



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103667/2019

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Held in Glasgow on 16 December 2019

Employment Judge R Gall

10 **Mr R Scott**

**Claimant
In Person**

Miss Gillian Rose (deceased)

**First Respondent
Represented by:
Mr I Maclean -
Employment
Consultant**

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Second Respondent

**Represented by:
Mr I Maclean -
Employment
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1. The claimant does not have standing to bring claims of the types he seeks to bring as he is not an employee in terms of Section 230 (1) of the Employment Rights Act 1996, is not a worker in terms of Section 230 (3) of the Employment Rights Act 1996 and is not engaged under a contract of employment or a contract personally to do work and therefore is not in employment as defined in Section 83 (2) of the Equality Act 2010 enabling a claim to be brought under that Act.

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As stated at the hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the hearing itself or by

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written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the hearing. The following sets out what was said, after adjournment, at conclusion of the hearing. It is provided for the convenience of parties.

- 5 2. At this hearing on 16 December 2019 the claimant appeared on his own behalf. The respondents were represented by Mr Maclean. The claimant give evidence. A bundle of productions was submitted by the respondents.
3. There was no evidence on behalf of the respondents. Since commencement of the claim, Ms Rose has unfortunately died. The claim remains resisted by
10 her personal representatives through Mr Maclean.
4. Prior to commencement of evidence I explained the procedure which would be involved in this Preliminary Hearing (“PH”). I explained to Mr Scott that in terms of the rules I was to ensure that parties are on an equal footing, as far as practicable. I explained that it was his responsibility to ensure that any
15 elements of evidence which he wished to give were given to me and that he referred me to any relevant documentation which he said supported his ability to bring the claim. I would seek to ask relevant questions however he should ensure that he spoke in evidence about any factors which he regarded as being of significance when it came to my assessment of whether he was an
20 employee, worker or was engaged under a contract personally to do work. He gave his evidence and, prior to conclusion of his evidence, consulted notes which he had made in order to try to ensure that he had given evidence about any points which he regarded as being helpful to determination of his status. Mr Maclean had no objection to these notes being used by the claimant for
25 that purpose immediately prior to conclusion of his evidence in chief.
5. The claim at present is one of unfair dismissal, also extending to one for holiday pay and breach of contract. The claimant has proposed that it be amended to include a claim of discrimination. This PH was dealt with as if the claim of discrimination was being made in that it seemed appropriate to make
30 the decision on his status on the footing that the claims advanced include a claim of discrimination.

6. The PH was set down to determine the status of the claimant and the identity of the employer if there was an employer.
7. The Employment Rights Act 1996 deals in Section 230 with the definition of employment. An individual is an employee if he or she has entered into, or works under, a contract of employment. An individual is a worker if he or she works under a contract of employment or an agreement to perform work or services personally. In terms of the Equality Act 2010 a claimant is able to advance a claim if he or she is, for the purposes of this type of claim, employed, meaning that he or she is employed under a contract of employment or a contract personally to do work.
8. Here, there is a written contract. That is an Independent Contractor Licence Agreement. That document was entered into on 14 October 2009 when the claimant commenced this working relationship. That working relationship terminated at the end of December 2018. The Licence Agreement is between the claimant and Ms Rose. A copy of the Licence Agreement is in the bundle.
9. That agreement states clearly that the claimant is self-employed. The claimant's own evidence was that he was self-employed. He confirmed that in an email to the respondents, that email appearing at page 20 of the bundle.
10. The business involved was that of gents' hairdressers. Customers attended to have their hair cut. There was no appointment system in place. The customer could nominate a particular barber to cut his hair. That might occur if for example the customer had had his hair cut by that barber on an earlier occasion. If that occurred the customer would simply wait for that particular barber to be free. The customer might be offered the opportunity to use the services of a different barber who might have become free. It would however be up to the customer whether he took that opportunity or waited for the barber for whom he had expressed a preference.
11. If a customer had no preference as to any particular barber he would wait in the queue and be taken by the next available barber.

