EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111855/2019

Held via telephone conference call on 16 November 2020

Employment Judge P O'Donnell

Mrs H Malcolm	**Claimant** **In Person**
Glen Travel Ltd	**Respondent** **Represented by:** **Mr Gibson - Solicitor** **[Counsel instructed by Markel Law LLP]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Respondent made an unauthorised deduction of wages from the Claimant contrary to s13 of the Employment Rights Act 1996 and the Tribunal awards the Claimant the sum of £2600 in respect of that deduction.

REASONS

Introduction

1. The Claimant has brought a complaint that she has suffered a deduction of wages contrary to Part 2 of the Employment Rights Act 1996 (ERA) in respect of commission payments which she says are owed to her.

2. The Respondent resists the complaint. The primary defence is that the Claimant is not a "worker" as defined in s230 ERA and so there is no jurisdiction to hear the claim. They also dispute the sum owed to the Claimant.

Preliminary issues

3. At the outset of the hearing, the Judge informed the Claimant that, when he had been in practice, his firm had instructed Counsel for the Respondent, Mr Gibson, over a period of time in relation to a litigation project in which the Judge had been involved. This instruction had ended approximately five years previously. The Claimant did not raise any issue with the Judge proceeding to her the case.

Evidence

4. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant.

    b. Suzanne Graham – a friend of the Claimant.

    c. Michelle Lister – the Respondent's retail manager.

    d. Andrew Glen – a director of the Respondent.

5. There was an agreed bundle of documents prepared by the parties. A reference to page numbers below are reference to pages in the joint bundle.

6. The Tribunal heard evidence about the events leading to the termination of the working relationship between the Claimant and the Respondent. Although it was useful for the Tribunal to be aware of the background to the case, this was not a claim for unfair or wrongful dismissal in which the Tribunal had to come to a decision on matters such as whether the Respondent had a reasonable belief that the Claimant had committed acts of misconduct, what steps they had taken to investigate this or whether the Claimant had contributed to the termination of the relationship.

7. In these circumstances, the Tribunal considered that much of the evidence it heard about the termination of the relationship was irrelevant to the matters which it had to determined and this is reflected in the findings of fact below.

8. The Tribunal also heard evidence about another person who had worked for the Respondent, Gemma Boland, and were taken to screenshots of a text exchange between her and the Claimant (pp65-70). The Tribunal found this evidence to

be of no assistance; the question for the Tribunal is whether the contract under which the Claimant worked for the Respondent is one which falls under the "worker" definition in the ERA and the terms and conditions under which Ms Boland may have been employed do not provide evidence of the terms under which the Claimant worked.

9. It appeared to the Tribunal that the Claimant had fallen into the error of assuming that because there were some parallels between her and Ms Boland (for example, neither of them were issued a written contract) then this was somehow determinative of employment status given that the Respondents described Ms Boland as an "employee". The question of employment status is, however, a matter of law to be decided by the Tribunal on the facts which apply to the particular case, not how a respondent describes someone else who worked for them.

10. There was not a significant dispute between the parties in relation to the relevant facts concerning how the working relationship operated. There was broad agreement about what was discussed between the Claimant and the Respondent when she began working with them as well as how the relationship worked in practice.

11. The only significant dispute in relation to a relevant issue was whether the Claimant was provided with the document at p22 when she met with Ms Lister and Mr Glen on 17 August 2018. The document sets out the terms on which homeworkers are engaged and the Claimant denies receiving it at the meeting whereas both Ms Lister and Mr Glen state that it was provided.

12. In relation to this issue, the Tribunal prefers the evidence of the Respondent's witnesses. They were both clear that the document was provided although they did not agree when it was provided in the course of the meeting. However, given the passage of time since the meeting, it would be surprising if they had such a clear recollection. The weight of evidence is, therefore, on the Respondent's side.

