Appeal No. UKEATS0010/19/AT

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 19th August 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MR WILSON BANNERMAN — APPELLANT

RESPONDENT

EUROSCOT ENGINEERING LIMITED

Transcript of Proceedings

JUDGMENT

FULL HEARING

0

APPEARANCES

For the Appellant — Mr David Flood of Counsel
Instructed by:
DLG Legal Services
PO Box 1195
Churchill Court
Westmoreland Road
Bromley
BR1 9YG

For the Respondent — Mr Alastair Hardman of Counsel
Instructed by:
Reid Quarton
272 Bath Street
Glasgow
G2 4JR

SUMMARY

CONTRACT OF EMPLOYMENT

EMPLOYEE, WORKER OR SELF EMPLOYED

In this case the Tribunal held that the Claimant was not the employee of the Respondent. It considered that while the tests in **Ready Mix Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 2 QB 497 were largely satisfied the Respondent did not possess a sufficient degree of control over the Claimant to constitute him an employee of the Respondent. There was no written contract of employment that specified the rights and obligations of the parties. The Claimant appealed arguing that the facts found by the Tribunal implied that the Respondent had ultimate control of the Claimant and that the Tribunal had misdirected itself by focussing on whether the Claimant in fact acted independently. It was submitted that the true question was whether the facts and circumstances showed that the Respondent had the ultimate right to control the Claimant. **Held** (1) that there were insufficient facts found proved by the Tribunal from which it could be implied that the Respondent had retained ultimate control of the Claimant and was therefore an employee of the Respondent; (2) that the Tribunal had found that the degree of control exercised by the Respondent was insufficient to imply that the Respondent had ultimate control or such a degree of control as warranted a finding that the Claimant was an employee of the Respondent; and that there was an insufficient basis for holding that the Tribunal had erred in law.

THE HONOURABLE LORD SUMMERS

1. On 9 June 2017, the Claimant presented a claim to the Employment Tribunal, seeking compensation for unfair dismissal, wrongful dismissal, and ancillary claims. A hearing

of evidence took place between 5th and 12th February 2017. The Tribunal considered among other things whether the Claimant was employed by the Respondents or not.

2. The Tribunal examined the evidence under reference to the well-known test in **Ready Mix Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 2 QB 497. Mckenna, J stated as follows -

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own 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 will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. "

Mckenna, J continued –

"As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. "

"**What matters is lawful authority to command so far as there is scope for it and there must always be some room for it, if only in incidental or collateral matters." - *Zuijs v. Wirth Brothers Proprietary Ltd***.

3. The ET was satisfied that there was a contract of personal service (paragraph 131) and mutuality of obligation (paragraph 132). It was not satisfied however that the Respondents exercised the requisite degree of control over the Claimant and as a result held it did not have jurisdiction to entertain the claim (para 138). It expressed itself as follows at paragraph 138 –

"While ultimate decisions rested with Ian Rorison this in itself was not in the Tribunal's view a sufficient exercise of control over the Claimant by the Respondent."

4. The ET concluded therefore that between 23 June 2014 and 17 January 2017 the claimant was not an employee of the respondent as defined by s.230(1) of the Employment Rights Act 1996. Judgement was given on 5th April 2018.

5. The Claimant appealed the judgement. The appeal was adjourned after argument. The E.A.T. utilised its powers to seek clarification of what the ET meant at paragraph 138 when it expressed the conclusion that Mr Rorison, the Managing Director and majority shareholder of the Respondents, made "ultimate decisions" but nevertheless did not exercise sufficient control. The parties submitted that it was not clear why, if the ultimate power of control on all matters rested with the Respondents, the ET had concluded that he was not an employee of the Respondent. The Claimant in particular submitted that even if Mr Rorison's power to decide was exercised within narrow parameters, there remained the question of whether he retained the legal right to control matters that in practice were left to the Claimant to decide.

6. At the reconvened appeal it appeared to the parties and to the E.A.T. that the questions directed to the ET had not been sufficiently addressed. A further request for clarification was sent. The EAT has now received a further Note from the Employment Judge under **Burns Barke** procedure. I am grateful to the Employment Judge for her assistance in clarifying matters.

7. Since the first request for assistance was superseded by the second request, I require only to rehearse the questions posed by the second request for assistance from the E.A.T. as they set out the issue at greater length.

"Question 1. On the facts found by you, did Mr Rorison and the claimant agree that Mr Rorison would have the right to exercise control or give direction to the claimant irrespective as to whether or with what frequency he exercised that right?"