12. During the period when the claimant worked in the premises in question, there were initially 3 barbers including the claimant. That increased to 5 barbers before the working relationship between the claimant and the respondent terminated.
- 5 13. Whilst the claimant was very concerned about the lack of space within the space of the salon for each hairdresser, that did not in my view assist with determination of the points at the PH.
14. Having had his hair cut, the customer would pay at the till. At the end of the week the claimant would receive two thirds of the price of each haircut as paid
10 by his customers. One third would be retained by the respondents. Any income therefore for the claimant was dependent upon the number of customers. There was no obligation on the part of the respondents to provide the claimant with any work. There was no obligation on the claimant to carry out work cutting the hair of any customer who appeared.
- 15 15. The claimant paid a rental charge to the respondents for the seat at the salon. That was £65 per week. The money was deducted from the payment to the claimant of two thirds of the charges for his customers.
16. The shop was overseen on a day-to-day basis by Mr Rose, father of Ms Rose. He would place hair products on the shelving beside each of the barbers. If a
20 customer wished to purchase those the customer would pay the relevant price at the till. None of that money went to the particular barber involved.
17. The claimant was slightly wary of Mr Rose. He wanted to keep on his "right side". He thought that Mr Rose might potentially terminate the Licence Agreement if there was a complete falling out with him. He therefore paid
25 attention to what Mr Rose said to him.
18. The claimant was able to organise holiday times for himself and to take breaks as he wished.
19. If the claimant wished to take a holiday he would enter the relevant dates on a calendar in the salon. He himself would arrange a substitute. That could be
30 anybody providing they were appropriately qualified. If he was unable to

5 arrange a substitute then he would speak to Mr Rose who would organise a substitute or ask others to increase their hours to cover the "seat". On one occasion in the 9 years when the claimant worked at the salon a substitute he had arranged when on holiday was asked by Mr Rose to cover a different seat from that of the claimant, resulting in the claimant having to pay the rental charge for receipt although on holiday. Had the substitute "taken over" the seat of the claimant, the substitute would have paid the rental charge.

10 20. Although the claimant could take holidays as and when he wished, Mr Rose might express a view on whether he saw that as being a desirable time for the claimant to take holidays. The claimant always had an eye to that and wished to keep Mr Rose happy as the claimant viewed himself as receiving good money for the job which he did. If therefore Mr Rose was unhappy at holiday times planned by the claimant, then the claimant might rearrange those. He did not however have to do that. It was his decision.

15 21. A similar position applied in respect of breaks. The claimant could take breaks if and when he wished. Again, Mr Rose might express a view if, for example, there were a number of people waiting to have their hair cut. Again, the claimant might alter the time of his break if he considered that appropriate. It was ultimately up to him as to when he took his break and whether he took it notwithstanding any reservation or unhappiness expressed by Mr Rose.

20 22. If the claimant was off ill he did not receive any sick pay.

23. The claimant dealt with his own tax and national insurance arrangements. He engaged an accountant. He submitted tax returns and settled his tax directly with HMRC.

25 24. The opening and closing times of the salon were determined by Mr Rose. The claimant did not have a set of keys for the salon until the later period of his time at the respondents' premises.

25. In deciding the status of the claimant, a Tribunal should properly have regard to the reality of the situation. It does not therefore simply follow that because

the Licence Agreement proceeded on the basis of the claimant being self-employed, that was his status.

26. I considered the evidence carefully. I had regard to the practical working arrangements as explained by the claimant and also to the terms of the Licence Agreement.
27. I kept in mind that the only evidence I heard had come from the claimant. There was no competing evidence of a different working arrangement to that which the claimant described during his evidence.
28. It seemed to me of particular significance that the claimant could take holidays and breaks as he thought appropriate. I also regarded as a significant that he could arrange a substitute who could be anyone with the appropriate qualification as a barber. The Licence Agreement provided for that possibility. It is of course not determinative in its terms. A Tribunal should have regard to the reality of the position. Although Mr Rose might express opinions on the timing of a holiday break, the claimant gave clear evidence that ultimately the decision on those matters was his.
29. It also struck me as significant that the claimant accounted for his own tax and national insurance.
30. I did not see it as consistent with the relationship being one of employment that the claimant paid Ms Rose money by way of rental of the chair.
31. I accepted the claimant's evidence that customers came to the business and that Mr Rose was influential in determining any deviation from a "taxi rank" arrangement whereby the customer was allocated to the barber next available. The claimant's evidence was that Ms Rose was present in the premises now and again. It was Ms Rose who had signed the Licence Agreement. Mr Rose was present on site most of the time as, in effect, manager. Ultimately one of the barbers was appointed manager. Mr Rose however remained regularly present in the premises in a supervisory capacity.
32. Mr Rose would challenge the claimant if the claimant appeared after the allotted start time in the morning. This element seemed to me to be the "high