13. The Claimant was clear in her denial that she had been given the document but, again, the Tribunal considers that the passage of time may have affected her

recollection. In particular, the evidence from all the witnesses was that the meeting on 17 August 2018 was a long meeting with much of it between Ms Lister and the Claimant discussing their respective histories in the travel industry and people whom they both knew. There was no evidence that the document itself was discussed in great detail or that particular significance was placed on it at the meeting to an extent that it would be fixed in the Claimant's memory.

14. However, the Tribunal did not place any significant weight on this document and considered that it was only a factor to be taken into account in assessing whether the Claimant was a worker rather than it being determinative in and of itself.

15. There were a number of reasons for this. First, it was not, and was not held out by the Respondent as, a contract. At most it was evidence of what was agreed between the parties. Second, much of the information it contained replicated what was discussed between the parties as to the terms on which the Claimant would work with the Respondent and which were not in dispute. It did not, therefore, add much to the other evidence. Third, although it contained an assertion that the Claimant was "self-employed" (the only express reference to this in any discussions at the outset of the relationship), the Tribunal was of the view that a bald assertion to this effect in a document prepared wholly by one party was not determinative and was simply a factor to be taken into account. Fourth, the relevant information in the document was provided in brief, bullet points and did not provide any more detail than was discussed between the parties elsewhere. Fifth, the document is entirely silent on a number of matters which are relevant to whether the Claimant is a worker. For example, it does not set out any express provision as to whether the Claimant has to do the work herself or whether she can substitute someone else to do the work.

Findings in fact

16. The Tribunal made the following relevant findings in fact.

17. The Respondent is a travel business. It operates as both a travel agent (in the sense that it sells travel packages provided by other travel businesses) and as a tour operator (in the sense that it creates and sells its own travel packages).

18. The Respondent has two main sources of business; it has a retail shop in Blantyre and it engages a number of people described as "homeworkers" who operate remotely (that is, not from the Respondent's premises) selling travel packages to customers on behalf of the Respondent. There are also three independent companies who hold a franchise from the Respondent but these are not directly relevant to the issues in this case.

19. The use of homeworkers is a common practice in the travel industry but there is no commonly applied set of terms and conditions for such workers. They can work under a range of terms and conditions or have a range of descriptions applied to them in terms of their status as employees, self-employed or otherwise.

20. The homeworkers engaged by the Respondent come with their own existing bank of clients and the Respondent does not supply them with details of potential clients or sales leads.

21. In August 2018, the Respondent place an advert on FaceBook looking for people to join the business. The Claimant, who had many years' experience in the travel industry, was interested in this and contacted the Respondent on 17 August 2018, speaking to the retail manager, Michelle Lister (ML).

22. The telephone call was recorded and a transcript of an extract of the discussion dealing with the terms on which the Respondent was looking to engage people was produced at pp22a-b. After listening to the recording, the Claimant accepted that the transcript was accurate.

23. During the telephone call, ML set out the terms of the working arrangement as follows:-

    a. It was a homeworking arrangement.

    b. It was not salaried but was commission-based. It was a 60/40 split between the Claimant and the Respondent on the commission paid by the tour operator.

    c. The Claimant would have her own client banks.

d. There was no set-up fee or monthly fee.

e. The Claimant would be covered by the Respondent's ABTA and ATOL licences.

f. Commission was paid at the end of every month if the client had paid the balance for their holiday. David Glen, one of the directors, dealt with the homeworkers and would provide a statement each month showing what was to be paid.

g. ML would set the Claimant up with a password to access the Respondent's systems. She just needed a laptop and a phone.

h. The Claimant was free to work when she wanted to work.

i. All the administration was done at the Respondent's head office including taking bookings and card payments.

j. The Respondent could also provide the Claimant with marketing support.

24. The Claimant expressed an interest in working with the Respondent and she was asked to come into meet with them. She attended a meeting on the same day at the Respondent's head office. The meeting was initially with ML and Alan Glen (AG), one of the directors, joined partway through the meeting.

