation:

Claimant: Mr D Lamina, representative

Respondents: Mr T Goldup, Advocate

RESERVED PRELIMINARY JUDGMENT

It is the Judgment of the Tribunal that:

1. the Claimant was not an “employee” of any of the Respondents within the meaning of s.230 Employment Rights Act 1996;
2. the Tribunal therefore has no jurisdiction to hear the Claimant’s claims of unfair dismissal and they are dismissed;

3. the Claimant was a “worker” under s.230(3)(b) Employment Rights Act 1996 and was in “employment” within the meaning of s.83 Equality Act 2010 of the Third Respondent;
4. the Claimant’s claims against the Third Respondent therefore continue;
and
5. the Claimant’s claims against the First and Second Respondents are dismissed.

REASONS

1. At a Preliminary Hearing on 10 February 2022, Employment Judge K Andrews identified that the Claimant had brought claims of
 - a. unfair dismissal;
 - b. automatically unfair dismissal and detriment because of whistleblowing (the protected disclosures being both an oral complaint and written grievance);
 - c. race discrimination –direct, indirect, harassment & victimisation (the protected acts being the same as the protected disclosures); and
 - d. unlawful deductions from wages.
2. Today’s preliminary hearing was listed by EJ K Andrews to determine the preliminary issue of the Claimant’s employment status, namely whether he was an employee or worker of any of the Respondents for the purposes of both the Employment Rights Act 1996 and the Equality Act 2010.
3. I agreed with the parties at the start of the hearing that the issues for me to decide were:
 - a. Was the Claimant an employee or worker within the meaning of section 203 of the Employment Rights Act 1996?
 - b. Does the Claimant fall within the definition of ‘employment’ set out in section 83 of the Equality Act 2010?
4. The Tribunal heard evidence from the Claimant on his own behalf and from Mr Lewis on behalf of the Respondents.
5. There were two bundles of documents, one of 109 pages and one of 421 pages.

Findings of fact

6. The following facts are only found in relation to whether the Claimant is an employee or a worker or neither.
7. The Claimant is a certified panel beater and spray painter for various types of vehicles including lorries and trains.
8. Mr Lewis is a Director of GW Facilities Ltd and has been since it was incorporated in October 2016. He was responsible for the financial side of the business but is now semi-retired, working two days a week. He gave evidence to the Tribunal, that is accepted, that "Lewis Coaches" is a trading name for GW Facilities Ltd but it is not a legal entity in its own right. GW Facilities Ltd is a coach hire business trading as Lewis Coaches providing coaches for hire across London, North West Kent and South West Essex. The size of hire vehicles range from eighteen seats to fifty seats.
9. Mr Lewis is also a Director of Elam Garages Ltd and has been since November 2008. Elam Garages was Mr Lewis' father's property company that rented garages. It never had any employees. Elam Garages has not actively traded for eight years and went into creditors voluntary liquidation on 7 March 2022.
10. At the beginning of February 2018 the Claimant went to Nathan Way, the premises of GW Facilities Ltd, looking for work as a panel beater and spray painter. He was given a trial fixing the rear bumper and repairing/spraying a mini coach. He passed the trial and was offered on-going work repairing and spraying GW Facilities Ltd's fleet. He wanted £27 per hour, but GW Facilities Ltd would only pay £10 an hour, which the Claimant accepted. There was nothing written, it was a verbal agreement.
11. The Claimant worked for GW Facilities Ltd for over two years. He worked most weeks. The Claimant had two children and worked flexibly so that he could care for them. The Claimant gave evidence that he worked 5 full days a week. This is rejected because it is clear from bank records that his pay varied and he said himself that he had to work flexibly to look after his children. I find as a fact his pay reflected the hours that he worked. The Claimant was only paid for the hours he worked - he did not get paid holiday pay or sick pay.
12. The work the Claimant did was always dictated by GW Facilities Ltd - they had a fleet of vehicles that needed repairing/spraying and there was always work for the Claimant to do. The Claimant had keys that let him in to the yard at Nathan Way and also into the unit where he worked on the vehicles. He worked with Mr Lawson, an employee of GW Facilities Ltd. The Claimant had his own spray gun but all the other tools he used were owned by GW Facilities Ltd.

