



EMPLOYMENT TRIBUNALS

Claimant: Mr C Melville

Respondent: I Need Pampering Limited

Heard at: Manchester

On: 24 February 2020

Before: Employment Judge Warren

REPRESENTATION:

Claimant: Did not attend

Respondent: Ms L Gould, Counsel

JUDGMENT having been sent to the parties on 5 March 2020 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:

REASONS

Introduction

1. This was an application made on notice by the respondent that the claims be struck out firstly on the merits of the case, there being no reasonable prospects of success, and secondly on the grounds that the claimant had not attended the hearing and was therefore not actively pursuing his case within rule 37 of the Employment Tribunals Rules 2013.

2. Attempts were made to contact the claimant to ascertain if he intended attending the hearing. All attempts failed. I made the decision to proceed with the case in the absence of the claimant, whom I was advised had disengaged in the process and had failed to engage in correspondence.

3. The claimant does have a history of mental health problems. However, the respondent was able to confirm that the claimant had been in court for something else within the previous two weeks so it was less likely to be a mental health issue that kept him away from the Employment Tribunal.

4. The first issue I had to consider was whether to hear the case on its merits before reaching a decision, or simply to hear an application to strike out on the grounds of the claimant's non attendance and his failure to pursue the case. I decided that the claimant has had opportunities in which to communicate both with the Tribunal and the respondent and has failed to do either. I therefore agreed to proceed to hear the case on its merits.

The Issue

5. The main issue in this case was the employment status of the claimant, whether he was an employee, a worker or self-employed. He had brought claims of unfair dismissal, unlawful deductions of wages, breach of contract, failure to supply terms and conditions complying with section 1 of the Employment Rights Act 1996, and for unpaid accrued annual leave at the date of termination.

6. The respondent defended the claims on the basis that the claimant was a self-employed investor in the business, that there had never been a contract of employment nor was he a worker.

The Evidence

7. There was a substantial bundle of documents prepared by the respondent which had been served upon the claimant. In addition, I heard the evidence of Camilla Blois. Ms Blois was entirely credible and extremely distressed by the way in which she alleged the claimant had behaved.

8. Although the claimant was not present, I took steps to ensure that his case, from the ET1, was put to Ms Blois, and from her evidence and her answers, considering the details of the claimant's case in the ET1, I made the following findings of fact.

The Facts

9. Camilla Blois is one of two directors of the respondent company. They are the only directors. The company has no employees. The business was set up in 2005 as an online retailer of luxury gift experiences such as spa breaks and beauty treatments.

10. The respondent, by 2017, was not performing well and the two directors decided to put the business on the market. The business was trading at a loss and they could not afford to offer employment to anybody. They were looking to sell the business or obtain investment in it.

11. On 9 October 2017 the claimant made contact with the respondent and indicated that he was interested in buying the company. Negotiations began with a non disclosure agreement. The claimant described himself on his LinkedIn profile as "an entrepreneur with 30 years' experience starting and running businesses from start-ups to 1,000+ people and companies" (page 143).

12. On 9 October 2017 the claimant emailed to say that he would only offer £50,000 to purchase the business (pages 162-164). This offer was significantly under the asking price of £250,000. The claimant admitted to the respondent that he

had a bad reputation but he assured them that he had the funds and ability to assist, and they noted he was very charming and charismatic. The directors rejected the offer to buy the business but agreed that the claimant could provide an investment through Lilou Experience Days (LED), a company which the claimant exercised control over and ran on a day-to-day basis. The offer was made with no mention of employment and refers only to continued investment (which Ms Blois noted did not come to fruition).

13. On 15 October 2017 the claimant sent Ms Blois a follow-up email indicating how he would work strategically if he were to invest in the respondent in the first 14 months. He suggested that he would provide two support staff. Emails were exchanged between 16 October 2017 and 29 November 2017, negotiating the terms of agreement for his investment (pages 170-180). The final terms of agreement were reached on 29 November 2017 (page 191). The final terms of agreement do not make reference to the claimant being paid a salary by the respondent. The agreement itself was between the current shareholders in the respondent business and LED, providing the necessary infrastructure and suitably skilled human capital to run the respondent. It was noted that there would be no cash distribution to shareholders and/or LED without agreement, and LED would not charge a management fee. Up to 31 December 2022 the two directors of the respondent would work two days a month for the respondent without charge, and thereafter would be paid £250 a day for any additional days worked until 31 December 2017. It was noted there was no equivalent term for the claimant. The original agreed start date was to be 1 November 2017 at which point there was due to be a £50,000 investment in place.

14. The claimant had originally indicated he would be operating from his offices in Scotland but then said that he had rented a property in a residential development near their Manchester office and he would work a little more from there in the New Year. He asked for a key to the respondent's office premises to enable him to go into the office at unusual times on his return from abroad. The two directors subsequently found out that the claimant was in fact living in their offices.

15. On 29 January 2018 the claimant finally invested £4,500 (not the £50,000 expected). The payment was in fact made by the claimant's mother. After 29 January 2019 the claimant made no further payments to the respondent. It became apparent in early February that he did not have the funds to invest but was running up bills in the respondent's name, including that he had signed a lease agreement with BNP Paribas, holding himself out to be a director of the respondent in order to obtain a £4,000 photocopier.

