



EMPLOYMENT TRIBUNALS

Claimant: Ms L.Dudnyk
Respondent: Romanos Restaurant (Kensington) Limited

Heard at: London Central
Before: Employment Judge Goodman

On: 3 January 2017

Representation

Claimant: in person
Respondent: Mr A. Silva, director

RESERVED JUDGMENT

The claims fail because the contract was illegally performed.

REASONS

1. On 15 September 2017 Mrs Lyudmyla Dudnyk presented a claim to the employment tribunal for arrears of wages and holiday pay. The wages claim is made up in part of a claim for wages not paid at all 29 May 2017 to 24 June 2017, and in part a claim that deductions made for tax were not in fact paid to HMRC between 1 August 2016 and 28 May 2017, and so I due to her.
2. On November 2017 the respondent replied asserting that the claimant provided services on a self-employed basis and was paid on invoice, and on that basis had not been underpaid. If she had not been paid in June 2017, it was because the respondent found out on 24 June and believed believed that she had unlawfully paid £1,000 from the business to a credit card in her name.
3. From this, and from conflicts in evidence and the documents, the issues be tribunal had to decide were:
 - 3.1 whether the claimant was a worker within the meaning of the Employment Rights Act 1996, or self-employed
 - 3.2 if a worker:
 - 3.2.1 was she correctly paid the national minimum wage for the time being, which in turn required findings on the hours actually worked in any week and the payments made to her from time to

time

- 3.2.2 what holiday had she taken, and what was owed on termination
- 3.2.3 what pay was outstanding and unpaid at termination

- 4. Each party appeared in person. The claimant had had some assistance from the Citizens Advice Bureau on the practicalities of presenting evidence but not on the legal issues. Neither made any submission on the law.

Evidence

- 5. The claimant had prepared a written witness statement and gave evidence, as did Mr Piero La Franca, a neighbor and customer of the respondent business. Mr Alessandro Silva gave evidence without a witness statement on behalf of the respondent.
- 6. Each party produced documents disclosed to the other immediately before the hearing. In addition, the claimant during the hearing course of giving evidence produced some bank statements from an account at Barclays, her phone to show texts not included in a selection of texts she had copy typed and inserted in the bundle, and a bundle of empty envelopes with figures and numbers on the back. There was a short adjournment to enable the respondent to review this material.

Findings of Fact

- 7. The claimant was known to the respondent as Mila. The surname in her passport is Dudnyk. Her maiden name is Borovyk, as appeared in the email address with which she has corresponded with Tribunal. She said Dudnyk was her married name and the respondent from time to time made payments to a Barclays bank account in this name; the statements for this account give an address in Italy, and she explained this is because for health reasons her husband lives in Italy and the account is joint. In addition, the tribunal learned during the hearing that she has the husband resident in Italy called Marco Ronchetti, with a joint account and credit card with her.
- 8. The claimant also explained in answer to questions from the tribunal that she had another Barclays savings account, a current and savings account with Halifax, and an account with an Italian bank. The only statements for any account of hers available to the tribunal are for the Barclays current account for 10 November 2016 to 31 May 2017.
- 9. The respondent is a small family restaurant business run for many years by Alessandro Silva's father and mother, Romano and Angela Silva. In April 2016 he took over the running of it. His father continued to cook and serve, while his mother served and did the books until her health began to fail in 2017. There are 38 covers. Mr. Silva explained that he paid wages through PAYE to employees, Joao Martins, Mihaela Purcell, and made regular payments to HMRC, as shown in the business bank statements produced for 29 November 2016 to 29 January 2017 and for 4 May to 29 June 2017. There were from time to time two chefs. He explained that

when he took over he had regularised the payment of staff wages. Payment was made at the end of the month by bank transfer, twice monthly if staff requested it. Tips were also paid subject to PAYE, and only to employed waiting staff.

