

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr S Flook

AND

Respondent
(1) Jessica Marsh
(2) Waseem Mohammed

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Cardiff **ON** 13 February 2020

EMPLOYMENT JUDGE NW Beard

Representation

For the Claimant: In Person
For the Respondents: No Appearance

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim for unlawful deduction of wages is well founded.
2. The first respondent is ordered to pay to the claimant the sum of £753.27 (Gross) as calculated below.

REASONS

Preliminaries

1. The claimant claimed that the first respondent unlawfully failed to pay him. The first respondent claimed in response that the claimant was not her employee but was the employee of another, Waseem Mohammed. Employment Judge Brace joined Waseem as the second respondent; no response was received from him.
2. Only the claimant attended today's hearing neither of the respondents appeared. Appropriate notices of hearing had been served by the tribunal on 13 January 2020. Further an email sent on 12 February at 14:31 made it clear that the hearing today would deal with the identity of the employer. In the circumstances I considered that the requisite fourteen-day notice of a hearing had been sent to the parties in accordance with Rule 58 of the Employment Tribunal Rules 2013 and that there having been no communication from the first respondent as to why they were not in attendance, and the second respondent having not entered a response that it was appropriate to proceed with the hearing in accordance with Rule 47 of the Employment Tribunal Rules 2013.

3. On that basis I heard evidence on an affirmation from the claimant read his ET1 and further documents provided by him at this hearing. In addition I read and took account of the ET3 of the first respondent.
4. There was no contention that the claimant's status was not that of an employee. Nor was it contended that the claimant had not worked as he had alleged in his claim form. The issue was which one of the respondents was his employer. Further I had to consider what hours the claimant had worked and what rate of pay he was to be paid.

The Facts

5. The claimant had been a friend of the second respondent at school and they were in touch via Facebook. The second respondent contacted the claimant using that medium about the possibility of work as a waiter. Without an interview the second respondent asked the claimant to turn up for work on 1 June 2019. The claimant indicated that there was no discussion about the level of pay but that the claimant was expecting no more than the National Living Wage to be paid (£8.21 per hour at that date).
6. The waiting work was in a restaurant within the hotel operated by the first respondent. I have seen no evidence of the assertion by the first respondent that there was a contract between her and the second respondent for him to operate the restaurant as a separate business. However, the cash register was supplied by the second respondent, from his restaurant business operated separately opposite the first respondent's premises.
7. The restaurant operated serving breakfasts to guests of the hotel and providing meals to customers off the street. The same chef was employed to cook at all times.
8. The second respondent was never present at the restaurant at any time when the claimant worked. The first respondent was, however, present once or twice a week when the claimant worked. The claimant was generally supervised by another employee; however, the first respondent would occasionally give the claimant instructions such as to vacuum the floor of the restaurant. There was a "launch night" for the restaurant again the claimant was given some of his instructions on this night by the first respondent.
9. The first respondent also promised the claimant that he would be paid for additional hours he worked which had not been originally on his rota. The claimant was told by the first respondent that his employment had come to an end. The claimant gave evidence that he understood that the restaurant was still serving breakfasts to guests. He also said that two of the staff employed in the restaurant did get paid by the first respondent.

10. The claimant had by that stage worked eighty-one and three-quarter hours on rota and a further ten additional hours, the hours worked on rota are shown on computer records of which I have seen photographs and the claimant told me of the additional ten hours, I had no reason to reject his evidence.
11. The claimant produced records of text exchanges between himself and, respectively, the first and second respondents. Those text messages indicate that neither respondent was accepting that they owed the claimant wages but each said that the other was responsible.

The Law

12. The following cases set out guidance as to who is an employee ***Ready Mix Concrete (Southeast) Limited V Minister of Pensions and National Insurance [1968] 2 QB 497; Young & Woods Ltd v West [1980] IRLR 201; Autoclenz v Belcher [2011] UKSC 41; White V Troutbeck SA [2013] IRLR 286*** and ***Crawford v Department for Employment & Learning [2014] IRLR 626***. In ***Ready Mix Concrete (Southeast) Limited V Minister of Pensions and National Insurance [1968] 2 QB 497*** McKenna J famously remarked that he could not describe an elephant but knew one when he saw one and that similar principles apply to describing an employee. However, he attempted to create a test by which the courts and tribunals could make that process of description more predictable. The multifactorial test that he devised has been developed through various cases and the stage has now been reached when an employment contract it is said must have a minimum content. That content must oblige one party to provide work personally, and oblige the other party to provide an opportunity to work and pay the other party for their work. There must also be some element of control. It appears to me that I can use the elements described to consider which of the two respondents more closely fits the definition.
13. I will also consider the principles of agency. This is because in the circumstances both respondents have on occasion given instructions to the claimant. It may be important to consider whether those instructions were given as a principle or an agent or without authority. The law set out in the authorities and extracts from practitioner textbooks, demonstrate that, when considering the liability of a principal for the actions of an agent, there is a requirement that an agent can, actually or ostensibly, agree alteration to contractual terms. A person can ostensibly be an agent if it would appear that the principle has given that person authority to act on their behalf.

Analysis

14. The second respondent engaged the claimant. The claimant was to work at the first respondent's premises. The first respondent gave occasional day to

day instructions to the claimant at her premises. There are therefore indications that either could be the agent of the other. However, in my judgment, objectively viewed, the facts point to the second respondent being the agent of the first respondent. The work was carried out at the first respondent's premises, her facilities were used, apart from the provision of a cash register I have seen no evidence that anything was supplied by the second respondent. On that basis I conclude that instructions given to the claimant by the second respondent were as agent of the first respondent.

15. Given that finding it appears to me that the evidence of the first respondent giving day to day instructions to the claimant at her premises point towards her exercising a degree of control over the claimant's work. There is no dispute that the claimant was an employee of someone and so the other elements of the test are met. The second respondent, it appears to me, did not exercise day to day control but simply arranged for the claimant to be employed. The most important elements underpinning my decision that the first respondent was the claimant's employer are that she dismissed the claimant and it was she that promised he would be paid additional sums.
16. The claimant worked for 81.75 hours on rota and worked a further 10 hours for the first respondent. At a rate of £8.21 per hour multiplied by 91.75 hours that amounts to £753.27 which I order the first respondent to pay to the claimant.

Employment Judge W Beard

Judgment sent to Parties on 14 February 2020

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS