EMPLOYMENT TRIBUNALS

Claimant: L Whitton

Respondent: UK Power Networks (Services) Limited

Heard at: London South Employment Tribunal by CVP

On: 1 February 2022

Before: Employment Judge L Burge

Appearances
For the Claimant: In person
For the Respondents: M Withers, Counsel

JUDGMENT ON A PRELIMINARY HEARING

The Judgment of the Tribunal is:

1. The Claimant was in "employment" with the Respondent pursuant to section 83(2)(a) of the Equality Act 2010; and

2. The Respondent's applications for strike out and/or for a deposit order to be made are refused.

REASONS

Introduction

1. The Claimant brought a claim of age discrimination against the Respondent. The Claimant's case is that he was a contractor in name only and that in reality he was an employee of the Respondent. The Respondent says the Claimant was neither an employee nor contract worker so is not protected by the Equality Act 2010 ("EqA") and denies any discrimination.

The Hearing

2. This Preliminary Hearing was listed at a previous Preliminary Hearing on 8 September 2021 by EJ Pritchard to decide:

    A. was the Claimant an employee of the Respondent within the meaning of section 83 of the EqA?

    B. was the Claimant a contract worker pursuant to section 41 of the EqA?

    C. should the Claimant's claim be struck out under Rule 37 as having no reasonable prospect of success, or

    D. should the Claimant be ordered to pay a deposit as a condition of being permitted to continue to advance the allegations and arguments of age discrimination as set out in his ET1 Claim Form?

3. However, a further application for strike out was brought by the Respondent on the basis that the Claimant had not complied with Tribunal Orders leading up to this Preliminary Hearing (see section A below).

4. A bundle of documents running to 165 pages was provided to the Tribunal. Two letters from Matchtech (the recruitment agency) and a consultancy agreement were also provided. Counsel for the Respondent provided a skeleton argument.

A. The Respondent's first application - strike out for non-compliance or costs if the hearing is postponed

5. EJ Pritchard made Case Management Orders for the preparation of this hearing. There should have been mutual disclosure of documents and the Claimant was to draft a witness statement. The Respondent could provide a witness statement if it so wished. Neither party had adhered to the order for disclosure by the ordered date. The Claimant had sent some emails to the Tribunal but had not prepared a witness statement. The Respondent had disclosed documents late, and chose not to provide a witness statement.

6. The Claimant is a litigant in person and said that he had been anxious about this case and that he did not understand what a witness statement was and what was required of him. He does not own a computer. He felt intimidated by the Respondent's solicitor's communications to him and he wanted to give his evidence at the hearing. Mr Withers submitted that the Respondent would be disadvantaged if the hearing went ahead without the Respondent knowing what the Claimant was going to say.

7. I decided that it was in the interests of justice to continue with this hearing, postponing the hearing could lead to the same situation at the next hearing and strike out would not be just in the above circumstances. I allowed the Claimant to give oral evidence but also allowed Mr Withers to take some time to obtain instructions from the Respondent (who was not that the hearing) before he cross

examined the Claimant. He asked for 30 minutes and I gave him 45 minutes to ensure there was no prejudice.

B. The Respondent's second application – the Tribunal has no jurisdiction to hear the claim as the Claimant is not an employee nor a contract worker

8. The Respondent submitted that the Claimant could not satisfy the test pursuant to sections 41 and 83 of the EqA as he was neither an employee nor a contract worker and so could not bring a claim against the Respondent.

9. The Respondent submitted that further and alternatively, if the Claimant was able to bring such a claim, this right expired on 31 March 2020 when his contract ended and therefore in so far as his claim relates to a decision taken after this date, it could not succeed.

Findings of Fact

10. I am making findings of facts relevant to whether the Claimant is an employee or a contract worker. I am not making findings on the alleged incident(s) of age discrimination as they will be made at the Final Merits Hearing.