25. The meeting between ML and the Claimant involved much discussion about people who they both knew in the industry. In relation to the terms on which the Claimant would be engaged, the following was discussed:-

a. The Claimant would book holidays for clients and make money for the Respondent.

b. The Respondent would deal with the administration involved in the bookings.

c. The commission from other tour operators whose packages were sold by the Claimant was split 60/40 in favour of the Claimant.

d. If the Claimant sold one of the Respondent's packages then she would get 100% commission.

e. The Claimant could work when it suited her.

26. The Claimant was shown the document at p22 during the meeting. This document sets out a short introduction to the Respondent and then sets out what is headed "Homeworking Offering" followed by a number of bullet points which are reproduced below:-

- *No set-up fee*
- *No monthly charge*
- *Self-employed*
- *Commission split 60/40 in your favour*
- *Full ABTA and ATOL protection*
- *Commission paid every month (after balance paid)*
- *Independent – allows you to sell all tour operators*
- *Access to net & group rates on many cruise companies*
- *Access to ITX fares with many airlines*
- *Product and marketing assistance at no additional cost*
- *Work when it suits you*
- *Glen Travel's own specialist tour operator (when you sell this product, you keep ALL the commission)*

27. The Claimant agreed to join the Respondent. It was agreed that she would trade under the name "Heather Malcolm Travel" but that, for ABTA and CAA purposes, this had to be part of the Respondent to operate under their licences. Any correspondence sent out in the name of "Heather Malcom Travel" described this as a trading name of the Respondent. An example of this is at p63.

28. The reason why the name "Heather Malcolm Travel" was used for trading purposes was that the Claimant had built up a client base over her career in the travel industry and these clients would be looking to contact her to book holidays rather than the Respondent. Similarly, where previous clients had recommended new clients make contact then they would give the Claimant's name.

29. AG sent the Claimant an email dated 28 August 2018 welcoming her aboard. He had purchased the internet domain name "heathermalcolmtravel.co.uk" and set up an email address for the Claimant with this domain name which was provided in the email along with a password. The domain name was owned by the Respondent for the same reasons that Heath Malcolm Travel was described in correspondence as a trading name of the Respondent.

30. This email also stated that AG would send the Claimant a contract but it was common ground that nothing was sent.

31. The Respondent also provided the Claimant with a mobile phone number which she could use for business purposes although it was common ground that this was accessed through her personal mobile phone and not one supplied by the Respondent. The Claimant also used her own laptop.

32. The Claimant did not immediately start working with the Respondent; she was working with another travel business at the time and there was outstanding work to be done in relation to that business as well as commission to be paid. It was the Claimant's understanding, based on her long experience in the industry, that the regulations governing the travel industry meant that she could not work for two travel businesses at the same time because it would be a conflict of interest. She placed her first booking in November 2018.

33. When the Claimant was contacted by a client seeking to book a holiday then she would do so through the Respondent's systems to which she had access. The confirmation of the booking would be sent to the Respondent who could then send it directly to the client or send to the Claimant for onward transmission. The Respondent would also print tickets or arrange online check-in. However, the Claimant preferred to be as involved in this process as much as possible; clients

would raise queries when correspondence was issued in the Respondent's name rather than hers.

34. In terms of payments, the Claimant was given access to an online "portal" by the Respondent through which card payments could be made. She would then email the Respondent to confirm to whose booking the payment related.

35. The Claimant had no targets to reach or minimum levels of business. If she had not generated business for a long period of time then the Respondent would have contacted her to confirm whether she wanted to continue the relationship, particularly where there was a cost to them (for example, paying for a phone number or domain name).

36. The Claimant was paid commission only with no deduction of tax or National Insurance contributions.

37. The Claimant had no absences on sick leave or annual leave during her time with the Respondent. Some homeworkers engaged by the Respondent operated an informal "buddy system" whereby they covered each other's absence. The Claimant did not operate such a system and was not aware of this system.

38. The end of the working relationship occurred in August 2019 when the Claimant and Respondent received a complaint from a client regarding a refund which the client sought. When this was investigated by the Respondent, they identified that this concerned a payment being made on this client's credit card which related to another client's booking. Further issues with wrongly allocated payments were identified by the Respondent during these investigations.