16. There is no evidence anywhere in the bundle of correspondence in which the claimant suggests that he would be receiving a salary or why he had not received a salary, or why he had not received an offer of employment or a contract. Ms Blois advised the Tribunal that this was because the claimant was simply an investor of the respondent, a fact of which he was aware all of the time.

17. On Saturday 24 February 2018 the other director found the claimant in a sleeping bag on the sofa in the office and became aware that he was actually living there. The claimant was asked to leave on 28 February 2018; he refused and was arrested and escorted out by the police.

18. In answer to the Tribunal's questions Ms Blois confirmed that the claimant was not under the control of the respondent, he was not paid a fixed amount on a regular payment date, although he did sometimes claim petty cash and it would seem in fact that he was living on this petty cash. They believed him when he said he wanted to be an investor in their business. It would seem that this is not the first time Mr Melville has been less than honest with business partners.

Submissions

19. On behalf of the respondent there was an application to strike out the claim as it had no reasonable prospect of success because there was no way that the claimant could demonstrate that he was an employee or a worker. This was not a mere dispute of fact where something that was said was interpreted differently. I saw a large volume of documents in which it was clear that the discussions were all around a sale of the business or investment in it, in stark contrast to the claim put forward.

20. The claimant's case was that there was a verbal agreement to pay £60,000 a year in salary and that this was reached orally. There is nothing in the bundle in the emails between the parties which even suggests a salary would be paid to the claimant. Even on the claimant's own case, he did not say when he would be paid and there was nothing through the written negotiations about what would happen in the future. The documentation makes no reference at all to any agreement for a salary or of a level of control or supervision of an employee or worker. The claimant was told off when he signed up to buy a £4,000 printer because he put himself forward as a director when he was not and he had no authority to obtain the printer. There was no element of ordinary control and no mutuality of agreement. There was no position for work to be undertaken: the work did not exist.

21. It is of note that the claimant makes no mention in his claim of buying the business or attempting to invest money in the business. This is not a dispute of fact based on mistakes: he is simply not telling the truth, and given the fundamental difference between what he says in the ET1 and what happened in accordance with the contemporaneous documents, his case does not fit together, and therefore he had no reasonable prospects of success because he cannot have been either a worker or have employee status. The respondent's submissions suggested that the claimant did not have any prospect of success and his claim should be struck out.

The Law

22. I have relied on the definitions of a worker and employee as set out in section 230 of the Employment Rights Act 1996. I have looked closely and applied the judgement in *Pimlico Plumbers Limited and another v Smith* (2018) UKSC.

Judgment

22. This case stands or falls on whether the claimant could potentially show that he was either an employee or at least a worker. He has failed to attend the hearing again today and has prevaricated over lengthy periods of time having brought his claim.

23. I have decided therefore to go ahead and hear the application because it is unfair on the respondent to continue to accrue legal costs and deal with the level of uncertainty that they face at present.

24. I have read and heard Ms Blois about the way in which the claimant met the respondent owners of the business. There was an assertion that he would buy the business, which was for sale and thus advertised. He later offered instead to invest in the business, up to £50,000, and to assist in bringing it back to profit: he says as an employee or worker, by agreement. The respondent says not, simply as an investor who would one day, when the business was in profit, benefit from dividends. In fact the claimant was found to be living in the respondent offices, incurring expenses without authority whilst holding himself out as a director, and at a time when he was in fact (the respondent later learned) disqualified from doing so.

25. In the bundle there is a vast amount of correspondence about the basis under which the claimant worked, and there is no mention of him being an employee or a worker, nor of any of the terms one might expect to see, such as working hours, place of work, wages, holidays, etc. There was no mutuality of agreement nor responsibility. He did as he wished without any real supervision, as one might expect of an investor hoping to see a return on his money. However, he did not even pay the money he promised, borrowing a mere £4,500 from his mother to give to the business. At the point when the relationship broke down he was found to have been living in the respondent's offices even though he claimed to have his own office elsewhere. He was thrown out by the police and the respondent found that he had been living on petty cash expenses that he periodically requested. The claimant had led them to believe he was a man of substance with an interest in investing in businesses. Applying section 230 and Pimlico Plumbers (referenced above), I have concluded that there is no evidence of a requirement to actually undertake any work – as an investor he may have chosen to do so. There is no evidence of any agreement to pay the claimant in any way other than on profits as an investor. In the circumstance he cannot be said to be a worker or an employee and cannot therefore expect to succeed on any of his claims.

26. I found Ms Blois to be a convincing witness and accepted her evidence at face value. It was supported in considerable measure by contemporaneous documents within the bundle. I have to say much of the bundle consisted of the claimant's previous business history unrelated to this case which I found to be less than helpful. That said, I strike out the claims as having no reasonable prospects of success as there is no evidence that he was an employee or worker.

27. All of the claims are dismissed.

Employment Judge Warren

Date: 28 April 2020

REASONS SENT TO THE PARTIES ON

1 May 2020

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