



EMPLOYMENT TRIBUNALS

Claimant: Mr N Jeffery

Respondent: Singh & Donaldson Ltd

Heard at: Manchester (Immigration Tribunal) **On:** 24 October 2019

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: In person

JUDGMENT having been given orally to the parties on 24 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is dismissed because the claimant was not employed for two years or more in accordance with section 108 of the Employment Rights Act 1996.
2. The claims for unlawful deduction from wages and breach of contract are dismissed.

WRITTEN REASONS

Introduction

1. The claimant brought a claim for unfair dismissal and unlawful deduction from wages/breach of contract by way of a claim form dated 26 April 2019. The claimant was a delivery driver for the respondent from 15 November 2017 until 9 January

2019. The respondent did not pay the claimant for this work, and the claimant seeks arrears of pay for this period.

2. A response was submitted by the respondent on 7 June 2019 denying the claim on the basis that the claimant worked on a voluntary basis and was not owed any monies.

Issues

3. The following issues were to be determined:

- (a) Whether the claimant was a worker in order to bring a claim for unlawful deduction from wages?
- (b) Whether the respondent unlawfully deducted wages between 15 November 2017 and 9 January 2019?

4. The Unfair Dismissal claim was dismissed at the outset of the hearing when the claimant conceded he had less than two years' service.

Evidence

4. At the outset of the hearing the respondent submitted that she had not seen the claimant's witness statement in order to prepare any cross examination of the claimant. It was established that the claimant had not understood that exchange of witness statements meant exchange of his own witness statement as opposed to any other witness statements he had obtained in support of his case.

5. It was clear that the claimant had received a copy of the respondent's witness statements and had been able to prepare cross examination. The respondent also contended that she had not seen the documentation on which the claimant relied.

6. I was of the view that the documentation on which the claimant relied had largely been seen by the respondent as it related to the respondent's business. Due to the short nature of the claimant's witness statement, I agreed to rise for one hour to allow the respondent to read through the claimant's witness statement and additional documentation. I reminded the claimant that throughout the Case Management Orders, he had been referred to the Presidential Guidance on the conduct of these proceedings which directed him to the exchange of any witness statements, which also meant his own.

7. When the Tribunal resumed one hour later, the respondent had no objection to continuing with the hearing having read through the claimant's statement.

8. The claimant gave evidence, and Mrs Jane Singh, the director of the respondent company, and Mrs Mandy Jones, a dispenser at the respondent company, gave evidence on behalf of the respondent.

9. The respondent submitted one document and the claimant submitted two documents in support of their evidence.

Relevant Legal Provisions

Status

10. The statutory definition of worker appears in section 230(3) of the Employment Rights Act 1996:

“(3) In this Act “worker” (except in the phrases “shop worker” and “betting 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.”

11. The status of the relationship is a matter of overall impression, although the factors which are significant in any particular case may differ depending on the context (see **Hospital Medical Group Ltd v Westwood [2013] ICR 415**). Whether there is a relationship of subordination is frequently important, although one must bear in mind the caveat expressed by Lady Hale in paragraph 39 of her judgment in **Clyde & Co LLP v Bates van Winkelhof [2014] ICR 730** that:

“..... there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in [James v Redcats (Brands) Ltd [2007] ICR 1006], a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.”

Unlawful Deduction from Wages

12. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

- “(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or**
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”**

13. A relevant provision in the worker’s contract is defined by section 13(2) as:

- “(a) one or more written contractual terms of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
- (b) in one or more terms of the contract, (whether express or implied and, if express, whether oral or in writing the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.”**

14. By virtue of section 14, section 13 does not apply if the deduction is for the overpayment of wages.

15. Section 27 defines wages which includes:

“any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.”

Findings of Fact

16. The claimant co-owns a Tree Nursery. The claimant works part-time in this nursery so that he can care for his children.

17. Mrs Singh owns the respondent business which is a Pharmacy in Lancaster. The respondent employs a pharmacist, dispensing assistants and delivery drivers. The claimant is diabetic and collected his medication, delivered by way of the DPD parcel service, from the respondent pharmacy.

18. In October 2016 the claimant and Mrs Jane Singh started a personal relationship.

19. In May 2017 Mrs Singh advised the claimant that her business was struggling financially. As a result, the claimant agreed to assist Mrs Singh with the finances which involved stocktaking products and bulk ordering to save money. The claimant performed this task on three occasions.

20. In August 2017 a delivery driver resigned and finished work the same month. Between the months of August 2017 and November 2017 the Wednesday and Thursday deliveries were made by Mrs Singh and Mrs Jones. Mrs Singh was going to advertise for a new driver but was stopped from doing so by the claimant when he offered to cover the deliveries on those days because it fitted in with his childcare arrangements.

21. On 12 October 2017 Mrs Singh sent the claimant a text message that said, "your new job starts on 15 November 😊 – got package for you". The claimant responded "lovely 😊".

22. The profit and loss accounts show that the respondent was not making any profit and on occasion had to defer payment of the pharmacist to a later date in a month when the cashflow allowed. The claimant stopped doing the stocktake and bulk buying because he was unable to secure credit with suppliers due to the respondent's debt history.

