Can an individual be a 'worker' if they are not obliged to accept any work at all?

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Nursing and Midwifery Council v Somerville UKEAT/0258/20/RN(V)

[ ] paragraph number of the EAT's judgment
Parties are referred to as they were in the ET

Introduction

1. The Nursing and Midwifery Council ('NMC') is the regulator of Nurses and Midwives in the UK. Pursuant to the Nursing and Midwifery Order 2001, the NMC has a Fitness to Practise Committee ('FTP'), which determines allegations of impairment of fitness to practise. The Claimant was appointed as a panel member and chair of the FTP for a four-year term on 16 April 2012. He was appointed for a further four-year term in April 2016.

2. In July 2018, the Claimant brought claims for unpaid statutory holiday pay. An Open Preliminary Hearing was held to determine employment status. The Respondent contended that the Claimant was not an employee nor a worker.

Background facts

3. In addition to his NMC appointment, the Claimant undertook what the ET described as a 'portfolio of work' including [11]:

    a. ombudsman at the Financial Ombudsman Services;
    b. accredited mediator and mediation advocate;
    c. arbitrator in a variety of different types of dispute;
    d. independent member/chair of employee disciplinary and grievance hearings;

e. independent investigator into serious disciplinary matters in various organisations;
f. panel member for the Medical Practitioners Tribunal Service ('MPTS');
g. member for the Chartered Institute of Management Accountants and the Construction Industry Council;
h. Magistrate;
i. from 2019, Judge of the First Tier Tribunal (Social Entitlement Chamber).

4. The Claimant was called to the Bar in July 2012; He completed an LLM in Dispute Resolution in 2013/14. He completed pupillage in February 2018 and practised as a barrister thereafter [11].

5. The agreement signed by the parties (described as a 'Panel Member Services Agreement' ('PMSA')) provided that the Claimant would have the status of an independent contractor.

6. The Claimant was required to 'comply with all procedures of the NMC relevant to Panel Members in force at the time'. There were a number of obligations on the Claimant arising from the PMSA and associated documents [14-15]. For example, the Claimant was required to comply with a Code of Conduct and the Service Standard for Panel Members. The Respondent had the power to suspend a panel member who breached the Code of Conduct and there was a power to terminate the agreement if the panel member committed serious breaches. The Claimant had the right to terminate the agreement on three months written notice.

7. The Claimant was paid fixed fees for work done (which were non-negotiable); the Claimant had no control over the level of fees. He was required to invoice the Respondent for work done. Travel expenses were reimbursed in accordance with the Respondent's policies [19].

8. The Claimant was responsible for accounting to HMRC for any income tax and national insurance due on fees paid to him by the Respondent. He offset substantial expenses against his income. In his tax returns, the Claimant variously described his business as 'consultancy and professional disciplinary' and 'Prof Regulatory Panel Chair/Ombudsman' [21].

9. The Claimant was not permitted to represent nurses or midwives in his capacity as a barrister but otherwise he was free to accept any amount or type of work for other organisations, including other regulators [18].

10. The ET found that the number of days on which the Claimant actually sat varied considerably: 129 days in 2013, between 61 and 98 days in each year between 2014 and 2017 and 17 days in 2018 [17]. He was able to turn down sitting days and in fact did so on occasions. He was not required to provide an acceptable reason. The ET found that there was an expectation that panel members would offer dates each year and that members were spoken to if they were not offering dates (they were encouraged to do so) but members were not required to offer a specific number of dates and were not sanctioned if they did not do so [17].

11. In summary, the ET concluded that [4]:

    a. there was a series of individual contracts each time the Claimant agreed to sit on a hearing and also an overarching contract in relation to the four-year term of appointment;
    b. the written materials represented the parties' true agreement;
    c. the Claimant was not obliged to offer or accept a minimum number of sitting days and he was free to withdraw from dates he had accepted;
    d. the Claimant was obliged to provide his services personally (there was no right of substitution);
    e. the Respondent was not a client or customer of a profession or business carried on by the Claimant (this is referred to below as 'the client/customer finding');
    f. in light of the above, the Claimant was a worker within the meaning of s.230(3)(b) Employment Rights Act 1996 ('ERA') and reg.2(1) Working Time Regulations 1998 ('WTR') but not an employee.

