Case Number: 3300186/2017

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S Aroua	**v**	**Madame Posh**

Heard at: Reading **On**: 12 July 2017

Before: Employment Judge S Jenkins

Appearances

For the Claimant: In person
For the Respondent: Ms L Robinson, Counsel

JUDGMENT

1. The Employment Tribunal does not have jurisdiction to consider the Claimant's claim of unfair dismissal and that claim is therefore dismissed.

2. The Claimant's claim for breach of contract fails and is dismissed.

3. The Claimant is entitled to payment in respect of work in October and November 2016 and the Respondent is ordered to pay the Claimant the sum of £600.00 in respect of that work.

4. The Claimant is entitled to payment in respect of accrued but untaken holiday and the Respondent is ordered to pay the Claimant the sum of £2,040.00 in respect of that.

REASONS

Background

1. The claims before me were for unfair dismissal, breach of contract relating to the Claimant's notice period, arrears of pay and for pay in respect of accrued but untaken holiday.

2. I heard evidence in this case from the Claimant on his own behalf and from Ms A Urso, General Manager, on behalf of the Respondent. I also

considered the documents within the bundle of documents which were referred to within the witness statement of the two witnesses.

Issues and law

3. The primary issue for me to address was the employment status of the Claimant. The Claimant contended that, notwithstanding the terms of his contract with the Respondent, he was an employee. The Respondent contended that the Claimant was self-employed and that that meant that there would be no ability for him to pursue an unfair dismissal claim, nor indeed for him to pursue a breach of contract claim before the Tribunal.

4. In relation to the claims for arrears of pay and holiday pay, there is no requirement for a claimant to be an employee, but they must be a worker. The Respondent contended that the Claimant was also not a worker, and that in any event there were no sums due to him in relation to his claims.

5. In relation to the unfair dismissal claim, I clarified at the outset of the hearing that the Claimant had only been engaged by the Respondent for a period of some nine months and therefore, regardless of whether he was an employee, he did not have sufficient service to pursue that type of claim; therefore, there was no jurisdiction to consider it and it had to be dismissed.

6. I did however need to consider whether the Claimant was an employee in order for me to consider his claim for breach of contract in that the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, which provides for the Employment Tribunal's breach of contract jurisdiction, only applies to employees.

7. If I concluded that the Claimant was indeed an employee then I would need to go on to consider whether he had committed a repudiatory breach of contract such that the Respondent was entitled to dismiss him without notice, the Respondent's contention being that, even if the Claimant was able to bring a claim for breach of contract, it was still justified in dismissing him summarily.

8. With regard to the claims for arrears of pay and holiday pay, I needed only to be satisfied that the Claimant was a worker; he did not need to be an employee to pursue such claims. If I was not so satisfied, then both those claims would fail. However, if I was so satisfied, I would then need to assess, in relation to pay, what pay was due to the Claimant in respect of his work for the Respondent prior to the determination of his engagement, whether payment had been made in respect of that and, if not, whether any shortfall was required to be ordered to be paid.

9. With regard to holiday pay, I would need to assess the holiday year in relation to the Claimant's engagement, how much holiday he had accrued during that period, how much he had taken and how much, if any, was therefore outstanding.

Findings

10. The Respondent is a café and restaurant business in Windsor operating at lunchtimes and through to afternoon tea. It is controlled by three directors, although there appears to have been a recent falling out amongst the directors, which was not relevant to my deliberations.

11. The Claimant was engaged as a Chef de Partie under a document described as a services agreement dated 15 February 2016. This noted that the Claimant was a professional culinary and cookery specialist and that he was to provide professional services to the Respondent, and it described the Claimant as a contractor. The agreement also contained a comprehensive schedule of services, running to two pages, which contained a number of broad headings in relation to the services to be provided, and then went into significant detail, listing the Claimant's main responsibilities in 21 numbered points, most of which appeared then to relate to the operational work of a Chef de Partie. The agreement also required, at clause 2.6, that the Claimant be available in accordance with a rota published by the Respondent.