13. The Claimant was allowed to use the workshop, on occasional Saturdays, to repair/spray a private vehicle and would be paid directly by the owner of the car. This did not happen very often - the Tribunal finds it happened on average once a month.
14. Mr Lewis gave evidence to the Tribunal that in theory the Claimant would have been able to send a substitute although this was never discussed and never arose in practice. It was always the Claimant who came and worked at Nathan Way. There was a sign in sheet for everyone who worked at Nathan Way, this was a record so GW Facilities Ltd would know who was in the premises if there was a fire. When the Claimant's car stopped working GW Facilities Ltd lent him a car belonging to one of the drivers, and the Claimant ultimately bought it.
15. When the covid pandemic hit in March 2020 GW Facilities Ltd put its employees on furlough. They did not furlough the Claimant. He was told there was no more work for him. He returned the keys to Nathan Way.
16. Looking at the amount the Claimant was paid, as set out in GW Facilities Ltd's bank account, I find that the Claimant worked the hours stated in the right column below:

Date	Pay	Hours worked
09/02/2018	250	25
29/03/2018	300	30
13/04/2018	300	30
08/05/2018	300	30
21/05/2018	500	50
01/06/2018	250	25
08/06/2018	200	20
15/06/2018	300	30
06/07/2018	400	40
02/07/2018	200	20
13/07/2018	300	30
23/07/2018	290	29
27/07/2018	200	20
13/08/2018	100	10
17/08/2018	150	15
24/08/2018	325	32.5
31/08/2018	300	30
07/09/2018	500	50
21/09/2018	500	50
01/10/2018	500	50
08/10/2018	350	35

12/10/2018	300	30
19/10/2018	400	40
02/11/2018	300	30
09/11/2018	300	30
30/11/2018	200	20
14/12/2018	300	30
11/01/2019	400	40
18/01/2019	300	30
25/01/2019	450	45
01/02/2019	200	20
08/02/2019	500	50
22/02/2019	500	50
01/03/2019	250	25
08/03/2019	250	25
15/03/2019	350	35
29/03/2019	450	45
29/04/2019	200	20
10/05/2019	300	30
03/06/2019	100	10
07/06/2019	200	20
17/06/2019	300	30
12/07/2019	100	10
19/07/2019	300	30
16/08/2019	400	40
04/09/2019	190	19
09/09/2019	500	50
13/09/2019	360	36
20/09/2019	300	30
04/10/2019	200	20
21/10/2019	100	10
08/11/2019	200	20
18/11/2019	350	35
29/11/2019	200	20
06/12/2019	400	40
20/12/2019	150	15
03/01/2020	200	20
10/01/2020	200	20
17/01/2020	300	30
31/01/2020	200	20
14/02/2020	400	40
06/03/2020	400	40
13/03/2020	100	10
20/03/2020	300	30
27/03/2020	400	40
03/04/2020	100	10

20/04/2020	100	10
15/05/2020	150	15
TOTAL HOURS WORKED		1966.50

17. The Claimant worked 1966.5 hours from 1 February 2018 until 15 May 2020 (119 weeks). He therefore worked an average of 16.5 hours a week.

The Law

18. Section 230 Employment Rights Act 1996 (“ERA”) sets out the definition of “employee” and “contract of employment”:

“(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) 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.”

19. Case law has established that personal service, control and mutuality of obligation are required in an employee/employer relationship under the ERA. However, the focus must be on the statutory wording (*Uber BV and ors v Aslam and ors* 2021 ICR 657).

20. Section 230(3) ERA sets out the definition of “worker”:

(3) In this Act “worker” (except in the phrases “shop worker” and “betting 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 of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.”

21. For claims under the Equality Act 2010 (“the EQA”) the definition of “employment” is set out in section 83 EQA as follows:

(2) “Employment” means—

“(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work
...”

22. In *Pimlico Plumbers Ltd v Smith* [2018] IRLR 872, the Supreme Court made it clear that even though the s.83 EQA definition does not expressly exclude from the concept a contract in which the other party has the status of a client

or customer, “this distinction has been held to be one without a difference” (per Lord Wilson, at paragraphs 13 and 14).

23. In the case of *Uber BV and ors v Aslam and ors* 2021 ICR 657, the Supreme Court considered *Autoclenz Ltd v Belcher and ors* 2011 ICR 1157 and in the judgment of Lord Leggatt, “*the primary question was one of statutory interpretation, not contractual interpretation*”.

24. In *Sejpal v Rodericks Dental Limited* [2022] EAT 92 the Employment Appeal Tribunal reminded Tribunals that when determining whether an individual is a worker pursuant to s.230(3)(b) ERA, it is the statutory test that needs to be applied:

“Concepts such as “mutuality of obligation”, “irreducible minimum”, “umbrella contracts”, “substitution”, “predominant purpose”, “subordination”, “control”, and “integration” are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases, or relevant only to a component of the statutory test. It is not a question of assessing all the concepts, putting the results in a pot, and hoping that the answer will emerge; the statutory test must be applied, according to its purpose.”