11. The Claimant worked as an electrician. In 2015 the Claimant was telephoned by SH from the Respondent and asked if he wanted to interview for work at the Respondent. The Claimant interviewed at the Respondent and was given the job. The initial documentation such as the passport, proof of identity were all processed through MC at the Respondent. The Claimant started work on 5 January 2015 and worked on average 40 hours per week throughout his time with the Respondent, a period of just over 5 years.

12. Having got the job, the Claimant was told that he would be employed through Matchtech Group Limited, an employment agency and employment business providing recruitment services. The Claimant was given a contract by Matchtech but did not sign it. Every week the Respondent would approve the Claimant's timesheet and he would then be paid by Matchtech.

13. After over two years working with the Respondent, the Claimant was told he had to set up a limited company in order to continue to be paid. He did as instructed and set up Whitton Electrical Services Limited. On 9 October 2017 Matchtech drew up a Consultancy Agreement between itself and Whitton Electrical Services Limited ("WEL"). The Claimant did not sign it. The Claimant was the only person who worked for WEL and there was no contract between them. In the Claimant's view, Matchtech was the payment company.

14. The Claimant did not receive holiday or sick pay. Every six months Matchtech would email him a further 6 month extension. The work he did was always directed by the Respondent and he only communicated with the Respondent about his work. The possibility of the Claimant sending in a substitute was never discussed between them. If the Claimant had not turned up to work, no one would have replaced him. The Claimant was obliged to attend work, he would have been sacked if he had not. At this preliminary hearing the Claimant was a

credible witness, he gave straightforward answers even when the answer could count against his case and the Tribunal believed him.

15. When he had first started in 2015, the Claimant worked on behalf of the Respondent at Mansion house substation as an electrician for 3 months. He then got a promotion and started running a job at Farringdon. He worked within a team structure at the Respondent, he and his team reported to a Project Manager. Over the years the Claimant went out on the network working on various contracts and then installed battery chargers. After another year installing electric car charge points, he started a project on bus garages and electrical bus charger points. In between projects the Respondent would give him other work for the Respondent, for example he was sent to Brixton to attend to some work there. The Respondent put him on courses to drive its vans and become proficient in first aid and sub-station compliance. He worked continuously for 5 years until the pandemic hit in March 2020 and in mid-March he told the Respondent that he would stay at home to shield his wife who had serious health issues. He was not paid while he was at home shielding.

16. The Respondent made the decision not to renew the Claimant's contract which expired on 31 March 2020. The Claimant's two team members went back to work in early April 2020. The Claimant asked to return but was told he could not.

17. In the bundle the Respondent had provided an agreement for the supply of Temporary Workers between Matchtech and the Respondent's sister company UK Power Networks (Operations) Limited for the provision of temporary workers. This document was not referred to in the Preliminary Hearing. Clause 6 provides:

> "*TEMPORARY WORKERS & PERSONNEL*
> *The Service Provider shall select and provide and at all times maintain suitable personnel and a Service Provider's Nominated Person to carry out the Services. The Service Provider shall ensure that all personnel, Temporary Workers and the Service Provider's Nominated Person:-*
>
> *(a) are adequately trained for the purposes of their function and possess such skills and experience; and*
>
> *(b) present a neat and clean appearance and render a competent, sober and courteous service; and*
>
> *(c) are made aware of and observe all provisions of the Contract and all requirements of applicable law insofar as they affect their performance of their functions under the Contract; and*
>
> *(d) are entitled to work in the United Kingdom; and*
>
> *(e) hold the necessary and relevant qualification certificates and any other certificates required to prove their entitlement to work; and*
>
> *(f) have undergone any security clearance procedures that may be required by UK Power Networks*."

