



EMPLOYMENT TRIBUNALS

Claimant: Charlotte Hasledine

Respondents: 1. Tracy Winterton
2. Academy 4 Dogs Limited
3. Happy Hounds Dog Grooming School Limited

HELD AT: Manchester

ON: 19 and 20 June
2017

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Mr J Searle, Counsel
Respondents: Ms F Ali, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant's claims are dismissed.

REASONS

1. The claimant has brought a claim of unfair dismissal following her resignation on 3rd January 2017. It was not apparent from the ET1 that the claimant alleges there were payments made to her of cash in hand for extra work done in addition to payments into her bank under PAYE from which national insurance was deducted. This allegation was apparent from the witness statements of the claimant and her witnesses. The respondents deny that any extra cash payments were made to the claimant.

2. Mr Searle rightly raised this question of jurisdiction at the start of the hearing because the Tribunal cannot support an illegal contract. The first question for consideration by the Tribunal, having heard the evidence, is was the contract of employment an illegal contract? If yes, can the illegal part of the contract be severed so that the remainder of it can be enforced?

3. The claimant was employed and/or paid by one or more of the three respondents at various times. She worked for businesses that looked after and/or trained dogs. I accept the evidence of the first respondent that in the world of dog care and training it may not be unusual for people to volunteer to work with dogs either for their own enjoyment, to increase their skills and knowledge or to further their careers.
4. The claimant started with the respondents as a volunteer and then became employed from March 2011. She was initially employed by the first respondent trading as Academy 4 Dogs Training School and Crèche for less than 16 hours a week, too few hours to earn at the level at which she would pay national insurance. She was paid in cash.
5. In 2012 the claimant was paid a proportion of her wages through PAYE. She was paid for 16 hours in this way although working 30 hours or more.
6. In September 2013 her contract was amended. The new contract had on the first line Academy 4 Dogs Ltd & Happy Hounds Dog Training School Ltd and then a reference to Tracy Chapman owner of Academy 4 Dogs Training School and Crèche. The claimant would be paid by "Academy 4 Dogs" and PAYE records show that payment came from the first respondent at the weekly rate of £139.04 later rising to £154 with an employee NIC of £0.60 and an employer contribution of £0.83. The job role was stated to be Pet Carer/Dog Trainer/Agility Instructor. As to the job description it included "Volunteer Agility Instructor" and "Volunteer Dog Trainer".
7. The claimant later got paid 22 hours through PAYE although sometimes she worked and was paid for in excess of 40 hours.
8. Obviously a business paying out cash must generate the cash to pay out because employers paying people in cash without putting it through the accounts from cash legitimately received and recorded through the books would not be able to show the payments of wages as legitimate costs of sales.
9. The claimant in her witness statement says "We have two card terminals at the desk in the centre, one for Happy Hounds and one for Academy 4 Dogs and we were told to put payments through the appropriate terminal according to what service the customer was there for. However sometimes Tracy would say that too many transactions and money had gone through in a certain month on one terminal and that we should therefore use the other regardless of service. I would also mention in passing that there were also occasions when we were also told by Tracy that too much had gone through on both terminals, in these cases we were told to tell customers that the card machine was not working and that we could only accept cash payments. When a new course of classes were due to start (every six weeks) we were also typically told to ring all the people who were booked on and tell them we were having problems with the card machine so they needed to bring the remaining balance in cash in order to start the course". The claimant was not cross examined on this evidence.

10. The claimant in her witness statement has confirmed she was paid regular weekly sums in to the bank and also payments in cash. The respondents have produced schedules from their accountant's PAYE records showing that the claimant was paid a regular weekly sum in to the bank. The rate of pay increased from time to time but otherwise, it did not vary from week to week.

11. From the cross examination of the claimant, she was saying that at one period she was paid 22 hours into the bank, she was also working some evenings 3 hours 6 until 9 doing training and was paid cash in hand. The respondent's representative confirmed that the work done by the claimant in this 6 to 9 period was in fact done as a volunteer without payment. Further, from my notes of the claimant's cross examination the hourly rate paid into the bank was £7.80 but when she was paid the extra hours it was based on £8.80 i.e. £1 more. She said she lived off the cash with the first respondent telling her not to pay it in to the bank account and that of course explains why the claimant could not bring bank accounts that would show payments of cash into her account because they did not reach it. As a part of the claimant's issues over her contract when she was raising issues and a grievance she said that the cash in hand issue was not mentioned at that stage, it wasn't an issue that she was aggrieved by.

12. In support of the respondents subsequently changing their policy from paying cash in hand to paying in the bank the claimant points to a text message from Nicola, a woman who is employed by the respondents but who has not attended Tribunal for personal reasons and therefore has not been cross examined. Nicola wrote "Everyone's getting there pay in the bank?! Full crèche hours" with Rebecca responding with "No way since when?" In the claimant's submission this supports the change in position of the respondent paying more hours into the bank rather than in cash.