39. During the course of the Respondent's investigations, the Claimant was informed that she should not transact any business or collect any monies on behalf of the Respondent. This was said to her at a meeting with AG and David Glen on 2 August 2019 (as recorded in AG's note of the meeting at p27) and again in an email from David Glen to the Claimant dated 19 August 2019.

40. These matters led to the Respondent terminating the relationship by letter and email dated 27 August 2019 for what they described as "gross misconduct"

(pp50-53). This correspondence stated that the Respondent was immediately terminating the Claimant's use of the internet domain name and phone number that they had provided.

Claimant's submissions

41. The Claimant made the following submissions.

42. There was nowhere it said that she was self-employed which was accepted as being credible.

43. She was welcomed aboard by AG in his email of 28 August 2018 and someone would not be "welcomed aboard" if they were self-employed. This implies she was an employee. The contract which he said would be sent was a contract of employment.

44. The witnesses of the Respondent were lying. Reference was made to difference in evidence between ML and AG regarding when the document at p22 was provided during the meeting on 17 August 2018.

45. There was an amount of control and she was never self-employed. She could not do her own admin.

46. Any money that was paid went into the Respondent's bank account and not hers. As an employee, she did not have a right to this money.

47. There was no reference in any email correspondence to the Claimant having a homeworker contract.

48. Nowhere in the telephone discussion between the Claimant and ML of 17 August 2018 did it say that the Claimant was self-employed.

49. Homeworkers in the travel industry can be self-employed.

50. Reference was made to s230 ERA and the definitions of "employee" and "worker".

51. She had never agreed in writing to any deduction being made in terms of Part 2 ERA.

52. In response to the submissions from the Respondent, the Claimant stated that Counsel for the Respondent had tried to bamboozle. The submissions and the bundle should, therefore, be ignored.

53. The Claimant stated that there was no contract at all. On questioning from the Judge, she clarified that she meant no written contract but that one did come into being through the phone call and meeting of 17 August 2018.

54. There was no evidence that anybody else working for the Respondent had anything different from her regarding payslips or targets. Being paid commission was quite normal in the industry.

55. ML had agreed that ABTA rules would prevent the Claimant working for another travel business whilst working for the Respondent.

Respondent's submissions

56. The Respondent's agent made the following submissions.

57. The Claimant is alleging that she is an employee and has not asserted worker status but this would be addressed. The Respondent denies that the Claimant is either an employee or a worker.

58. The claim is for £3076 which is said to be commission owed for July and August 2019. The Claimant confirmed in evidence that she was not claiming for a lost holiday.

59. The power to consider claims for unauthorised deductions of wages is given to the Tribunal by s23 ERA and s24 sets out the remedies. In that context, the Claimant is not claiming loss caused by any deduction.

60. It was accepted that the definition of "wages" in s27 ERA includes commission.

61. Reference was made to a breach of contract claim and it was submitted that the Claimant had not included this in the ET1. This requires the Claimant to be an "employee".

62. It was submitted that the claim should be rejected. If it was accepted that the Claimant was either an employee or worker then no award should be made

because the Claimant had not proved what was owed. In the alternative, the Respondent's sum of £2605 should be awarded.

63. Mr Gibson went on to set out the facts which he said the Tribunal should find. The Tribunal does not intend to repeat these in detail.

64. Mr Gibson then went on to make submissions as to how the facts should be applied to the law.

65. Reference was made to the definition of "worker" in s230(3) ERA and the two limbs which could apply.

66. It was submitted that there was no evidence that the Claimant met the first limb as she was not an employee of the Respondent.

67. In relation to the second limb, it was submitted that there were two elements to this. The first element was that there had to be a contract under which the Claimant undertakes to do or perform personally any work or services for the respondent.

68. In relation to this definition, reference was made to the case of *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730, paragraphs 31-40. In particular, Mr Gibson relied on paragraphs 38 & 39 which he read out. He submitted that this decision required the Tribunal to take the facts as found and apply them to the words of the statute.

