Appeal No. UKEAT/0042/20/AT (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 17 November 2020
Judgment handed down on 8 January 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

DR SABER ALEMI — APPELLANT

(1) MS KADY MITCHELL
(2) ORTON BUSHFIELD MEDICAL PRACTICE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON FORSHAW (of Counsel) Instructed by: Hegarty LLP Solicitors 48 Broadway Peterborough Cambridgeshire PE1 1YW
For the First Respondent	MS ANDREA CHUTE (of Counsel) Instructed by: Royal College of Nursing 20 Cavendish Square London W1G 0RN
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

Sex Discrimination

The Employment Judge erred in law in holding that all that is necessary for a person to be an employee in the extended sense for the purposes of section 83(2) **Equality Act 2010** is that the person should have entered into a contract under which she or he agrees to do work personally.

There is no significant difference between the definition of an employee in the extended sense for the purposes of section 83(2) **Equality Act 2010** and a limb (b) worker for the purposes of provisions such as the **Employment Rights Act 1996** , both of which exclude those who are genuinely in business on their own account and undertake work for their clients or customers.

HIS HONOUR JUDGE JAMES TAYLER

1. The Appellant is a locum doctor. He worked as such at the Orton Bushfield Medical Practice ("the Practice – the first Respondent before the Employment Tribunal) from September 2017. The Claimant in the Employment Tribunal (I will continue to refer to her as the Claimant) was employed as a Practice Nurse. The Claimant alleged that the Appellant subjected her to sex related and sexual harassment. On 12 September 2018, the Claimant brought proceedings against the Practice and the Appellant in the Employment Tribunal. She claimed that the Appellant was either an employee or agent of the practice, rendering the Practice and himself liable for his actions.

2. The Appellant defended the proceedings on the basis that he was neither an employee nor an agent of the Practice. A Preliminary Hearing was held before Employment Judge Michael Ord on 3 May 2019 to determine whether the Appellant was an employee or agent of the Practice. EJ Ord held that the Appellant was an employee of the Practice for the purposes of section 83(2) of the **Equality Act 2010** in a Judgment, sent to the parties on 9 August 2019. As a result, he did not go on to consider whether he was an agent of the Practice.

3. The Appellant submitted a Notice of Appeal that was received by the Employment Appeal Tribunal on 16 September 2019. The grounds are that: (1) the EJ misdirected himself and applied the wrong test; (2) the EJ expressly disregarded relevant and binding authority; (3) the EJ thereby disregarded material and relevant factual considerations which should have factored into his determination.

4. The Practice does not resist the appeal. The Claimant resists the appeal. She submitted a response on 6 April 2020.

The definition of the term "employment" in the Equality Act 2010

5. Section 83(2) **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;"**

6. As Mr Forshaw notes at paragraph 15 of his Skeleton Argument:

> **"Although the definition in section 83 EqA 2010 expresses itself only to apply to Part 5 EqA 2010 (and therefore would not apply to the claim brought against Dr Alemi under section 110 EqA 2010 which forms part of Part 8 EqA 2010) the general interpretation provisions in section 212 EqA 2010 provide that throughout the EqA 2010: ""employment" and related expressions are… to be read with section 83."**

The categories of people who obtain statutory protection

7. Where a person provides work or services pursuant to a contract, the true nature of the contract determines what, if any, statutory rights the person obtains and, in a case of this nature, may determine what liabilities they may have. Unfortunately, the statutory definitions do not fit together well and there is no simple Venn diagram to show where the overlaps occur. In particular, it is confusing that a person who works under a contract of employment is an employee for the purposes of the **Employment Rights Act 1996**, but is also defined as a worker; whereas a person who would be a limb (b) worker for the purposes of the **Employment Rights Act 1996** is likely to fall within the definition of an employee for the purposes of the **Equality Act 2010**. This can be seen by comparing and contrasting the definition of "employee" in section 83(2) **Equality Act 2010**, set out above, with that of "employee" and "worker" for the purposes of section 230 **Employment Rights Act 1996** which are follows:

> **"230 Employees, workers etc.**
>
> **(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.**

> **(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."**

8. The definitions have given rise to a great deal of litigation and many appellate decisions because of the great significance the definitions have for determining who obtains statutory protection.