10. The claimant told the tribunal, though the dates were not always clear, that she had lived in the United Kingdom from 1999 until 2011, then went to live in Italy, and returned in 2015. For many years she had worked as a waitress. In was a letter from HMRC confirming that she had worked for Saporì Sardi Ltd from 6 October 2015 to 5 April 2017, and for Valentino fine foods and wines Ltd from 10 May 2016 to 31 August 2016. Judging by the amount paid the tax year ending April 2017, the claimant worked very limited hours for Saporì Sardi in that year. In both jobs wages were subject to deduction of tax and national insurance, as shown by the HMRC letter.
11. She explained to that from time to time she also worked for the respondent, helping out on Sundays when Angela Silva did not usually work, and in August and at Christmas when Joao went home to Madeira, both before and after her stay in Italy. For the Sunday working she was paid cash in hand. When covering in August or at Christmas she got a cheque. On these occasions she did not supply an invoice, nor did she get a payslip. The payments were not declared for tax
12. On the claimant's account in August 2016 she went to the respondent on a regular and full-time basis as a waitress, working 10 or 11 hours a day from Monday to Friday, and from 5 to 9p.m. on Sundays at £5 per hour after deduction of tax. On the respondent's account, she worked 5 hours per day as a cleaner, from 10 until 12 in the morning and from 3 until 5 or 6 in the afternoon, leaving whether the restaurant open for service at midday and at 6:30 pm. On occasions, he said, Mr Silva she would remain in the restaurant socialising with customers.
13. The only documentary evidence is in the form of a list of payments compiled by Angela Silva in or around February 2017 and again in March 2017, when the claimant queried whether she had received all that was due. This gives the amount due each day, but does not show the number of hours, or the hourly rate. The claimant does not have her own record of when she worked, and does not query Angela Silva's record. This shows that typically she was paid £25 per day, but on certain days (usually one day in the week, but more around Christmas) £45 per day. If the rate was £5 per hour, as the claimant says, this represents 5 hours work per day, not the 10 or 11 asserted in the witness statement. The respondent says this represents 2 and a half hours of cleaning at £10, rising to 4 ½ hours on busy days when she also cleared up between lunchtime and evening service.
14. Angela Silva's records also record the date that the claimant was given a cheque for each week. Some, but not all, of these can be matched to payments into her Barclays bank account, usually in the order of £170-175 per week; there are other payments into the account which cannot be matched even if more than one cheque was paid in on a particular day.
15. The claimant asserted that she received cash tips from two parties, in

November and December 2016. It is denied by the respondent that he was ever paid tips.

16. According to Mr Silva, in line with his policy of regularising payments when he took over, he wanted the claimant to be paid either on PAYE, or failing that by invoice. There were ongoing discussions on this from time to time. The claimant declined to provide her national insurance number, he said, and instead from time to time invoiced as MB Cleaning Company for restaurant cleaning. Mr Silva said she assured him she accounted for her own tax. The invoices in the bundle are for 9 December 2016 for £80, 18 January 2017 for £485, 1 May 2017 for £320, and 3 June 2017, £350. For all but the last, there are corresponding debit entries in the respondent's bank statements, and credit entries in the claimant bank statements, the latter marked "ref: cleaning" in the statement. The claimant stoutly denies that she has ever produced invoices, in the name of MB Cleaning or otherwise. As for the "cleaning" reference in the bank statement, she said she never read her bank statements, and relied only on mini-statements produced by the cash machine.
17. The texts cast some light on arrangements about working hours. On 5 February 2017 there is a request from the respondent to work the evening and to do lunch and dinner the following day. On 30 April 2017 there is an offer to "give you a proper pay structure with regular on-time payment" if she will stay, and on 6 June 2017 a request to cover while Joao is away. This suggest that the claimant was not working long hours on a regular basis.
18. Mr La Franco's evidence was that he often passed by the restaurant and saw the claimant at work. However, he was not specific as to the time of day or what she was doing, and in the face of the response asserting that at times she was present as a customer or visitor, his evidence does not help in deciding when she worked.
19. The claimant was asked why, given that she had experience of regular working under PAYE, she did not ask why she was not getting pay slips, or an end of year P60, if she believed that respondent was deducting tax. She said only that she thought they were deducting tax. She asserted she had produced her P45 from the last job.
20. The claimant did not keep records of her own. She did not dispute the list of payments due and paid made by Mrs Silva, even when it conflicted with her own evidence to the Tribunal about hours. From time to time when giving evidence she was challenged about discrepancies, at which point she did say that she had got the date wrong (sometimes clearly it was), or that HMRC was in error about a date (for example when she said that she was working 34 and half hours a week at Valentino's in August 2016 at the same time as working over 60 hours per week for the respondent. She may not be untruthful (it is possible that when helping out over the Christmas period she did work long days), but in her inattention to detail she was not a reliable witness.
21. In respect of the invoices for the cleaning, the Tribunal concludes that it is most likely either that the claimant did produce these invoices, or that the respondent produced them for her, with her agreement, MB being the