23. Deliveries were not usually ready until after 10.00am and some deliveries could take place after 3.00pm. The arrangement with the drivers was that they would be there at 10.00am and work until 12.00pm and then come back at 2.00pm and work until 3.00pm/4.00pm.

24. In December 2018 the personal relationship between the claimant and Mrs Singh ended.

25. On 7 January 2019 Mrs Singh telephoned the claimant and asked him to collect his personal medication from another pharmacy. The claimant was told that deliveries would be covered by the other drivers.

26. In February 2019, the claimant contacted Mrs Singh and sought arrears of pay.

Submissions

Respondent's Submissions

27. The respondent recalls being taken aback that the claimant sought payment for the delivery driving. The respondent contends that her accountants were unaware of the claimant's existence and there was never an agreement to pay him for any delivery driving. The respondent was grateful of the claimant's assistance because the business was at risk of going under.

28. The respondent contends that the delivery driver left in August 2017 and that she and her other employee covered the delivery driving until November 2017. The respondent concedes that she probably did advertise for a new driver, but that she took the advert down, when the claimant agreed to voluntarily cover the delivery driving in order to save the respondent money.

Claimant's Submissions

29. The claimant submits that he has evidence that he worked at the pharmacy over a set period. The claimant also submits that the previous delivery driver did not finish until the November, and that is why the text message was sent in the October and he did not start until the November. It is the claimant's contention that there was a verbal contract and the text is evidence of this.

30. The claimant contends that the respondent has not provided any evidence to show that he was only working on a voluntary basis. It is the claimant's view that the profit and loss accounts show that in one particular month, the business was in profit and could afford to pay him. The claimant contends he would never work for free and always intended to be paid once the business was in profit.

Discussion and Conclusions

A. Was the claimant a worker?

31. The claimant gave evidence that the text message he received from the respondent made reference to a new job and a package.

32. All employees of the respondent had contracts of employment. Each new employee is required to complete a new starter form on joining the respondent which is then sent to the accountant for payroll purposes. The claimant did not complete a new starter form nor was he provided with a contract of employment, and it was the evidence of Mrs Singh and Mrs Jones that he was helping the respondent out on a voluntary basis.

33. Mrs Singh and Mrs Jones both gave evidence that the claimant was doing the respondent a favour because they could not afford to replace the driver. The business was not in profit and Mrs Singh was delaying paying the pharmacist until cashflow improved.

34. The text message was sent in the context of the personal relationship given the use of emoji symbols, including the emoji symbol response that the claimant sent back to the respondent. The reference to a package relates to the DPD package that had been delivered to the pharmacy for the claimant to collect.

35. The respondent admits she discussed taking the claimant on holiday to thank him for the voluntary work. The respondent did not take employees on holiday in payment for their work at the pharmacy. The respondent made this offer in the context of the personal relationship she had with the claimant. The promise of a holiday was not remuneration but a gesture of thanks.

36. The claimant admitted he did not expect to get paid for the stocktake or the bulk buying. The claimant only stopped doing this work because he was unable to make progress due to the respondent's bad debt.

37. It was clear that the respondent's business was in financial straits and was unable to pay the existing staff. The respondent could not afford to replace the delivery driver. During the course of performing the deliveries, the claimant did not seek any payment from the respondent for this reason. The claimant did not agree to work for the respondent in expectation of financial reward.

38. Mrs Jones gave evidence that the claimant often would arrive at the pharmacy prior to 10.00am and finish at 3.00pm, which made it difficult to get some deliveries completed. Mrs Jones was of the view that because the claimant was working for free, there was little she could say about his start and finish times. It often meant

that somebody else had to go out and do the deliveries because the claimant was not available.

39. The respondent was grateful of the claimant's help and did not dictate the times that he started and finished the deliveries. The other delivery drivers had set hours in order to ensure the deliveries were made. Mrs Jones found the lack of control over the claimant's hours a hinderance which often added to her workload because she had to make deliveries after the claimant had gone home.

40. The respondent had no control of when the claimant arrived at or left the pharmacy. Given the respondent's financial position, she was grateful for any voluntary assistance from the claimant and did not seek to dictate the hours when that assistance was provided.

41. Mrs Singh and the claimant were in a personal relationship and I prefer the evidence of Mrs Singh that whilst in that relationship, it was agreed that the claimant would help the business out on a voluntary basis. It was only once Mrs Singh ended the relationship that the claimant sought payment.

42. Had the claimant been a worker he would have completed a new starter form, been provided with a contract of employment and been required to work the normal delivery driver hours. It is likely that the claimant and Mrs Singh discussed going on a holiday when the business was back in profit to thank him for the voluntary work.

43. The claimant never sought payment for the stocktake and bulk buying and had the relationship continued, it is unlikely that he would have sought payment for the delivery driving. There was no obligation on the claimant to attend at the pharmacy during set hours to ensure the deliveries were completed and the respondent made no promise to pay the claimant for his assistance during a difficult financial period. There was therefore no contract at all in order for the claimant to qualify as a worker with the meaning of the legislation.

B. Was there unlawful deduction of wages?

44. As the claimant was not a worker, he cannot pursue a claim for unlawful deduction from wages and this claim is dismissed.

Employment Judge Ainscough

Date: 15 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 January 2020

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