point” of the claimant’s case in that there was a degree of control by the claimant being asked to explain any late coming. On the claimant’s evidence, Mr Rose would say that the claimant needed to be there and would ask him whether he liked his job, implying that if he wished the working arrangement to continue then he should be present. This was an area in which the licence agreement at clause 4.5.2 said that the claimant was to have regular and predictable opening hours but that they were to be as the licensee in his absolute discretion was to determine. That appears not have been the position given the fact that Mr Rose would speak to the claimant if he did not appear in time for a 9 o’clock start and also on the basis that Mr Rose was the person who opened up and locked up the salon. In the later stages of the agreement, as noted above, the claimant confirmed that he had a key for the premises.

33. Weighing everything in the balance however, I concluded that the claimant was not in a relationship of employment as detailed in the Employment Rights Act 1996 and in the Equality Act 2010. That was my conclusion on the evidence, particularly with regard to the ability of the claimant to arrange a substitute without the need for approval by the respondents, the ability of the claimant to arrange his holidays and breaks as he saw fit, subject only to the potential of there being a degree of disapproval from Mr Rose and also having regard to the arrangements for tax and national insurance being matters for the claimant, with the payment by him of a rental fee for the chair being a requirement.

34. Having come to that conclusion, and having reconvened to deliver this Judgment, the claimant sought to produce documents which had not produced or spoken to at the PH. Mr Maclean did not object to those being lodged and spoken to by the claimant.

35. The one document which seemed to me to be relevant to the point to be determined at this PH was the text exchange between the claimant and Ms Rose. That was from October 2018. The claimant had sent a text to Ms Rose saying that it had very quiet that day. He asked if it was OK to leave early. Ms

Rose replied that this was OK “but just today tho”. Mr Maclean did not wish to cross examine the claimant on this.

36. That text was consistent with the claimant requiring approval to leave early. That did not square with his earlier evidence. It certainly seemed to contradict his evidence that he could leave for a break when he wished. He did not say in evidence that this was a regular occurrence, or indeed that it had happened more than once. This was the only instance mentioned by the claimant of approaching either Mr Rose or Ms Rose for approval to do anything. His evidence was that Mr Rose was the person on site. It was Mr Rose who sometimes expressed his view to the claimant on the claimant’s proposed arrangement of his day or of his holiday dates. It was unclear why the claimant had contacted Ms Rose on leaving early on this occasion. His earlier evidence was in direct contradiction of there being any need to obtain approval before he took a break or took any holiday. This late passage of evidence appeared to describe one occurrence.

37. I took a few minutes to review this fresh evidence. Having done so, I adhered to the view I had earlier taken. It seemed to me that the claimant’s own evidence at the initial stage of this PH as to how his working arrangement operated and how he could take holidays and breaks as he wished outweighed this recently given evidence of one particular instance of the claimant seeking approval to stopping work early. Certainly that text exchange was puzzling given that earlier evidence. Had the situation been one of evidence from the respondent that the relationship was of the claimant pleasing himself in relation to hours, holidays and acceptance of a customer, with contrary evidence of that not being the position and this text exchange being pointed by the claimant, it might have been different. The only description I had of how the working relationship operated was from the claimant. His evidence (this text exchange apart) was far more consistent with a self-employed situation than with a relationship of employer/employee and/or one in which the claimant was a worker.

38. Having so determined, the position is that the claimant is unable to proceed with his claim, given his failure to meet the essential foundation criteria of employment or worker status.

Expenses

5 39. The respondents have sought expenses. They have issued a costs warning
letter to the claimant. I explained to the claimant that there were provisions in
the Rules as to when expenses can be awarded by a Tribunal. I also explained
that the Rules provide that the Tribunal can take his ability to pay into account
in deciding whether to make an award of expenses and, if an award is to be
10 made, in deciding what any such award is to be. If he wishes the Tribunal to
consider his ability to pay, it is essential that he produces information with
vouching eg current salary, capital (house, car, savings information if
applicable) utility charges, mortgage details (if appropriate) and
documentation to support any other capital, income or outgoings of the family.
15 Evidence would potentially be given. A hearing is set down to consider the
application. It should be for 3 hours. The date set is 6 February at 10am. The
Clerk to the Tribunal is requested to send the hearing notices to parties.

Employment Judge: R Gall
20 Date of Judgement: 16 December 2019

Entered in Register,
Copied to Parties: 18 December 2019