8. In the Employment Judge's Note of 23 July 2020 the Employment Judge stated that there was no oral or written agreement allocating to Mr Rorison the right to exercise control or give direction to the Claimant. The Employment Tribunal went on :–

"The Employment Tribunal considers that from the following facts that were found that Mr Rorison and the claimant agreed by implication that Mr Rorison had the right to exercise control and give direction to the claimant.

Mr Rorison decided that the claimant should assist in the development of the business in Glasgow; then setting up a business in the Middle East; and continuing to be involved in business development work (paragraphs 20, 24, 34, 35, and 57). Mr Rorison decided when and how the claimant was paid and from around March 2016 the amounts to be paid (paragraphs 20, 30, 52, 53, 58, 60, 61, 62 and 64).

Question 2. If so, on the facts found by you, did that right exist in a sufficient degree to make one party the master and the other the servant?"

9. In response the Employment Tribunal set out a variety of respects in which it considered that the Claimant acted autonomously. It went on to state: –

"The Employment Tribunal considers that while Mr Rorison as the director and sole shareholder of the respondent made the ultimate decisions about the direction of the business, he did not direct what the claimant did; the way or when it was to be done. The claimant did not act as subordinate to Mr Rorison. The claimant advised on the direction of the business. He had control of the way and when work was to be done by him. As set out in paragraphs 133 to 138 of the Judgment the Employment Tribunal did not consider that the right of control existed in a sufficient degree to make one the master and the other the servant."

10. I shall return to Question 3 at the end of the Judgement.

Facts and Circumstances

11. Before I recount the factual conclusions, I should record that when the matter was before the ET the question of whether a contract could be spelled out from facts and circumstances was not the focus of the parties' submissions. The parties accepted that the focus was largely on whether or not the ET should accept the validity of a document produced by the Claimant that bore to be a contract of employment. The ET decided it was not a contract of employment and did not accept that there was a written contract between the parties. The parties accept that the ET was not favoured with detailed submissions on the matter that has occupied this appeal. The parties also accept that in examination and cross examination the factual issues of control and degree of control were not the subject of detailed consideration. The ET's findings therefore were not framed with the benefit of the submissions made to me.

12. The ET's findings relevant to the issue in hand are found between paragraph 133-138. In summary these disclose that the Claimant took the lead on business matters such as business development, improving productivity and processes and in connection with advice about a project in the Middle East "Ian Rorison took advice from the Claimant" (paragraph 134 line 23). It considered that the Claimant had "free reign" (sic). He gave advice on a variety of business matters. The ET found that it was "Ian Rorison's role to decide whether to take that advice". The ET found that (paragraph 136) the Claimant at times told Mr Rorison what to do. The ET thus concluded that in some connections the Claimant exercised control over Mr Rorison. At paragraph 137 the ET found that the Claimant took the lead in relation to some matters. He was controlling in relation to the Middle East project. He sought and was given power of attorney.

13. The ET here explains that the reason it did not find the Claimant to be an employee was because although there was a right of control it was not a sufficiently extensive one to qualify under the **Ready Mix** test. It in effect held that while Mr Rorison as the owner of the company retained the power to make strategic decisions and give directions designed to implement those decisions he "did not direct what the claimant did; the way or when it was to be done". These words echo the language of **Ready Mix**. Thus the ET provides an explanation of its expression, "ultimate decisions" at paragraph 138 of the Judgement. The ET makes it clear that it did not intend to say that the Respondent had ultimate control of all matters. What it meant was that it had control over strategic

decisions as befits the fact that Mr Rorison was the Managing Director and majority shareholder. But in matters lying outside the ambit of those types of decisions the Claimant was in control of his work.

14. Answer 1 states that the Claimant had no say in when and how he was paid and from 6 March 2016 how much he was paid.

The Grounds of Appeal

15. The Claimant lodged a Note of Appeal. It contained two grounds of appeal. He submitted that the Judgement between paragraphs 133-138 placed too much emphasis on daily control and not enough on with whom and to what extent ultimate control resided. The Claimant submitted that the evidence demonstrated that all control rested with Mr Rorison. The second ground of appeal was that the ET had failed to appreciate that the **Ready Mix** test was multi-factorial and failed to give sufficient weight to the elements that pointed to employment.