initials for Mila Borovyk, something he is unlikely to have known himself.

22. Taking this evidence as a whole, Tribunal concludes that the claimant was working in the order of 2 ½ to 4 ½ hours a day for £10 per hour, usually cleaning but at busy times helping out with general restaurant duties. One of the reasons for reaching this conclusion is that the claimant has worked in the United Kingdom for several years, and in regular employment under PAYE, and would have no reason (unlike some workers with irregular immigration status or poor English) to accept payment at less than the national minimum wage.
23. The tribunal also concludes that the claimant knew her way around the tax system, and could have been paid subject to tax and national insurance deductions if she had wished. It is evident from the respondent's bank statements that other staff were paid through PAYE, and this was not a business where staff are in effect forced to work for cash or on a self-employed basis.
24. The discrepancy between the payments made by Mrs Silva (who can be seen to have signed the cheques) and the invoicing required by her son are probably accounted for by his reliance on his mother for day-to-day bookkeeping.
25. It is relevant to consider how the employment ended, given the claim of unpaid wages for the last three weeks. A text shown to the tribunal, though it was not in the list provided by the claimant, 15 May 2017 shows the claimant getting 2 weeks' notice to terminate the arrangement, as well as asking about the last weeks wage. Another for 24 June (which is on the typed list) says "this Saturday is my last day, please make all the money you owe me".
26. The respondent agrees that he has not paid her for any time worked during June, but says that this is because when cashing up on 24 June 2017 he discovered that a refund had been made to a credit card for the sum of £1,000 which is in the name of Marco Ronchetti and Mila Borovyk or Ronchetti. He said he concluded that the claimant had helped herself to the money and telephoned to ask her to repay it. When she did not he informed the police. The police investigation is ongoing and it is not for this tribunal to make findings on the matter.
27. It is difficult to assess what holiday has been taken because the claimant has offered no evidence on this point, and the records of Mrs Silva do not cover only a few weeks of the period. They do show that the restaurant was closed on 25 and 26 December 2016 and 1 January 2017, that the claimant was away 17 - 22 January, and that she was not paid for these days.

Relevant Law

28. Section 230 of the Employment Rights Act 1996 defines worker and employee. An employee is an individual who has entered into or works under a contract of employment. A worker is an individual who has entered into or works under either a contract employment, or (section 230(2)(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 the client or customer of any profession or business undertaking carried on by the individual”.