13. The claimant called two live witnesses and produced statements from others. I have not taken into account the evidence of the witnesses who had not been before the Tribunal.

14. Sally Thorley worked for the respondents for around a year from October 2013 to October 2014. I should add that she is now appears to be involved with the claimant in a business they are operating together. She said in her statement that "I was initially paid the hours I worked straight into my bank account however I took up overtime fairly quickly from the outset of my employment and the first respondent Tracy told me that I could only do these extra hours if I was paid for them in cash saying that it was easier and better for both of us. I assumed this just meant paying cash instead of bank payment was easier for her however I later found out that the cash was undeclared. All of my training class hours were paid to me in cash, Tracy told me that if I wanted to be a trainer I had to pretend I was volunteering for the third respondent Happy Hounds. She said if I didn't agree to this she would reduce my hours to my contractual hours of 8 per week which she knew I was unable to live on".

15. The second witness called by the claimant was Claire Bradshaw who I think also may now be involved with the claimant in a business venture. She was involved

with the respondents from September 2012. She said that her pay in respect of the hours she worked in day care was paid directly into her bank account but the hours during which she was teaching classes was paid in cash. She asked why it was paid like this and was told by Tracy that it was done that way to benefit her and naively she believed it.

16. According to the first respondent she initially traded in her own right but now there are now two companies, each with a turnover of £60,000 or £70,000 carrying out dog related activities, each below the VAT threshold. The respondent businesses have properly paid employees and are assisted by volunteers who teach classes without payment although the respondent businesses receive payment from the dog owners for the classes.

17. The respondent called evidence from Stephanie Moore, employed since 2010 who said that all of her wages go into her bank account each week and have done so since she started. This evidence may well be absolutely right because it is apparent from Ms Moore's statement that she was working looking after the dogs not taking classes because she didn't feel confident to do so. This might explain why in her case there was no need for any extra payment over and above what went into her bank.

18. Because this issue was raised both sides made submissions. For the respondents it was submitted that they deny that any such improper payments were made or received.

19. Mr Searle has helpfully provided an extract from Harvey on Employment Law and I shall start with the introduction to the chapter headed "Illegality in standard employment law cases".

"Most of the reported cases have however concerned rights under the Employment Rights Act 1996 where employment status is vital. In this context ordinary principles of contractual legality or illegality come to the fore; moreover to apply such principles to debar a claim has been held not to offend Article 6 of the convention on human rights, the right to a fair trial because it constitutes the application of substantive law not a procedural bar. Contracts may be held illegal and void at common law as being contrary to public policy on a variety of grounds. In employment cases the issue has usually arisen in relation to contracts illegal on the grounds that they defraud the Inland Revenue".

20. Harvey goes on to say that the rules were distilled by Mr Justice Elias when President of the Employment Appeal Tribunal in a case of **Enfield Technical Services Limited and Payne 2007 IRLR 840** in the Employment Appeal Tribunal and subsequently approved by the Court of Appeal in the same case reported at **2008 IRLR 500**. Lord Justice Lloyd agrees with the analysis of Elias J in particular:

"In our judgment the essential feature of all the cases where there has been found to be illegality is that the parties have knowingly entered into arrangements which have to their knowledge represented the facts of the employment relationship to be other than that they really were...We do not consider that the authorities ... support the proposition that if the arrangements have the effect of depriving the Revenue of tax to which they were entitled then this renders the contract unlawful. For the reasons we have given, in our judgment there must be some form of misrepresentation, some attempt to

conceal the true fact of the relationship before the contract is rendered illegal for the purposes of the doctrine rooted in policy”.

21. Looking at all of the facts before me I conclude it is more likely than not that the claimant and her witnesses and Stephanie Moore were being truthful and that Tracy Winterton's evidence was not truthful. It does not seem to me to be credible that employees would willingly volunteer to do so many hours of unpaid work when the employer was being paid to provide the classes. I therefore conclude it more likely than not that cash payments in the nature of wages were being made which thus took from Her Majesty's Revenue and Customs tax and national insurance contributions it was rightly entitled to. Both parties it seemed to me participated in this arrangement, the claimant less willingly than the respondents but the claimant accepted illegal payments for the majority of her period of employment even receiving a higher payment in cash than she did when paid through the bank. I conclude that the contract between the parties was an illegal one by reason of the cash payments and that the claimant was an active participant in the scheme.

22. Mr Searle submits that it might be possible to sever the illegal part of the contract from the remainder and make a judgment on the balance of the contract but it seems to me that the pay is such a fundamental element of a contract of employment that it is not one that I can reasonably sever, therefore I dismiss the claimant's claims on the basis of illegality.

22 June 2017

Employment Judge Sherratt

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 June 2017

FOR THE SECRETARY OF THE TRIBUNALS