16. The Claimant's submissions were refined further in light of the Notes supplied by the EJ. I summarise these as follows:

The Claimant's Submission

17. The Claimant submitted that the ET's answer to Question 1 indicated that the Respondents held a power of control. Although in its response to question 2 the ET had referred to matters that were within the control of the Claimant, it was evident that this was only so because the Respondent permitted it to be so. Mr Flood pointed to the expression "free rein" and argued that this finding indicated that while the Claimant was given his head the Respondents could have reined him in if they wished. Mr Flood submitted that on a sound understanding of the findings in fact the Respondents could have issued an instruction to the Claimant in respect of any of the matters for which he had responsibility and he would have been bound to comply with that instruction. The fact that no such instruction was given was not the point. He submitted that the ET's Answer to Question 1 made matters clear. **"Mr Rorison had the right to exercise control and give direction to the claimant".**

The Respondents' Submission

18. The Respondent submitted that the issue was not whether or not the Respondent had the right of control. The question was whether it existed in a sufficient degree to make the Claimant the employee of the Respondents, following the test in **Ready Mix**. In a case where there was no written contract of employment, the only source of evidence from which contractual terms could be implied were the actings of the parties. While in some connections those actings indicated that power lay with the Respondents, in others the they indicated that power lay with the Claimant. In the absence of any facts that necessarily implied a term giving complete control of all matters to the Respondents, it was open to the ET to decide that a right of control was held by the Respondent for some purposes and not for others. It had concluded that the facts enabled it to imply that the source of control in some connections could be traced back to the Respondents but it had also decided that the facts indicated that the right of control could in other connections be traced back to the Claimant. Mr Hardman submitted the factual context indicated that the relationship between the parties was analogous to that of a consultant and his client. While the ET had found some of the indicia of contract viz. the supply of personal service and mutuality of obligation, the facts disclosed that the Claimant was largely independent of the Respondents. The ET in deciding the question as one of degree were in effect holding that having regard to the totality of the evidence, the Claimant should be seen as a consultant not an employee.

Decision

19. The appeal turns on a narrow point and traverses a handful of factual findings. The essence of the Claimant's argument is that the Tribunal erred in law when it assessed the question of control. While the Claimant accepts that there was evidence that in day to day affairs the Claimant acted independently, he argued that if ultimate control remained with the Respondents then the **Ready Mix** test was satisfied. The Respondents may not have chosen to exercise their power of control but if they could have done so the **Ready Mix** test was satisfied. The Claimant relied in this connection on **White v Troutbeck SA** [2013] IRLR 286. Although it was not mentioned in argument, the Court of Appeal heard this case and gave a short judgement (2013 IRLR 949). In the EAT HHJ Richardson gives a helpful and extended reprise of the law in this area. The Appeal Court without adopting the exposition upheld his judgement. Subsequent cases accept it as representing an accurate account of the law.

20. In **White v Troutbeck** the E.A.T. and the Court of Appeal held that even where a putative employee appears to be working autonomously, if the legal position is at variance with the working practises of the putative employee, those facts cannot override the legal position. The Court of Appeal accepted that an agreement as to status is of crucial importance. The value of **White** in the context of this case is diminished to a degree because there was a written contract of employment and other indicia of the employment relationship. In the present case the lack of an express agreement on the status of the Claimant is a significant factor.

21. The real value of **White** is the exposition of the law on the "right of control" by HHJ Richardson. It is worth repeating in full:

"40) Firstly, the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day to day control of his own work.

41) It has often been observed that in modern conditions many workers – especially the professional and skilled – have very substantial autonomy in the work they do, yet they are still employees. But this has, I think, always been the case. There have always been great houses and estates left for long periods in the practical care and stewardship of servants while the owners and masters have been away. The fact that these servants have been left in charge has never prevented the law – and the parties – from regarding them as being retained under contracts of service. There would be no doubt that the owners retained the right to step in and give instructions concerning what was, after all, their property. It does not follow that, because an absentee master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them.

42) Secondly, all aspects of control are relevant to this question. It was once thought that for a contract of employment to exist the master must be empowered to direct not only what is to be done but also the manner in which it is to be done. But many kinds of employee – such as the surgeon, the captain and the footballer discussed by Somervell LJ in Cassidy v Ministry of Health

[1951] 1 All ER 574 at 579 – are engaged to exercise their own judgment as to how their work should be done.

43) Thirdly, the starting point lies in the express terms of the contract between employer and employee. If the express terms of the contract do not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

44) I would add, from Autoclenz, one further point. Lord Clarke said (paragraph 19):

> **"If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement."**

45) In my judgment what was required was to analyse the terms of the agreement between the parties to see whether, expressly or by implication, Troutbeck – in practice Miss Ibru – retained a right of control to a sufficient degree. I do not think this process is really to be found in paragraphs 48 to 50 of the ET's reasons. Moreover, for the reasons I have given, it is not inconsistent with the concept of employment for an absentee owner to want someone to be responsible for maintaining and managing their property. The question is not by whom day to day control was exercised but with whom and to what extent the ultimate right to control resided. I therefore conclude that the ET's approach was wrong in law."