18. The same clause is replicated in the 2018 agreement which also was not referred to.

Legal principles relevant to employee/contract worker status

19. Section 39 of the Equality Act 2010 ("EqA) provides:

> *…*
> *(2)An employer (A) must not discriminate against an employee of A's (B)—*
> *(a)as to B's terms of employment;*
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(c)by dismissing B;*
> *(d)by subjecting B to any other detriment.*

20. Section 41 EqA provides:

> *41 Contract workers*
> *(1)A principal must not discriminate against a contract worker—*
> *(a)as to the terms on which the principal allows the worker to do the work;*
> *(b)by not allowing the worker to do, or to continue to do, the work;*
> *(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
> *(d)by subjecting the worker to any other detriment.*
>
> *…*
>
> *(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).*

21. Section 83(2)(a) EqA 2010 says "Employment" means "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work." The Explanatory Note to the EqA says "this Act covers discrimination both in the employment and related fields and in relation to goods, facilities, services, transport and certain public services". The Equality and Human Rights Commission Statutory Code of Practice: Employment repeats this when citing the "Purpose of the Equality Act 2010". In "Scope of the Code" it states "Part 5 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in employment, when seeking

employment, or when engaged in occupations or activities related to work." (page 18). The code is not binding on Tribunals but is highly influential.

22. In *Autoclenz Ltd v Belcher and ors* 2011 ICR 1157 the Supreme Court held that the written agreement is only a part of the factual context in which the status of the working relationship should be determined. Lord Clarke drew a distinction between certain principles "which apply to ordinary contracts and, in particular, to commercial contracts", and "a body of case law in the context of employment contracts in which a different approach has been taken". Lord Clarke ended his discussion of the law (at para 35) by saying:

> "*So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description*."

23. In the case of *Uber BV and ors v Aslam and ors* 2021 ICR 657, the Supreme Court considered *Autoclenz*. In the judgment of Lord Leggatt:

> *"69. Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation"*

24. In determining the status of an individual, the tribunal will have concern to all of the relevant factors, including mutuality of obligation, control, direction and economic reward, as it would in determining status pursuant to the Employment Rights Act 1996 (*Pimlico Plumbers v Smith* [2017] EWCA Civ 51, [2017] ICR 51).

25. In *James v London Borough of Greenwich* [2008] EWCA Civ 35, [2008] IRLR 302 the Court of Appeal agreed with the guidance as set out by the Employment Appeal Tribunal on when a tribunal may infer an implied contract. This guidance included whether the way in which the contract is performed is consistent with the agency arrangements or whether it is only consistent with an implied contract of employment between the worker and the end-user, that it would not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties. Further, that the mere fact of long service does not justify the implication of a contract and it will be more readily open to a tribunal to imply a contract where the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user. *James* was about the

narrower definition of "employee" under the Employment Rights Act but is nevertheless relevant.

26. The EAT in *London Borough of Camden v Pegg and others* UKEAT/0590/11 held that despite no mutuality of obligation, when an assignment was accepted the claimant was under a contract to do work personally and therefore a contract worker could bring a discrimination claim holding that "the critical point is that when she accepted the assignment she owed a contractual duty to [the employment business] to do the work personally".

Conclusions on whether the Claimant is in employment with the Respondent or a contract worker or neither

27. In accordance with the Supreme Court's approach in *Uber*, I start by looking at the statutory provisions of the EqA to determine whether the Claimant fell into the definition of "employee" or "contract worker" and so is protected from discrimination by the provisions of the EqA. I also have in mind that the purpose of the EqA is to prohibit discrimination both in the employment and related fields. The contracts are one piece of the factual matrix which I consider, they are not the starting point.

28. The Claimant was recruited by the Respondent, he was telephoned directly and interviewed directly. Once he was accepted the Respondent introduced him to the recruitment agency who would pay him once his time sheets had been signed off by the Respondent. An agreement existed between Matchtech and the Respondent's sister company for the supply of temporary workers. Matchtech did not "select and provide" the Claimant to the Respondent.

29. It was the Respondent who moved the Claimant between projects over the 5 years, found other work for him between the projects and put him on courses to drive its vans and become proficient in first aid and sub-station compliance. Two years after he started working he was told he needed to set up a private limited company in order to be paid. He set up WEL as he understood he could not be paid if he did not. The Claimant did not draft a contract of employment between himself and WEL. He carried on working at the Respondent as he had always done, he attended work and was expected to attend. He reported to a project manager. There was never a discussion about sending someone in his place, it was not relevant to the relationship. I accepted the Claimant's evidence that if he did not turn up he would have been sacked.