9. The position is now reasonably clear. There are three basic categories: (1) those employed under contracts of employment – "employees in the narrow sense" who obtain all of the statutory protections; (2) those who work under contracts to do work personally who are to an extent self-employed but work in circumstances that are akin to employment, who benefit from some statutory protection – often referred to as "limb (b) workers" for the purposes of the **Employment Rights Act 1996** and similar provisions, or "employees in the extended sense" for the purposes of the **Equality Act 2010**; and (3) the "genuinely" self-employed, who are in business on their own account and undertake work for their clients or customers; they benefit from none of the statutory protections.

10. In **Dr R Gunny v Great Ormond Street Hospital for Children NHS Foundation Trust** UKEAT/0241/17/DA Choudhury P, having considered the overview of the authorities and analysis of section 83 **EqA** provided by Underhill LJ in **Windle v Secretary of State for Justice** [2016] ICR 721 (which I shall not insert here as it is more helpful to read the analysis in the full report), summarised the position succinctly as follows:

> **"20. It is clear from that analysis that:**
>
> **(a) The jurisprudence under limb (b) of section 230(3) of the Employment Rights Act 1996 ("ERA") is relevant to an analysis of whether a person is employed under a contract personally to do work.**
>
> **(b) There are two kinds of self-employed people: those that carry on a professional business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them (and who would therefore not be workers); and those who provide their services as part of a profession or business undertaking carried on by somebody else (and who would therefore be workers).**
>
> **(c) Under EC case law, the concept of subordination may distinguish between those who are independent providers of services and those workers who, for a certain time, perform services for and under the direction of another person in return for remuneration. However, subordination is not by any means to be regarded as the "infallible touchstone" for distinguishing between the two kinds of self-employed worker under section 230(3) of the ERA.**
>
> **(d) Whether an employee is or is not employed under a contract personally to work will depend upon the detailed consideration of the relationship between the parties. In other words, the facts will be all important."**

11. There is a difference in the wording of the definitions of an employee in the extended sense for the purposes of the **Equality Act 2010** who must have entered into *"a contract personally to do work"* and a "limb (b) worker" for the purposes of the **Employment Rights Act 1996** who not only must have entered into a contract *"to do or perform personally any work or services"* but also must not *"by virtue of the contract"* have the status *"of a client or customer of any profession or business undertaking carried on by the individual"*. The main point in this appeal is whether the additional wording makes a significant difference. It is now well established in the authorities that it does not.

12. The line of authorities goes back to **Mirror Group Newspapers Ltd v Gunning** [1986] IRLR 27. The current state of the authorities was summarised by Lord Wilson in **Pimlico Plumbers Ltd and another v Smith** [2018] ICR 1511 at 1516 paragraphs 13-15:

> **"13. On its face section 83(2)(a) of the Equality Act 2010 defines "employment" in terms different from those descriptive of the concept of a "worker" under section 230(3) of the 1996 Act and under regulation 2(1) of the 1998 Regulations. For it defines it as being either under a contract of employment or of apprenticeship or under "a contract personally to do work". Comparison of the quoted words with the definition of a limb (b) "worker" in section 230(3) of the 1996 Act demonstrates that,**