12. The Claimant did not appeal the conclusion regarding employee status. Similarly, there was no challenge (from either party) to the finding that there was a series of individual contracts and an overarching contract [5].

The Grounds of Appeal

13. The main ground of appeal was that:

> *The Claimant could not be a worker within the section 230(3)(b) ERA meaning because mutuality in the sense of the existence of an irreducible minimum of obligation is a prerequisite to satisfying the statutory definition* [9]

14. The Grounds of Appeal also took issue with the ET's reliance on the contracts which had been found to exist between the parties, on the basis that they did not oblige the Claimant to undertake any minimum amount of work for the Respondent, but that argument appears to add little if anything to the first ground of appeal.

15. Two further grounds of appeal challenged the ET's findings in relation to the client/customer finding.

Legal principles

16. In this case, the EAT conducted a thorough review of the case law, which is beyond the scope of this summary [43-82]. However, it is convenient to record the following principles.

17. Section 230 ERA provides:

> *(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" …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.

18. Regulation 2(1) WTR adopts the same definition of worker as the ERA.

19. In *Uber BV v Aslam* [2021] UKSC 5 ('*Uber*') at [41], Lord Leggatt (giving the judgment of the Court) described the statutory definition of worker as having three elements: (1) a contract whereby an individual undertakes to perform work or services for another party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual

20. As observed by the EAT, it is also important to keep in mind that the phrase 'mutuality of obligation' has been used in two ways in the case law:

    a. to denote the exchange of promises of consideration from each party of a kind necessary to create any form of bilateral contract (this was subsequently referred to by the EAT as 'mutuality of obligation'); and

    b. an obligation on a putative employee to accept and perform some minimum amount of work for the putative employer, along with the corresponding duty on the putative employer to offer some work and pay for the same (the EAT subsequently referred to this as the 'irreducible minimum of obligation') [6]

Does the finding that there was no obligation on the Claimant to carry out any sittings at all mean that he cannot be regarded as a worker?

21. The EAT concluded that the equivalent of the Respondent's submission had been considered in detail and rejected in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181. Moreover, the EAT suggested that the Respondent's argument was either inconsistent with or otherwise not supported by *Hospital Medical Group Ltd v Westwood* [2013] ICR 415 (CA), *Windle v Secretary of State for Justice* [2016] IRLR 628 and *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511 UKSC.

22. But what about the Supreme Court's decision in *Uber*? In paragraphs 90-91 and 113 of the judgment in *Uber*, Lord Leggatt held as follows:

> The contractual arrangements between drivers and Uber London did subsist over an extended period of time. But they did not bind drivers during periods when drivers were not working: rather, they established terms on which drivers would work for Uber London on each occasion when they chose to log on to the Uber app.
>
> Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working.
>
> …
>
> It is not necessary for present purposes to express any view on whether the *Mingley* case was correctly decided. I do not accept, however, that the fact that the claimant in that case was free to work as and when he chose was a sufficient reason for holding that, at times when he was working, he was not employed under a contract to do work for the firm.

23. However, at paragraphs 125-126, Lord Leggatt said:

> Uber argues that it is clear from the tribunal's own findings that drivers when logged onto the Uber app are under no obligation to accept trips. They are free to ignore or decline trip requests as often as they like, subject only to the consequence that, if they repeatedly decline requests, they will be automatically logged off the Uber app and required to wait for ten minutes before they can log back on again. Furthermore, when logged into the Uber app, drivers are at liberty to accept other work, including driving work offered through another digital platform… Counsel for Uber submitted that, on these facts, a finding that a driver who switches on the Uber app undertakes a contractual obligation to work for Uber London is not rationally sustainable… [emphasis added]

> The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation"… In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work. [Emphasis added].