30. The Claimant was paid by the recruitment agency but did not sign the consultancy agreement that they sent him. The fact that he was not paid when he shielded his wife at the beginning of the pandemic is not determinative. It was an extraordinary situation where the country was having to respond to a unique situation.

31. There was no genuine relationship between the Claimant and Matchtech. The Claimant did not owe a contractual duty to the recruitment business to do the work personally and there was no contract between the Claimant and the limited

company he was told to set up. He therefore does not fall within the "contract worker" provisions of s.41 EqA.

32. Looking at all of the circumstances, I conclude that there existed an implied contract personally to do work between the Claimant and the Respondent. There was an inequality of bargaining power between the Claimant and the Respondent, the Claimant did as he was told. He had to turn up, did turn up, the Respondent found him work to do between projects, he worked continuously for 5 years, the Respondent sent him on courses, his day to day direction and control came from the Respondent and if he had not turned up he would have been sacked. Given this reality of the relationship it is only consistent with an implied contract of employment and I am satisfied that it is necessary to imply a contract between the Claimant and the Respondent. The Claimant therefore falls under the definition of "employment" in Section 83(2)(a) EqA.

C. The Respondent's third application for a strike out and/or a deposit order on the grounds that the claims have no or little prospects of success

33. Given my decision that the Claimant was in "employment" with the Respondent, the Tribunal has jurisdiction to hear his claim of age discrimination.

34. The Respondent asks that the claim be struck out, as it discloses no reasonable prospect of success, or in the alternative if there is only low prospects of success, that the Claimant should be ordered to pay a deposit.

The Law relating to strike out and deposit orders

35. The Tribunal can strike out a claim under Schedule 1, Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "Rules") on various grounds including in circumstances where the Claimant's claims have "no reasonable prospect of success".

36. Linden J provided a helpful summary of the principals in *Twist DX Ltd v Armes* (UKEAT/0030/20/JOJ) at [43] as follows:-

> *a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30.*
>
> *b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success": see, for example, paragraph 26 of the Judgment*
> *of the Court of Appeal in Ezsias v North Glamorgan NHS Trust [2007] 4 Wll ER 940, CA. case (supra).*

c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of Ezsias.

d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.

e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, Campbell v Frisbee [2003] ICR 141 CA.

f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see Soo Kim v Yong [2011] EWHC 1781.

g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in Hassan v Tesco Stores Limited UKEAT/0098/16 and Mbuisa v Case Number: 2201755/2021 Cygnet Healthcare Limited UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

37. Under Rule 39(1) of the Rules, the Tribunal has the power to make separate deposit orders in respect of individual allegations or arguments, up to a maximum of £1,000 per allegation or argument. Rule 39(2) obliges the Tribunal to make "reasonable enquiries into the paying party's ability to pay the deposit and to have

regard to any such information when deciding the amount of the deposit." The Tribunal did make enquiries of, and obtained information in relation to the Claimant's ability to pay.

38. In considering whether to make deposit orders, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

> *"…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response";*

39. In *Hemdan v Ishmail* [2017] IRLR 228, Simler J described the purpose of a deposit order as being:

> *"…to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."*

Conclusions on the application to strikeout/deposit order

40. I was conscious that I was not to conduct a "mini trial" on the evidence. I am also mindful that I have not heard evidence from the Respondent. The nub of the Claimant's case is that he was told there was at least three years' more work for him, but then once he told the Respondent that he would be retiring, they made the decision not to renew his contract. Taking the Claimant's case at its highest, it does have a reasonable prospect of success and so the Respondent's application for strike out and/or a deposit are refused. There is a core factual conflict that should properly be tested at a Full Merits Hearing.

EJ L Burge

3 February 2022