12. The Claimant was paid under his agreement with the Respondent at the rate of £12 per hour. The agreement also specified that he would be entitled to 20 days' holiday in addition to public holidays. It also contained an ability for the engagement to be brought to an end on notice, restrictions on the Claimant's activities after the employment ended, and provisions relating to confidential information and intellectual property.

13. The agreement also contained an ability for the Respondent to terminate it with immediate effect and without prior notice in certain circumstances, which included where, in its reasonable opinion, the Claimant's conduct had brought it into disrepute or was likely to materially prejudice its interests.

14. The accepted evidence of both parties was that the Claimant worked for the Respondent at its premises consistently from the start of his engagement in February 2016 until it ended in November 2016. He did not work regular hours, but worked consistently through virtually every week between February and November, being responsible for the preparation of savoury food, and he supervised up to three junior chefs or assistants in that respect.

15. The services agreement did not contain any ability for the Claimant to send any substitute to do the work although, equally, it did not contain any provision which obliged him to do the work personally. The evidence from both parties was that the Claimant did not, at any time, seek to send a substitute.

16. The agreement also did not contain any restriction on the Claimant's ability to work for other customers or clients during the course of the engagement, although the evidence from both parties was that the Claimant had not undertaken work for any other customer or client during this particular period.

17. The Claimant submitted monthly invoices for his services to the Respondent and did so in the form of formal invoices, from "Saad Services", each month. Those invoices appear to have been paid without contention until the invoices for October and November, which form the basis of the Claimant's claim for arrears of pay.

18. Ultimately, during the period of the Claimant's engagement with the Respondent several concerns were raised about his behaviour and conduct, particularly with regard to his aggression within the workplace and his relationships with others. There were a number of documents within the bundle which indicated that complaints had been made about the Claimant by a number of different individuals. I noted that the Claimant contended that these emails were not genuine and that, in one or two cases, he indicated that some of the individuals making the complaints had vested interests in wanting to make complaints against him or to protect the Respondent's position. However, I noted that there were other complaints, notably from an external chef who attended at the premises of the Respondent for a trial, where it did not seem that any such contention could be substantiated.

19. The Claimant was issued with a warning about his attitude and his conduct in September 2016, but further complaints appear to have arisen and it appeared, from the documents, that a view broadly held within the Respondent organisation was that the Claimant was not someone who took instruction well, was someone who challenged those in a managerial relationship to him, and, in general, was aggressive on many occasions.

20. Ultimately matters came to a head on 6 November 2016 when the police were called and removed the Claimant from the Respondent's premises. He was ultimately then dismissed by the Respondent by letter dated 9 November 2016.

21. With regard to the Claimant's hours worked and payments received, he was as I have mentioned above, paid in response to the invoices he submitted up to an including that for September. The October and November invoices were however checked by the Respondent, with Ms Urso looking at the CCTV images from the premises, following which she drew up spreadsheets relating to the months of August, October and November, which showed discrepancies in comparison with the Claimant's invoices. By way of clarification, Ms Urso explained that the CCTV footage was not available for the month of September. She contended that there had been similar discrepancies in earlier months, but confirmed that she had not prepared any spreadsheets in relation to those earlier months, and no direct evidence was put before me in relation to them.

22. The Claimant asserted, in his schedule of loss, that he was due to receive other payments for services he rendered, notably in relation to a trip to London on a day off, which he contended was to look at which plates to buy for the Respondent. He also contended that he should have received

additional payment for several weeks in July and August 2016, when up to three other staff members were absent and when he contended that he was therefore effectively doing the work of two or three people. However, the services agreement did not contain any provision for payment beyond that of £12 for each hour worked, and there was no evidence of any specific agreement regarding additional payments. Furthermore, the Claimant had submitted invoices for the relevant periods and had made do claim for any such payments. I was therefore satisfied that no such sums were due.

23. With regard to holidays, the Claimant had not formally requested holidays and that had been accepted by Mr Urso. He did appear to have taken some time off during the period of his engagement but it was clear that he had not been paid for any of that time taken.