25. The Department for Business Energy and Industrial Strategy “Guidance Employment status and employment rights: guidance for HR professionals, legal professionals and other groups” (Published 26 July 2022) (“BEIS Guidance”) is not binding on Employment Tribunals but is useful guidance.

Conclusions

Who was the employer?

26. The Claimant claims to be an employee of all three Respondents. He had arrived at Nathan Way and seen the sign for Lewis coaches. He had never received a written agreement nor payslips. It is not surprising he was not sure who his employer was.

27. On his bank statements payments were shown as being from “GW FACILITIES LT LEWIS”. Mr Lewis confirmed that “Lewis Coaches” was the trading name of GW Facilities, the third Respondent. Elam Garages Ltd has not traded since November 2008 and since March 2022 has been in liquidation.

28. I conclude that the Claimant’s employer was GW Facilities Ltd, the Third Respondent.

Was the Claimant an “employee” of GW Facilities Ltd (s.230 ERA)?

29. The statutory wording says there must be a contract. The true nature of the agreement must be ascertained by looking at the whole picture. I conclude that the Claimant and GW Facilities Ltd entered into a verbal contract for the Claimant to work at Nathan Way fixing and spraying GW Facilities Ltd’s coaches. The work was flexible and enabled the Claimant to look after his two children and come and work when it suited him. His hours varied and depended upon when he decided to work. The Claimant would be paid for the hours he did, working on average 16.5 hours per week from 1 February 2018 to 15 May 2020. Once a month he would bring in a private vehicle to work on in Nathan Way but I conclude that this did not affect the work that he did for GW Facilities Ltd.

30. It was always the Claimant who attended to do the work, there was no discussion about whether he could have sent a substitute. I conclude that the Claimant had to do the work himself.

31. The BEIS Guidance states:

“Control is best understood as how much freedom the individual has to decide for themselves over how, where, and when the work is done. Factors to consider can include who gives out the work, who specifies how, where and when it is to be done, who sets the rate of pay for each assignment, who provides the equipment, or whether the individual has to wear a uniform or specific branding. Day to day control of work is not a requirement, but the employer must have ultimate control by retaining a right to give instructions and for the employee to follow them (provided they were reasonable) or be at risk of disciplinary actions up to and including dismissal”

32. The Claimant had the freedom to decide whether to work and what hours he would work. When he was in work he would do the work GW Facilities Ltd required to be done. GW Facilities Ltd set the rate of pay at £10 per hour. The Claimant had his own spray gun but all the other tools he used were owned by GW Facilities.

33. There was no commitment for the Claimant to attend work, however, once he attended, GW Facilities provided him work and the Claimant was obliged to do it.

34. I conclude that because the Claimant could decide upon his hours of work, and decide whether or not to attend work, the relationship lacked the relevant “control” that would be present in an employee/employer relationship.

Was the Claimant a “worker” within the meaning of s.230(3) ERA and in “employment” within the meaning of s.83 EQA?

35. The Claimant worked under an oral contract with GW Facilities Ltd. As stated above, he was to provide personal service – it was him who attended work to undertake the repairs/spraying. There was no discussion about whether he could send someone else, nor did he.
36. The Claimant was not operating an independent professional or business undertaking whereby GW Facilities Ltd was his client. While the Claimant had asked for £27 per hour, GW Facilities Ltd had rejected this and paid the Claimant £10 per hour. GW Facilities Ltd determined the work that was done and the Claimant worked alongside others, having a key to let himself in. There was no company name, no business undertaking, the Claimant was simply paid £10 for the hours he had worked into his personal account. Once a month the Claimant would bring in a personal job, however, this limited exception does not undermine the conclusion that GW Facilities Ltd was not his client or customer.
37. The Claimant therefore satisfies s.230(3)(b) ERA – as he worked under:
- “any other contract ... 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”.*
38. The Claimant was therefore a “worker” of GW Facilities Ltd.
39. Given that there is little distinction between the test for a “worker” under s.230 ERA and “employee” under EQA (*Pimlico Plumbers*), it follows that the Claimant is also in “employment” for the purposes of s.83 and the protection from discrimination provisions of the EQA.

Employment Judge L BURGE

23 August 2022

05th September 2022

