



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103340/2019

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Hearing Held at Dundee on 5 July 2019

Employment Judge A Kemp

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Mrs J Telima-Adolphus

**Claimant
In person**

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JPS1 Ltd t/a 247 Professional Health

**First Respondent
No appearance**

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The Secretary of State for Business,

**Second Respondent
Written
representations**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The claimant was an employee and a worker.

2. The first respondent made unlawful deductions from the claimant's wages in respect of pay and holiday pay, and she is awarded the sum of Four Hundred and Ninety Nine Pounds and Forty Five Pence (£499.45).

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3. In failing to give her statutory notice of termination the first respondent is in breach of contract and the claimant is awarded the sum of One Hundred and Seventy Two Pounds and Twenty Six Pence (£172.26).

E.T. Z4 (WR)

REASONS

Introduction

1. The claimant was formerly employed by the first respondent and pursued a claim for outstanding wages, holiday pay and notice. She called as second
5 respondent the Secretary of State for Business, Energy and Industrial Strategy as representing the Insolvency Service.
2. The first respondent has not entered appearance.
3. The second respondent submitted a Response Form, in which it was indicated that the status of the claimant as employee and worker was disputed, with
10 reasons given for that. It was also stated that the second respondent did not intend to appear at the hearing, and wished the Response Form to be considered as a written submission.

Facts

4. The claimant is Mrs Johneba Telima-Adolphus.
- 15 5. The claimant was employed by the first respondent from 19 July 2018 as a carer. She worked on a part-time basis.
6. The claimant was provided with a document headed "Contract for Services" by the first respondent when she commenced working with them. It was not signed by either the first respondent or the second respondent. It purported to contain
20 provisions for a contract for services but did not reflect the reality of the working relationship between the parties.
7. The claimant was provided with a staff uniform to wear. She was provided with work equipment. She did not provide any work equipment herself. She was sent to work at clients of the first respondent, primarily care homes. The
25 claimant was informed of what work was available and indicated to the respondent what work she could do by email to her manager. When working, the claimant worked a 12 hour shift.

8. The claimant's work was controlled by the first respondent, particularly her manager she knew only as Laureen. Any issue that arose with regard to the claimant's working conditions, performance or otherwise was addressed by that manager. When working for the first respondent the claimant had the obligation to follow their instructions and they had obligations to her including as to pay.
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9. The respondent prepared a document called a "Pay advice". It had a "payroll number" for the claimant. It referred her to "pay".
10. The claimant was informed that her pay was made under deductions for income tax and national insurance contributions.
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11. The claimant was enrolled under the auto-enrolment provisions of the Pensions Act 2008 by the first respondent, and had deductions from pay made for her own contributions.
12. The tax, national insurance, and pensions contributions were shown on the pay advice.
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13. The payments were made by the first respondent into the claimant's bank account where it was described as "payroll".
14. The claimant was paid at the rate of £9 per hour for hours worked. During each 12 hour shift she had a one hour break, and was paid for 11 hours.
- 20 15. The claimant carried out a 12 hour shift on each of 17 and 19 December 2018. She ought to have been paid £198 for doing so, subject to statutory deductions, but no such payment was made by the first respondent.
16. On 24 December 2018 the claimant received an email to inform her that the first respondent was to proceed to liquidation, and that her wages and other sums would not be paid to her.
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17. Her employment terminated on that date. At that date she had accrued an unused holiday entitlement to 3.5 days for which she was entitled to be paid a total of £346.50 subject to statutory deductions.

18. The claimant did not receive notice of termination of employment. She suffered a gross loss in earnings reasonably quantified at the sum £198 for a period of one week.

19. The average of her working days per week was 2 days.

5 20. The average of the deductions made from her earnings was 13%.

The law

21. Wages are defined in section 27 of the Employment Rights Act 1996 as including sums due for wages earned, and holiday pay. There is a right not to suffer an unauthorised deduction from wages by section 13, and the right to claim at tribunal at section 23, but that right arises where the person is a
10 “worker”.

22. Section 230 defines the term “worker” as

15 “an individual who has entered into or works under (a) a contract of employment or (b) any other contract, whether express or implied...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.”

20 23. The Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 SI 1994/1624 (“the Order”), confers on the Tribunal power to determine a claim for breach of contract arising on termination of contract. The right however arises only where the person is an employee. Section 230 of the 1996 Act defines “employee” as “an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.”
25 There is a right to a minimum period of notice under section 86 of the Employment Rights Act 1996, which for the claimant is a period of one week.

24. The issue of the status of a person as employee, worker or neither of those terms has been the subject of much case law. The essential test for

employment status was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] All ER 433***, which referred to the need for an irreducible minimum of mutuality of obligation and control. ***James v London Borough of Greenwich [2008] EWCA Civ 35*** addressed the issue of whether or not an agency worker could be an employee by implication, in the context of whether the employer could be the end user client, and held that it could not. In ***Autoclenz v Belcher and others [2011] UKSC 41*** the Supreme Court considered the terms of a written document and whether that was conclusive evidence of the parties' relationship, and held that if there was or might be a sham arrangement a tribunal should examine the working relationship between the parties, how that operated, and what was the reality of the situation. Similar issues were examined by the Supreme Court in ***Pimlico Plumbers Ltd v Smith UKSC 000053/2017***.

25. Where an employer is insolvent the employee may seek payment of certain sums from the Insolvency Fund under sections 166 and 182 of the Employment Rights Act 1996.

Discussion

26. As indicated above the second respondent did not appear, and I thus only heard evidence from the claimant herself. I had no hesitation in accepting her evidence.
27. I was in no doubt but that the claimant was a worker. She could not be described as being in business herself or in a professional relationship with clients. She was a part-time carer and provided her services during the contract to the first respondent, which controlled her work.
28. I considered whether she was an employee, which was not so straightforward. The status of the contract for services document was not clear, as it had not been signed but just handed to her. It did not however reflect the reality of the situation. The claimant was treated as an employee, and paid as an employee. She had tax and national insurance deducted, and was auto-enrolled into pension as only an employee would be under the Pensions Act 2008. She was

controlled by her manager, who dealt with issues on a day to day basis. There was mutuality of obligations between them. I consider in those circumstances that the claimant was an employee, and that the definition in Ready Mixed Concrete is met.

5 29. Whilst I did consider all the submissions made by the second respondent, that was based largely on the written document, and not the evidence before me.

30. I have therefore found that the sums claimed by the claimant are due to her by the first respondent. The claimant provided gross figures. I have made awards on a net basis having regard to the terms of the pay advices before me, and
10 using the averages I was able to from what was limited evidence.

31. In light of the fact that the second respondent had challenged the status of the claimant and has not yet had an opportunity of considering the decision made and of making payment I do not at this stage make any judgment against the second respondent. In the event that the sums awarded are not paid to the
15 claimant, she may make a further application to me for a judgment against the second respondent, at which point the second respondent may make such further submissions if any as it wishes to. I consider that proceeding in this manner is in accordance with the overriding objective in Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations
20 2013.

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35 **Employment Judge:** Alexander Kemp
Date of Judgment: 09 July 2019
Date sent to parties: 09 July 2019