69. It was submitted that there were three approaches that the Tribunal could take to this exercise.

70. The first arises from what is said at paragraph 13 of *Byrne Brothers (Formwork) Ltd v Baird & ors* [2002] ICR 667 that it is not right to adopt a different approach in relation to the issue of personal service in assessing the second limb of the worker definition from that taken in relation to this issue in assessing the first limb (that is, whether there is a contract of employment).

71. In this context, reference was made to the case of *Pimilico Plumbers Ltd & anor v Smith* [2018] ICR 1511 where a limited right of substitution did not mean that

there was no obligation of personal service and it was submitted in the present case there was no such right.

72. The second approach was said to arise from *Redrow Homes (Yorkshire) Ltd v Wright* [2004] ICR 1126. It was submitted that this case provided that the construction of the contract was critical including the provision of the service and how the reasonable man would view it. Reference was made to paragraphs 20 and 21.

73. The third approach arose from the case of *James v Redcats (Brands) Ltd* [2007] ICR 1006 and involved the assessment of the dominant purpose of the contract. Reference was made to paragraphs 52-70 of the judgment and, in particular, Mr Gibson relied on paragraph 67. In the context of the present case, it was submitted that the Claimant had contracted to provide or generate bookings and this was the dominant feature, not providing a service.

74. It was submitted that the Claimant failed for the first element of the second limb for the following reasons:-

    a. There was no express agreement to personally provide a service.

    b. The terms of the conservation between the Claimant and ML did not include an obligation to do work personally.

    c. The document at p22 makes no reference to personal service.

    d. There is no proper basis to imply there was such an obligation.

    e. The Respondent had no problem with the Claimant having someone else do the work for her.

    f. Indeed, the Respondent would not have known if the Claimant had someone else do the work.

    g. Reference was made to the fact that some homeworkers used a “buddy system”.

    h. This was not a case where there was a restricted right of substitution.

    i. The dominant feature of the contract was to achieve the bookings.

75. It was submitted that the Claimant also failed the second element of the test and that the Respondent was a customer of a business undertaking operated by the Claimant.

76. Reference was made to paragraphs 16 & 17 of *Byrne Brothers* for the proposition that the "worker" definition created an intermediate class between employees and the self-employed. The same consideration as to whether it is a contract of services or for services should apply although pushed further in favour of the worker.

77. The following matters were put forward as reasons why the Claimant failed the second element:-

    a. The Respondent exercised little or no control over the Claimant; there were no set hours; she could work from home; she was not told how to work; there were no minimum hours or level of business. Reference was made to paragraph 33F of *James v Redcats*.

    b. There was no exclusivity and the Claimant was not forbidden to work for others.

    c. The Claimant was not integrated into the Respondent's organisation; she worked from home; she used her own equipment; she did have admin support but did not have a line manager. She presented as "Heather Malcolm Travel" albeit this was said to be a trading name of the Respondent.

    d. She was paid commission with no deduction of tax or National Insurance.

    e. The Claimant bore the risk of being paid or not.

    f. The Respondent was not responsible for any business accounts the Claimant may prepare.

    g. The amount of work she did or did not do had no affect on what she was paid. It was only the amount of business which was done that impacted on pay.

78. Mr Gibson made two final points. The first related to the issue of an umbrella contract and it was submitted that there was no such contract in this case as the Claimant was free to work for others. The second related to paragraph 48 of *James*; there was no evidence that the Claimant was working for others but the fact that she may have been dependent on the Respondent for her earnings did not mean that she was a worker.

79. For all these reasons, it was submitted that the Claimant was not a worker and so the claim under Part 2 ERA must fail.

80. In relation to any breach of contract claim, it was submitted that the Claimant required to be an "employee" and she was not. In any event, this claim would fail as the Claimant had agreed at the end of the contract that any commission could be retained by the Respondent.

81. In response to a question from the Judge, Mr Gibson confirmed that the Respondent did not rely on s14 ERA to say that there was prior contractual or written authority for any deduction of wages.