> **while the obligation to do the work personally is common to both, the Equality Act does not expressly exclude from the concept a contract in which the other party has the status of a client or customer.**
>
> **14. As it happens, however, this distinction has been held to be one without a difference. Part 5 of the Equality Act, which includes section 83, primarily gives effect to European Union law. Article 157(1) of the Treaty on the Functioning of the European Union requires member states to ensure application of "the principle of equal pay for male and female worker for equal work or work of equal value". In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328; [2004] ECR I-873 paras 67-68 the Court of Justice of the European Communities interpreted the word "workers" in what is now article 157(1) as persons who perform "services for and under the direction of another person in return for which [they receive] remuneration" but excluding "independent providers of service who are not in a relationship of subordination with the person who receives the services". In Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] ICR 1004, the Supreme Court applied the concepts of direction and subordination identified in the Allonby case to its interpretation of a "contract personally to do ... work" in the predecessor to section 83(2)(a). In Bates van Winkelhof v Clyde & Co llp (Public Concern at Work intervening) [2014] ICR 730, paras 31 and 32, Baroness Hale of Richmond DPSC observed that this interpretation of the section yielded a result similar to the exclusion of work for those with the status of a client or customer in section 230(3) of the 1996 Act and in regulation 2(1) of the 1998 Regulations. She added, however, at para 39 that, while the concept of subordination might assist in distinguishing workers from other self-employed people, the Court of Appeal in that case had been wrong to regard it as a universal characteristic of workers.**
>
> **15. Notwithstanding murmurs of discontent in the submissions on behalf of Mr Smith, this court is not invited to review its equation in the *Bates van Winkelhof* case of the definition of a "worker" in section 230(3) of the 1996 Act with that of "employment" in section 83(2)(a) of the Equality Act…."**

13. There was no real difference in approach to the law between counsel for the Appellant, Mr Forshaw, and counsel for the Claimant, Ms Chute. In essence Mr Forshaw contends that EJ Ord erred in law because he considered there was a significant difference between the definition of an employer in the extended sense for the purposes of the **Equality Act 2010** and a limb (b) worker for the purposes of the **Employment Rights Act 1996** believing that to be an employee in the extended sense it was only necessary that the Appellant had entered into a contract with the Practice under which he agreed "personally to do work" (while split in three, there is really only one ground of appeal); whereas Ms Chute contends that EJ Ord properly directed himself on the law and applied it correctly to the facts to find that the Appellant was an employee in the extended sense, even if he did not quite put it that way.

The arguments in the Employment Tribunal

14. The Appellant advanced two main arguments before the Employment Tribunal. He contended that: (1) there was no contract between himself and the Practice – the contract was with his service company; alternatively (2) if there was a contract with him, he was not an employee pursuant to it.

15. It appears that much of the Preliminary Hearing was spent dealing with the first argument. The Appellant lost comprehensively and has not appealed the determination that he entered into a contract with the Practice.

The Employment Judge's direction as to the law

16. The Employment Judge referred to a number of the key authorities at paragraphs 34 and 35: **Jivraj v Haswani** [2011] IRLR 827, **Windle v Secretary of State for Justice** [2016] IRLR 628 and **Bates van Winkelhof v Clyde and Co LLP** [2014] IRLR 641. There is nothing to suggest a misdirection in law in those two paragraphs.

17. At paragraph 36 EJ Ord stated:

> **"I was referred to the case of James v Redcats (Brands) Limited [2007] IRLR 296 as authority that whether a putative employee is in a subordinate relationship and consideration should be given to the extent to which that person is in a dependant relationship with the putative employer or whether the putative employee has a range of clients or customers. That case was to define the definition of worker under the 1998 National Minimum Wage Act (which is the same as that in s.230 of the Employment Rights Act 1996). Those Acts define a worker as:**
>
> > **"An individual who has entered into or works under .... (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is expressed) 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 professional business undertaking carried on by the individual".**
>
> **The definition in the Equality Act 2010 does not contain the caveat of the status of the person who has contracted personally to do work."**

18. While the last sentence is correct, it gives the first inkling that the analysis might be about to go array.

The Conclusions of the Employment Judge

19. Having carefully considered whether there was a contract between the Appellant and the Practice and decided that there was, EJ Ord went on to state at paragraphs 48 and 49:

> **"Was this then a contract "personally to do work"?**
>
> **The answer is, I find, "Yes".**

20. EJ Ord stated at paragraph 51:

> **"The authorities relied upon by the second respondent in this area deal with different definitions of "employee" in particular under either s.230 of the Employment Rights Act 1996 or under s.54 of the National Minimum Wage Act 1998."**

21. This was incorrect, in that a number of the authorities Mr Forshaw relied upon dealt with the meaning of employ in the extended sense for the purposes of section 83(2) **Equality Act 2010**. More importantly, it suggested that EJ Ord thought that there was a substantial difference between the definition of an employee in the extended sense and a limb (b) worker. The authorities that he had been referred to said the opposite.