22. Mr Flood directed my attention to **Nayak v Lucent Advisors UK Ltd (debarred), Lucent Advisors Ltd (debarred)** UKEAT/0154/17/LA and paragraph 20, 21 and 26 where the E.A.T. accepted that the tribunal must look at the contract as well as day to day practice. He also referred me to **Wright v Aegis Defence Services BVI Ltd** UKEAT/0173/17/DM another decision of the E.A.T. that is aligned with **White**.

23. In **Wright** Langstaff, J emphasised that an Employment Tribunal must not focus exclusively on day to day to control but must ascertain whether and to whom the contract gives the right of control. The conduct of the person who gives the orders is only relevant to the extent to which this casts light on the true issue viz. does one party have the right of control over the other.

"35 As to control, there have been a very great number of cases relating to employment status which have come to the Employment Appeal Tribunal in which it has been clear that the Employment Judge has looked to see whether control has actually been exercised as a matter of fact in practice. It seems that in some of those cases much of the discussion has related to whether the evidence shows that orders have been given or not, and whether the Claimant has or has not availed himself of the rights that one might expect an employee to utilise or have. <u>This approach concentrates upon practical manifestations of day to day control and not upon the contractual entitlement to which MacKenna J drew particular attention in what he had to say, yet it is this which is critical</u>. He was speaking about rights, by reference to *Zuijs v Wirth Brothers Proprietary Ltd.*

36 *Zuijs* is a case which was decided by the High Court of Australia, but it is of great use knowing that the essential principle within it has recently had the endorsement of the Court of Appeal in *White v Troutbeck* as I have described."

24 .I acknowledge the assistance these authorities provide. I consider the key question is whether the ET's findings in fact show that the Respondent had an overarching right of control and that a term to that effect should have been implied into the parties' contract. It seems to me that in essence what the ET decided was that the Respondents retained control over business strategy. This is to be expected. Mr Rorison was after all the Managing Director and principal shareholder of the Respondents. The ET further decided that the Claimant had control of the day to day running of the business and the implementation of the strategies. I accept that in some cases control over business strategy may imply retention of power over all other aspects of the Claimant's work such as the day to day running of the business. But I do not consider that this is

necessarily so in every case. In this case the ET was satisfied that some of the actings of the Claimant e.g. when he told Mr Rorison what to do or where he took the lead in matters and Mr Rorison followed, were prima facie evidence of his independence of the Respondents. While such findings may not necessarily prove his independence, in order for them to be reconciled with his status as an employee there would in my opinion have to be other evidence implying that there was nevertheless an implied overarching right of control. There was no evidence that placed the apparently autonomous acts of the Claimant in a factual context that indicated that they were in fact exercises of delegated power or subject to the Respondent's control. In a case such as this the ET's assessment of the facts is important. The ET make it plain that the degree of control exercised by the Respondents was in its view insufficient. I consider that in such a context I should defer to the ET's assessment of the facts. I do not consider that the Note of 23 July 2020 reveals a contradiction between Answer 1 and Answer 2. I do not consider that the ET misdirected itself. It would appear to me that the Judgement read in light of the two Notes supplied by the EJ indicates that it applied the test in **Ready Mix** and came to the conclusion that while the Respondents had ultimate control over some matters, the degree of control the Respondents exercised was insufficient to justify the conclusion that the Claimant was an employee of the Respondents.

25 Mr Flood submitted that a hypothetical question could have been asked at the Tribunal. He submitted that the Claimant and Mr Rorison could have been asked what would have happened if Mr Rorison had instructed the Claimant not to perform some task or had countermanded a decision the Claimant had made. In his submission there was only one answer to this question. The Claimant would have been bound to obey the order from Mr Rorison whatever aspect of the business it related to. But such a question was never asked. As I have explained at that stage counsel did not foresee that the question of the Respondents' control over the Claimant would be crucial to the outcome of the case. In my opinion where a crucial question was not asked and where the issue of control was not thoroughly investigated in evidence, I am not inclined to submit the ET's Judgement to minute scrutiny. In my judgement this would be unfair to the ET. It is not clear to me what the answer to such a question would have been. Nor is it clear to me that the ET would have been bound to conclude that Mr Rorison had an overarching power of control consistent with his status as employer.

Postscript

26 The ET's Answer to Question 3 was not the subject of any oral submissions. It referred to the third stage of the **Ready Mix** test and arose because there was no indication in the Judgement that the ET had applied its mind to the third element. Answer 3 indicted that the terms identified were in its view compatible with a contract of employment, a contract of personal service or a contract of employment with a third-party employer. Thus the third stage of the **Ready Mix** test did not indicate that the Claimant was an employee of the Respondent.

Order

27 In these circumstances I refuse the appeal and affirm the decision of the Tribunal.