Relevant Law

82. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

83. Section 27 of the ERA defines "wages" which include any fee, bonus, commission, holiday pay or other emolument referable to a worker's employment whether payable under the contract or otherwise.

84. The term "worker" is defined in s230(3) ERA as follows:-

In this Act 'worker' (except in the phrases 'shop worker' and 'betting 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.

85. The "worker" definition, and particularly limb (b), is considered to be a wider definition than that of "employee" which also appears in s230 ERA. It does still require, in general, for there to be a contractual relationship between the worker and the putative employer.

86. One of the first cases to consider the definition in detail is *Byrne Bros (Farmwork) Ltd v Baird* [2002] IRLR 96. In this case, it was confirmed that a limited right of substitution did not mean that the contract under consideration did not include an obligation of personal service. It was noted by the EAT that, as a matter of common sense and experience, where an individual was offered work then it was on the understanding that they would be the one doing the work.

87. The principle that a limited right of substitution did not prevent there being an obligation of personal service was followed in subsequent cases including the more recent decision of the Supreme Court in *Pimlico Plumbers Ltd v Smith* [2018] IRLR 872.

88. The case of *Byrne Bros* also considered the second element of the limb (b) definition relating to business undertakings. The EAT analysed this provision as meaning that the worker definition applied, on the face of it, to all contracts to personally provide a service but that there was then an exception for those cases where the putative worker was engaged in a business undertaking. The EAT considered that the distinction is between those workers whose degree of dependence on the employer was similar to that of employees on the one hand and those who have a sufficiently independent and arms- length position on the other.

89. In drawing that distinction, the EAT considered that this involved an exercise similar to that in considering whether a contract was one of service or one for services but with the balance pushed further in favour of the worker. The EAT suggested that relevant factors in assessing this would be the degree of control, the degree of exclusivity, the equipment provided by the worker, the method of payment and the level of risk. All relevant factors must be taken into account and weighed by the Tribunal.

90. In *Wright v Redrow Homes (Yorkshire) Ltd* [2004] IRLR 720, the Court of Appeal confirmed the broad approach of the EAT in *Byrne Bros* but with two qualifications. First, they warned that Tribunals should not be swayed by policy considerations of whether individuals should be workers and must only concern themselves with whether the definition is met on the facts of the case. Second, the question for the Tribunal is whether the parties intention was that there should be an obligation of personal service.

91. The "business undertaking" exception was again considered by the EAT in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 where, at paragraph 53, Langstaff J says:-

"it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

92. In *James v Redcats (Brands) Ltd* [2007] IRLR 296, the EAT suggested that the "dominant purpose" test used for the definition of "employment" in the discrimination legislation could provide some assistance to Tribunals in considering the "worker" definition and, in particular, the "business undertaking" exception. The test seeks to identify the fundamental nature of the contract between the parties and whether it is one which falls within the employment field or one which is a contract between two independent businesses.

93. In construing the contract of employment, the express terms agreed between the parties are paramount, particularly where these are reduced to writing in the form of a contract which sets out what the parties have agreed. However, oral contracts can also be reached and oral terms can be agreed in addition to any written contract that may exist. Where it is alleged that there was an oral agreement or term which was different from anything that had been reduced to writing then there needs to be sufficient evidence to prove that the parties had intended that any such oral agreement would vary the express written contract.

94. Evidence of what was agreed between the parties to a contract, particularly in the employment field, may come from a variety of source or in a variety of forms. For example, it may include evidence of what was discussed at interview, there may be a letter of appointment setting out terms or there may be a collective agreement or staff handbook incorporated into the contract which sets out the details of the terms and conditions of employment.

95. There can be certain terms imposed or implied into a contract in the employment field. For example, s66 of the Equality Act 2010 imposes an “equality clause” into all contracts of employment which amends the other terms of the contract where there are less favourable than the terms of the contract of some of the opposite sex doing equal work.

96. There are certain other terms implied by law such as the mutual duty of trust and confidence, the duty of loyalty and fidelity placed on employees and the duty of care placed on employers.