22. The fact that EJ Ord was drawing this mistaken distinction was emphasised by the next paragraph, paragraph 52, in which he stated:

> **"The definition of "employee" under the Equality Act 2010 is broader. Employment as defined includes employment under "a contract personally to do work". There are no other limitations or restrictions placed upon that definition."**

23. The authorities establish that the definition of "employee" under the **Equality Act 2010** is not, despite the difference in wording, broader, to any significant degree, than that of a limb (b) worker.

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24. In paragraph 53, in considering the meaning of employee for the purposes of the **Equality Act 2010** EJ Ord stated that:

> **"Accordingly, that definition can include people who are considered (whether by themselves, any other contracting party or HM Revenue and Customs) to be "self-employed" or in business on their own account. It requires only that there exists a contract between the individual and another under which the individual contracts personally to do work."**

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25. The last sentence of that paragraph makes it clear that EJ Ord considered that to be an employee in the extended sense for the purposes of the **Equality Act 2010** a person need only have entered into a contract to do work personally. That could include a contract between a person who is in business on her own account and undertakes work for her clients or customers, as a genuinely self-employed person, provided she is required to perform the work herself. That analysis is wrong. People who are genuinely in business on their own account and work for their own clients or customers are excluded from the definition of employee in the extended sense for the purposes of the **Equality Act 2010**, just as they are from the definition of limb (b) worker for the purposes of the **Employment Rights Act 1996** and similar provision. This was succinctly stated by Baroness Hale in **Bates van Winkelhof v Clyde & Co LLP** [2014] ICR 730 at paragraph 31:

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> **"As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract personally to do work within its definition of employment (see, now, Equality Act 2010, section 83(2)), does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route."**

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26. The fact that the Employment Judge had made this error is clear from the next two paragraphs, paragraphs 54 and 55:

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> **"In this case:**
>
> **(1). The contract was between the first respondent and second respondent.**

(2). Under that contract the second respondent and the second respondent alone was to carry out work for the first respondent.

For those reasons I find that the second respondent was, at the times he was carrying out work under the agreement between himself and the first respondent, an employee of the first respondent within the wider definition in s.83 of the Equality Act 2010."

27. The core of Ms Chute's response to the appeal was a contention that the Employment Judge having referred to a number of the relevant authorities considered whether the Appellant was an employee in the extended sense and so could be "self-employed" but still be an employee for the purposes of the **Equality Act 2010**. For the reasons set out above I do not accept that is the case. It is clear from his reasoning that EJ Ord considered there was a fundamental distinction between an employee in the extended sense for the purposes of the **Equality Act 2010** and a limb (b) worker for the purposes of **Employment Rights Act 1996** and similar provisions, believing that the **EqA** only required a contract to do work personally. That was an error of law that means that the appeal must succeed. Mr Forshaw's other two grounds of appeal do not add much of substance to the first ground, being little more than slightly different ways of evidencing the error in law made by the Employment Judge in this case. However, it is correct that the Employment Judge did not follow binding authority and also did not conduct the detailed factual analysis referred to by Choudhury P in **Gunny** which will have to be conducted on remission, taking full account of the relevant authorities.

28. I allow the appeal and remit the matter for consideration of whether the Appellant was an employee or agent of the Practice by a different Employment Judge.

29. I consider that the matters should be remitted to be determined by a different Employment Judge because, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

(1) It is not proportionate to await the availability of the same Employment Judge before this case can progress.

(2) The error of law was fundamental to the decision reached.