



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Carberry

**Respondent:** Integrity Pub Management Limited

**Heard at:** Manchester (by CVP)

**On:** 2 November 2020

**Before:** Employment Judge Ainscough

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr G Healey (Director)

**JUDGMENT** having been given orally to the parties on 2 November 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:

## JUDGMENT

The claimant is an employee/worker in accordance with the meaning set out at section 230 of the Employment Rights Act 1996.

## WRITTEN REASONS

### Introduction

1. The claimant has brought claims for unfair dismissal contrary to section 94 of the Employment Rights Act 1996 and unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1998, following his dismissal from the respondent company on 19 December 2019.

2. In order to bring a claim for unfair dismissal the claimant must be an employee and in order to bring a claim for unlawful deduction from wages the claimant must be a worker.

## The Law

1. The definition of an employee appears in section 230(1) of the Employment Rights Act 1996:

- “(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.”**

2. The legislation goes on to define in section 230(3) the concept of a worker. An identical definition appears in the Working Time Regulations 1998 and the Employment Relations Act 1999. The definition is as follows:

**“In this Act “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.”**

## Employee

3. The statutory definition simply incorporates the common law concept of what is a contract of service or a contract of employment, traditionally distinguished from a contract for services which is a contract for a self-employed arrangement. There is a wealth of decided cases on what will amount to a contract of employment, beginning with the well-known summary in **Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497**:

**“The contract of service exists if these three conditions are fulfilled:**

- (1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.**
- (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master.**
- (3) The other provisions of the contract are consistent with it being a contract of service.”**

That remains the starting point even though, of course, the language of master and servant is something from which the law has moved on.

4. More recently in **Carmichael v National Power Plc [1999] ICR 1226** the House of Lords confirmed that there is an “irreducible minimum of mutual obligation necessary to create a contract of service”. It follows, as was confirmed in **Montgomery v Johnson Underwood Ltd [2001] ICR 819**, that unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

5. If those irreducible minimum requirements are met, the other considerations include how the parties have labelled or characterised their relationship, which is relevant but never in itself conclusive, the treatment of tax and national insurance, and any other matters that form part of the working relationship. Ultimately the task for the Tribunal is to look at all the relevant factors and form an impression, looking at the picture as a whole, as to whether the contract in question is one of employment or not.

### Worker

1. The different statutory provision means that there is not the same requirement for mutuality of obligation, control or integration that is necessary for there to be an employment relationship. As Underhill LJ put it in paragraph 24 of his judgment in **Secretary of State for Justice v Windle [2016] ICR 721**, for the claimant “the passmark is lower.” That case was concerned with the Equality Act definition of “a contract personally to do work”, but the point remains valid.

2. Once again it 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.

## Findings of Fact

3. The claimant was employed as a Pub Manager and Company Director for the respondent from 13 March 2015 when he signed a contract of employment. From March 2015 until December 2017 the claimant was the sole shareholder in the respondent company.
4. The employment contract provided that the claimant's salary as £11,000 per annum and detailed his place of work as the Rovers Return Public House on Chapel Street in Manchester. The claimant received a P60 from the financial year 2016/2017. This document showed that the claimant was paid through the PAYE system and paid tax and national insurance.
5. The claimant worked fixed hours each week. The contract required the claimant to devote full-time efforts to his role, not to compete and not to have any conflict of interest. The claimant's role was to manage the public house. The claimant did not work behind the bar but he was responsible for the administration, including the company accounts and VAT returns.
6. At the same time the claimant also owned another business in Liverpool to which he devoted approximately six hours per week over and above his role with the respondent.
7. In 2017 the respondent company ran into financial difficulties. In order to save the respondent company, Mr Greaves and Mr Ashton of Property North West Limited, bought a third share each in the respondent company. The claimant's shareholding was reduced to one third.
8. It was agreed between the claimant and Mr Greaves that respondent would continue with the services of the instructed accountancy firm and the claimant would retain responsibility for the VAT returns and the maintenance and filing of company accounts. The claimant attended meetings with the other shareholders to discuss VAT and company accounts.
9. The respondent firstly, leased the pub to the claimant as an individual tenant and then, at the request of the claimant, amended the lease to record the tenant as Rovers Return Pub Limited. The claimant was the sole Director of Rovers Return Pub Limited. The rent was paid via credit card receipts into the respondent's bank account.
10. In January 2018, all staff who worked for the respondent, save for the claimant and his wife, transferred in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006, over to Rovers Return Pub Limited.
11. On 2 February 2018 the claimant signed a statutory declaration declaring, amongst other things, that as of that date the respondent had no "bona fide" employees and did not owe more than £5,000 to creditors.
12. There is a dispute as to whether the Rovers Return Pub Limited extinguished the rent obligation in the lease, between January 2019 to December 2019. Rovers Return Pub Limited was evicted on 23 December 2019 on the grounds of forfeiture

for non payment of rent. At an extraordinary general meeting on 19 December 2019, the claimant was removed as a director of the respondent company.

## **Submissions**

### Claimant's submissions

13. The claimant submits that Mr Grieves and Mr Ashton had ample time to complete due diligence on his legal status within the respondent company prior to buying their shareholdings.

14. It is the claimant's case that the administrators appointed prior to the purchase were aware that the claimant was an employee of the respondent company.

15. The claimant submits that it was agreed that he would stay on as an employee of the respondent to run the administration side of the public house.

### Respondent's submissions

16. The respondent submits that it was the understanding of Property North West Limited that the claimant would remain as a tenant of the public house following the purchase of shares in the respondent company.

17. It is submitted that this was why the original lease was in the name of the claimant. The name of the tenant was altered at the behest of the claimant and because Mr Grieves and Mr Ashton trusted the claimant.

18. The respondent relies upon the statutory declarations signed by the claimant confirming that the respondent had no employees.

## **Discussion and Conclusions**

19. When Mr Greaves and Mr Ashton became shareholders in January 2018, the claimant's contract of employment was not terminated. The claimant's contract of employment with the respondent existed alongside his shareholding.

20. The respondent only appointed new accountants in late 2019/early 2020. Up until that point, and up until the claimant's removal as a director and the eviction of Rovers Return Pub Limited, the previous accountant had been dealing with matters. The respondent admitted that they kept the accountant on as the claimant had a relationship with that firm and to assist with the recovery of VAT and the filing of accounts.

21. The only change in January 2018 was the reduction in the claimant's shareholding. The claimant was not given notice and he was not in receipt of a P45 to confirm that the employment contract had been terminated.

22. The respondent says that it was unaware of the contract and relied upon the statutory declaration signed by the claimant on 2 February 2018. However, it is the claimant's evidence that the administrator was aware of all the contracts of employment, including his own, and he verbally reminded Mr Greaves of his status, and that of his wife, prior to signing the declaration. The claimant says the

respondent was not concerned. This position is reflected in a document completed by the respondent to set up a Lloyds bank account which records the number of employees as two.

23. The respondent's witness admitted in evidence that at the time of the purchase there was goodwill between the parties. The respondent says that this is reflected by the fact that the respondent agreed to a lease in the name of a limited company rather than the claimant.

24. The claimant was employed by the respondent up until his removal as a director in December 2019 and was similarly a worker for the purposes of the unlawful deduction from wages.

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Employment Judge Ainscough

Date 2 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
15 December 2020

FOR THE TRIBUNAL OFFICE

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