



EMPLOYMENT TRIBUNALS

Claimant: Mr P Nechita
Respondent: Epidaurus Limited
Heard at: East London Hearing Centre
On: 7 December 2020
Before: Employment Judge Russell

Representation
Claimant: In person
Respondent: Did not attend, not represented

JUDGMENT

- (1) The Claimant was a worker for the Respondent for the purposes of the Equality Act 2010 and the Employment Rights Act 1996.
- (2) The Employment Tribunal has jurisdiction to hear his claims for unpaid holiday pay, unauthorised deductions from wages and unlawful discrimination because of race.

REASONS

1 By a claim form presented on 29 June 2020, the Claimant brought complaints of unfair dismissal, breach of contract, failure to pay notice and holiday pay, unpaid wages and race discrimination. The claims for notice pay, unfair dismissal and redundancy payment were a dismissed by Regional Employment Judge Taylor at a Preliminary Hearing on 29 October 2020 as the Claimant does not have sufficient continuity of employment. Regional Employment Judge Taylor listed today's hearing to decide whether or not the Tribunal has jurisdiction to hear the remaining claims as the Respondent asserted that the Claimant as a self-employed person falling outside the scope of the relevant legislation.

2 In order for the Tribunal to have jurisdiction to hear the claim for unauthorised deduction from wages, the Claimant must be an employee or worker within s.230 Employment Rights Act 1996. This defines an employee as an individual who has entered

into or works under a contract of employment and a worker as an individual who has entered into or works under (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.

3 The right to bring a claim for unpaid holiday pay pursuant to the Working Time Regulations 1998 also requires the claimant to be a worker, see regulation 2(1) which defines a “worker” in terms identical to those in section 230(3) of the ERA.

4 The Equality Act 2010 section 83(2)(a) defines employment for the purposes of bringing a discrimination claim as “employment under a contract of employment, a contract of apprenticeship, or a contract personally to do work.”

5 The Claimant is a Romanian national with the legal right to work in the United Kingdom. He has a National Insurance number issued by the relevant tax authorities.

6 The Claimant is the owner and director of Petrica Personnel Cleaning Company Limited. As the name suggests, the business of the company is to provide cleaning services although it is essentially dormant as it currently has no cleaning customers.

7 To find work, the Claimant registered with a platform called Brigad. It is not a traditional employment agency but operates in the manner of the Uber or Deliveroo applications. Brigad posts available shifts for catering work with a range of companies. If a person registered with Brigad is available and wants to do the work, they click on the shift to accept it. After the work is performed, the end user pays Brigad which in turn pays the person who worked the shift.

8 The Claimant saw work for the Respondent advertised on Brigad, he accepted a shift and worked it. The Claimant showed me the record on his Brigad account confirming that he worked for five and a half hours on 6 February 2020 for which he was paid £56.61.

9 Following the shift, the Claimant had a conversation with Katerina, the restaurant manager and I accept his evidence that she offered to provide him with further work as a kitchen porter directly rather than through Brigad. The Claimant’s Brigad account confirms that thereafter he accepted no further jobs on Brigad and I find that henceforth there was an agreement between the Claimant and the Respondent directly. There is no written contract, although I accept the Claimant’s evidence that Katerina had promised him both a job and a contract. The orally agreed terms were that the Claimant would work as a kitchen porter on shifts from 9.00am to 9.00pm, starting on 3 March 2020, at an hourly rate of £8.72. The Claimant gave the Respondent his personal bank details.

10 The Respondent did not attend today’s hearing but has presented an ET3, the contents of which I took into account. The Respondent’s case is that it contracted with Petrica Personnel Cleaning which in turn engaged the Claimant; it avers that payments were made directly to the company. Despite being represented at the Taylor Preliminary Hearing and having received a copy of the Case Management Orders made, the Respondent has not sent any documents or provide any witness statements relevant to the preliminary issues of employment or worker status, as such there is no evidence to confirm its assertion that it made payments directly to the limited company.

11 The Claimant accepts that he discussed Petrica Personnel Cleaning with Katerina but in the context of general discussion about its lack of customers and seeking her advice, they did not discuss using the company as a vehicle for providing his services to the Respondent. The Claimant's case is that his work as a kitchen porter was entirely independent of any cleaning work performed by his limited company and that he entered into the contract to provide his services personally. The Claimant's evidence, which I accept, is that Petrica Personnel Cleaning did not submit any invoices to the Respondent, rather he was paid directly in cash.

12 The Claimant relies upon a contemporaneous exchange of emails between himself and Katerina which refer to the work that he was performing for the Respondent. In one of the emails, Katerina refers to the Claimant as being self-employed and refers to help available to him. However, the email goes on to confirm that the Claimant provided his National Insurance number to the Respondent and states that the Claimant had said that he was "self-employed in the capacity of cleaning services". I find on balance that the contents of Katerina's email are consistent with the Claimant's evidence that he discussed his cleaning company generally, seeking her guidance, but that he was self-employed for the purposes of cleaning services only. This is consistent with the HMRC PAYE record for the year ending 5 April 2020 which shows that he provided his services directly to other employers and records no payment from Petrica Personnel Cleaning.

13 I conclude that the Claimant's work for the Respondent as a kitchen porter was not undertaken in the guise of cleaning services through his limited company, but pursuant to a contract entered into directly between himself and the Respondent. This is consistent with him providing his personal bank details and his National Insurance account to the Respondent and the absence of any invoices to the company. The Respondent has not adduced any evidence of a contract with Petrica Personnel Cleaning or payments made to the company.

14 The oral agreement was for the Claimant to provide his services personally as a kitchen porter and Respondent were not the client or customer of a business carried on by the Claimant. The Tribunal has jurisdiction to hear all claims and the hearing listed for 3, 4 and 5 November 2021 will go ahead. The Claimant must confirm whether he requires the assistance of an interpreter at that hearing.

15 The race discrimination claim is currently not set out in detail and, therefore, I have made an Order requiring the Claimant to provide further information. It will also be necessary to have a telephone Preliminary Hearing to identify the issues and make further Case Management Orders to prepare for the final hearing.

ORDER

Made pursuant to the Employment Tribunal Rules of Procedure 2013

On or before **19 March 2021** the Claimant must send to the Respondent and to the Tribunal, the following information for every act of discrimination alleged in the ET1 (and limited only to the contents of that claim form):

(a) The date on which it happened;

- (b) Who did it;
- (c) A brief summary of what they did or did not do or the words used which are said to amount to discrimination;
- (d) The names of any witnesses.

Employment Judge Russell

18 February 2021