29. Workers, as so defined, benefit by section 23 – complaints of unlawful deductions from wages – and by the Working Time Regulations 1998, which provide for holiday pay of 28 days in any calendar year, the balance untaken in the current year to be paid on termination, and in more recent ECJ judgements, for earlier years if the employee was not permitted to take holiday in those years. Workers are also entitled to receive the national minimum wage for the time being, by virtue of the National Minimum Wage Act 1998. For the relevant period, this was £7.20 and £7.50 per hour.
30. There is substantial body of case law on who is an employee, who is a worker, and who is not a worker because he is carrying on a profession or business undertaking. The cases on workers are reviewed in **Pimlico Plumbers and another v Smith (2017) EWCA Civ 51**, and **Uber B.V. and Others v Mr Y Aslam and Others: UKEAT/0056/17/DA**.

Discussion

31. What was the nature of the contract in this case? On the face of it, the parties contracted for the claimant to carry out cleaning services on a regular basis, and from time to time other restaurant duties as required and probably by agreement. There was no written contract, indeed no documentary evidence at all. On the evidence of Mrs Silva’s records, and the claimant’s evidence £5 per hour, she was doing 39 hours per week (but not the 60 hours per week asserted in the witness statement), so she could only have worked another business for a limited time. If her son’s evidence is accepted, she worked in the business for 17 hours per week, more around Christmas. The latter is the picture accepted by the tribunal. The tribunal has no evidence of whether the claimant in fact worked for another during this period; the HMRC letter suggests that she did work on occasions for Saporì Sardo as a worker or employee. As found, the claimant from time to time submitted invoices for MB cleaning, or agreed to be paid on invoice. There is no evidence of MB Cleaning having any other existence, or has any accounts; the claimant has not declared any income for tax except through PAYE. The overall picture is the claimant was a worker, except for the fact that she accepted or acquiesced, in payment for a cleaning business as if self-employed. It is not suggested that she supplied cleaning services to anyone else, or provided her own equipment, as cleaning companies do.
32. The question arises as to whether the contract was illegal performance, because payment was made in such a way as to avoid payment of either tax and national. As a worker should have paid. The cases were reviewed in **Tinsley V Milligan (1994) 1AC 340** and in **Hall v Woolston Hall Leisure Ltd (2001) ICR 99**. It is a question of fact whether the employee not only knew about the facts making performance illegal, but actively participated.

33. The Tribunal accepts that on occasions employers leave employees little choice but to acquiesce in payment arrangements which have the effect of avoiding statutory deductions. The tribunal does not accept that this is the case here. The claimant is a woman with many years work experience and strong views. She has worked and been paid under PAYE, and is aware of her employment rights and the national minimum wage. She will have known that she was not getting payslips. The Tribunal does not accept that she was unaware of the MB Cleaning invoice arrangement or that she never reviewed her bank statements. The Tribunal accepts the evidence, both from Mr Silva and on the evidence of the respondent's bank statements, that he wanted to run the business either by paying staff through PAYE or as contractors on invoice, and that he was prepared to pay the claimant through PAYE had she agreed or volunteered her national insurance details. Had this been her only income, on £175 or so per week she was below the threshold for paying tax, which for 2016/17 was £212 per week, but was liable to pay National Insurance contributions, the lower earnings limit than being £112 per week. The claimant would have been liable to pay 12% when her income was over the primary threshold, £155 p.w. The employer would have been liable to pay 13.8% when her income was over the secondary threshold, £156 per week. The tribunal concludes that it was the claimant who did not wish to be paid through PAYE. This may have been to avoid National Insurance deductions, or speculatively, she may have had other income, or even claimed benefits, though this is denied. She agreed in giving evidence that she had received cash payments from time to time and casual payments before August 2016 which had not been declared. Whatever the reason, the Tribunal's conclusion is that it was the claimant who did not wish to regularise the arrangements for statutory deductions, that she knew of the invoicing, and she knew that tax and national insurance deductions were not made (otherwise she would have asked for pay slips). She was not coerced or induced to collude in illegal performance, and had the opportunity to be paid under PAYE.

Conclusion

34. The conclusion therefore is that the contract, being illegal in performance, is unenforceable, and the claim fails.

Employment Judge Goodman on 3 January 2018