24. Finally, with regard to my findings, I was conscious that there were some quite distinct versions of events on both sides, in the form of the evidence provided by the Claimant on one side and Ms Urso on the other. Tribunals are often faced with situations where they have to deal with contradictory evidence on both sides of the case, and a tribunal judge then needs to look for support from the evidence given orally, and from other material such as the documents provided, or documents or evidence which might have been expected to be provided had the state of affairs contended by the particular party actually existed.

25. In this particular case I noted the amount of documentary evidence, in the form of emails and reports from others, regarding the Claimant's behaviour and I was satisfied that the Claimant had conducted himself in the manner alleged, that he did have issues in terms of his relationships with others at work, and had, at times, been aggressive in the workplace.

26. With regard to the hours worked, I was also satisfied that the spreadsheets provided within the bundle, prepared by Ms Urso, properly reflected the work undertaken by the Claimant in the months of August, October and November, such that the amount of hours listed there should be considered to be accurate as opposed to the Claimant's invoices.

Conclusions

27. As I identified above, the primary issue for me to consider was whether the Claimant was an employee or, if not an employee, a worker. With regard to the test of being an employee, the statutory definition, set out in s.230(1) of the Employment Rights Act 1996 ("ERA"), is as follows:

"*an individual who has entered into, or works under (or where the employment has ceased, worked under) a contract a contract of employment*."

28. In that context, a contract of employment is not necessarily confined to any written document between the parties, but can be concluded by implication from a number of sources. I was conscious in this particular case that the

written document between the parties described itself as a services agreement, and described the Claimant as a Contractor rather than an employee. I was however conscious of the case law that has built up surrounding this issue, going back as far as case of Ready-Mixed Concrete (South East) Ltd v the Minister of Pensions and National Insurance [1968] 2 QB 497. That case, and several subsequent cases, have made it clear that, in order for there to be considered to be a contract of employment between two particular parties, there needs to be an "irreducible minimum" in relation to three core matters; personal service, control and mutuality of obligation. The case law has also indicated that the other factors should also be consistent with there being a contract of employment.

29. In this particular case I noted, with regard to mutuality, of obligation that the Claimant was required to be available as per the respondent's rota, pursuant to clause 2.6 of his agreement, I also noted that, whilst the agreement did not specify that the Claimant would be given any particular quantity of work, he did, as a matter of fact, attend very regularly throughout the period of his engagement. I also noted the very comprehensive list of duties set out in the schedule which seemed to go beyond those of an external consultant to the organisation. It seemed to me that the Claimant was expected to work as a Chef de Partie and did indeed work as a Chef de Partie throughout the period of his engagement, alongside the Respondent's other employed staff.

30. With regard to personal service, there was no ability within the services agreement which allowed the Claimant to provide a substitute in relation to his work, and I was conscious that he did not, as a matter of fact, ever provide one. I accepted that the need never arose but there certainly was no exercise of any ability on the part of the Claimant to provide an alternative to do the work, and he performed the services personally throughout.

31. Finally, with regard to control, I noted the Respondent's contention that the Claimant had a degree of autonomy over his particular area, the savoury area, and in relation to the staff working within that area. However, the Claimant himself was subject to the overall management structure of the organisation, and was controlled by those in managerial positions in relation to him. I also noted that those in managerial positions had issued him with a warning regarding his behaviour which, to my mind, was indicative of a significant degree of control.

32. I was therefore satisfied that those matters which were stated to be required to exist as the irreducible minimum of an employment contract had been present.

33. With regard to the other factors, I was also satisfied that the majority of them pointed towards an employment relationship. The relationship was an open ended one, terminable only on notice, and I noted that the agreement contained restrictive covenants which sought to limit the Claimant's activities after the employment, which are more usually to be found in employment

contracts rather than those relating to contractors. The Claimant also appeared to be fully integrated within the organisation and, whilst he did provide some of his own equipment, in the form of his own knives, all other equipment appeared to be in situ on the Respondent's premises.