24. At first glance, the final sentence of paragraph 126 of the *Uber* judgment appears to support the view that to qualify as a worker, there must be an obligation to do at least some amount of work (the irreducible minimum). If that is the correct interpretation, the finding that the Claimant in this case was not required to undertake any sitting days at all would appear to be incompatible with a finding of worker status. But the EAT did not accept the Respondent's interpretation of the judgment in *Uber*.

25. The EAT reasoned that the suggestion that Lord Leggatt was laying down a general test that for worker status there must be an irreducible minimum of obligation does not sit easily with paragraphs 91 and 113 of the *Uber* judgment. Moreover, the EAT took the view that in paragraph 126, Lord Leggatt was addressing the suggestion that Uber drivers owed no contractual obligation to work for Uber even when they had logged into the app: 'in that particular context, the question of whether there was an obligation on the drivers to do some amount of work from the point when they switched on the app was directly germane to the question of their status and specifically whether there was a contract then in existence for them to provide their work or services to Uber' [emphasis added] [92].

26. Accordingly, the EAT dismissed the Respondent's main ground of appeal: an obligation to undertake some minimum amount of work is not a prerequisite of worker status.

The client/customer finding

27. The Respondent's secondary argument was that the only proper inference to be drawn from the findings of fact made by the ET was that the Claimant was carrying on a business undertaking of which the Respondent was his client or customer [96].

28. The EAT noted that the determination of whether the client/customer exception applies entails a multi-factorial assessment, in which the degree of weight to be placed on a particular factor is a matter for the ET [98]. There is no one test of general application, although consideration of whether the individual markets his or her services or whether they were recruited as an integral part of the putative employer's operations may assist in many cases [98].

29. The EAT dismissed the Respondent's appeal related the client/customer finding:

    a. the ET was correct to say that the label used by the parties (independent contractor) was not determinative of the Claimant's status [101];

    b. the ET was entitled to treat the work undertaken by the Claimant outside of acting as a regulatory panel member as a distinct business [103-104];

    c. the ET took into account the similarity between the work undertaken by the Claimant for the NMC and other regulators [105-106];

    d. the ET's conclusion that the Claimant did not market his services did give the EAT pause for concern, 'one tenable view, [is that] he was making approaches, offering these bodies his services as part of a business of providing services as a regulatory panel member' but the grounds of appeal did not include perversity [107-108];

    e. the ET was entitled to view the Claimant's tax and business expenses, along with the Claimant's own description of his business in his tax returns as a neutral factor [109-110];

    f. there was no difficulty with the ET noting that the Respondent was dependant on the services of its panel members in discharging its principal functions. Although in general that point is unlikely to of central importance, as key operational tasks may well be undertaken by genuinely independent contractors, it was not wholly irrelevant [114]. Alternatively, even if any of the individual matters relied on by the Respondent were irrelevant, there was no material error given the extent of the other factors legitimately considered by the ET [115]

Comment

30. Notwithstanding the Supreme Court's judgment in *Uber,* handed down in February 2021, employee/worker status is likely to continue to be a much-litigated topic. In light of the EAT's judgment in this case, it appears settled that a requirement for an individual to accept some minimum level of work (however small) is not an essential ingredient of 'worker' status.

31. There are a very large number of regulatory and/or disciplinary bodies that operate panels and recruit members in a similar way and/or on similar terms to the NMC. This judgment should be considered carefully by them and by their panel members. In my experience, many individuals who sit on such panels, like the Claimant in this case, hold multiple appointments to different regulatory and/or judicial bodies, including the ET. The EAT emphasised that the test in relation to the client/customer exception is multi-factorial and the weight to be attached to the factors identified is a matter for the evaluation of the first instance judge [98]. In relation to those who might be described as 'professional panel members', depending on the facts of the particular case, it is possible that a different ET would reach the opposite conclusion regarding the client/customer exception to that of the judge in this case.

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