34. I did not consider see that the Claimant was subject to any form of financial risk in relation to his activities, over and beyond the normal risks that employees would face of their employers dispensing with their services. He certainly did not gain from the better performance of his duties or suffer from the poorer performance of his duties.

35. The method of payment was certainly one issue which pointed away from a contract of employment, in that it was done by way of invoices and the clamant was paid without deduction of tax throughout. I was however satisfied that the method of invoicing was not used by the Claimant for any other client, and therefore I was not satisfied that it ultimately undermined my conclusions that there was indeed an employment contract in place in this particular case.

36. I was mindful in that regard of the direction provided by the Supreme Court, in the case of Autoclenz Ltd v Belcher [2011] IRLR 820, that where an expressed state of affairs between parties was sought to be argued to be different in reality, it was appropriate to look at what was the true agreement between the parties. In my view, it seemed that the true agreement between the parties was that the Claimant would attend regularly and consistently at the Respondent's premises to provide the duties of a Chef de Partie, in charge of the delivery of savoury food on the premises alongside the Respondent's employees, and I did not see that that amounted to anything other than a contract of employment.

37. However, if my conclusion that regard was wrong, I would nevertheless still be satisfied that the Claimant had been a worker. The definition of worker in s.230(3)(b) of the ERA is:

"*an individual who…works under any other contract [other than a contract of employment]…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 of customer of any profession or business carried on by the individual*".

38. In that regard. I was satisfied that the Claimant had undertaken to do and perform work personally, and the key question therefore was whether he was doing that with the Respondent being a customer of his business or not. My conclusion was that the Claimant had not been undertaking his activities in the context of such a business; there was no evidence to indicate that he had any other client and, as I have noted above, he provided his services regularly and consistently to the Respondent. I was therefore satisfied that the Claimant was a worker in addition to my conclusion that he was in fact an employee.

39. Applying those conclusions to the individual claims, the issue of employment status was only of relevance to the breach of contract claim. With regard to that claim, I was satisfied, from my findings above, that the Claimant had conducted himself in an inappropriately aggressive manner which had undermined the authority of the Respondent's management. I was satisfied that there were grounds to conclude that that conduct had brought the Respondent into disrepute and/or had been likely to materially prejudice the Respondent's interests, both of which enabled the Respondent to terminate the contract with immediate effect and without prior notice. In the circumstances therefore, I considered that the Claimant's claim for breach of contract should be dismissed.

40. Turning to the payment claim in respect of the hours worked, as I have indicated above in my findings, I was satisfied that the spreadsheets prepared by the Respondent in the bundle were an accurate reflection of the hours worked by the Claimant in the months of August, October and November. I noted the contentions of the Respondent that there had been earlier overpayments to the Claimant in respect of earlier months but no direct evidence was put before me in respect of that and, therefore, I did not consider that it would be appropriate for me to accept that contention.

41. With that in mind, the Claimant was entitled to payment in respect of 66 hours in October and 28 hours in November, but that those amounts needed to be reduced by the amount of overpaid hours in August of 44 hours, leaving a balance of 50 hours to be paid, which finally led to a gross sum of £600.00.

42. Finally, with regard to holidays, the Claimant's contract indicated that he was entitled to paid annual leave and, indeed, as an employee, or indeed worker, he would have been entitled to paid annual leave under the Working Time Regulations 1998 in any event. The clear evidence, accepted by Ms Urso, was that the Claimant had not requested holiday or that, even if he had taken time off by way of holiday, he had not been paid for that. Therefore, he remained entitled to be paid in respect of holiday during the particular holiday year. He had only been employed within one holiday year so there was no question of the Claimant having lost entitlement to holiday by not having exercised his right to take it during the particular leave year.

43. In the circumstances, the Claimant was employed for three quarters of the holiday year which led to an entitlement of 15 days which, at the rate of £12 an hour for a typical 8-hour day, led to an entitlement by way of holiday pay of £1,440.00.

44. In total therefore the Respondent was ordered to pay the Claimant the sum of £2,040.00.

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Employment Judge S Jenkins

Date: 21/7/17……..

Sent to the parties on: .....

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For the Tribunal Office