97. Terms can also be implied into the contract based on the conduct of the parties or by custom and practice within a business or the broader industry in which the employer operates. There requires to be cogent and clear evidence for the Tribunal to imply terms into the contract on these bases. In particular, where the alleged implied terms conflicts with an express term then the Tribunal needs to have sufficient evidence that the conduct of the parties amounted to an intention to vary those express terms.

98. In relation to custom and practice, the term to be implied needs to be “reasonable, notorious and certain”. There needs to be evidence that the custom

was followed consistently and over such a period that it was well-known that the custom was to be followed in all circumstances.

99. Terms can also be implied by what is known as the "officious bystander test), that is, that the term in question was so obvious that parties must have intended it to be included in the contract (*Shirlaw v Southern Foundries (1926) Ltd* [1939] [1939] 2 All ER 113). It may also be possible for terms to be implied where they are necessary to make the contract work (the "business efficacy" test). Further, implication of terms by these routes can also include cases where it is necessary to imply terms into the contract to make express terms workable or intelligible (see, for example, *Ali v Petroleum Company of Trinidad and Tobago* [2017] IRLR 432).

Decision

100. The first question which the Tribunal requires to address is whether the Claimant was a "worker" for the purposes of s230(3) ERA. If she is not then her claim fails as the Tribunal lacks jurisdiction. In determining this point, the Tribunal will address the question of whether she satisfies the "limb (b)" definition first; if the Claimant succeeds on this point then there is no need to consider whether she meets what is considered to be the more difficult definition in "limb (a)".

101. There are some preliminary comments which the Tribunal would make in relation to its consideration of the "worker" definition which apply across all the elements of test.

102. First, the lack of a written contract means that, in relation to a number of important issues such as personal service, there are no clear and unambiguous express provisions. Similarly, the verbal discussions between the parties did not address these issues in express and unambiguous terms. This is a "double-edged sword" as it means that neither party can point to a clear and unambiguous agreement on these issues. The Tribunal, therefore, needs to construe the contractual position on these issues from the facts of the case.

103. Second, in relation to these same issues, there was no instance in which the conduct of the parties provides evidence of what terms had been agreed. For example, there was no situation in which the Claimant sought to substitute

someone else to do her work and the Respondent confirmed whether or not she could do so. Again, this causes problems for both sides as neither of them has evidence of what was agreed on such issues from what was done in practice.

104. Third, there were a number of matters (for example, personal service or exclusivity) in which the Respondent said in evidence or in submissions that the Claimant could behave in a particular way and they would not have known about it. The Tribunal did not find this persuasive in any way as there may be many things that a worker or employee may do of which the employer is unaware at the time but about which they take action (and would be entitled to take action under the contract) when they learn of these matters. In this case, for example, the Respondent was initially unaware of the issues around allocations of credit card payments but as soon as they were aware then they took steps to investigate it, prohibited the Claimant from carrying out further business for them and terminated the contract. There was no suggestion that they were not entitled to take these actions under the terms of the contract.

105. In order for the Claimant to be a "worker" then she must work for the Respondent under a contract. If there is no contract then that is an end of the matter. There was no dispute between the parties that there was a contract between them. Although the Claimant would assert that there was no contract, she clarified that this was a reference to the absence of a written contract rather than the absence of any contract. The Respondent did not seek to argue that there was no contract.

106. The Tribunal is satisfied that there was a contract between the Claimant and Respondent; there was clearly an offer and acceptance required by Scots law to create a contract. The real question is whether the contract that existed was one which fell into the definition set out in "limb (b)".

107. It is fundamental to the "limb (b)" definition that there is an obligation of personal service. There was no evidence that this was ever discussed between the parties, either when the contract was formed in 2018 or at any subsequent time. There is, therefore, no express term either stating that the Claimant must personally perform the work or that the Claimant could substitute others.

108. It was submitted on behalf of the Respondent that in the absence of any express term to the contrary then there must be a right of substitution and so no obligation of personal performance. The Tribunal is not persuaded by this for a number of reasons; it is a fundamental principle of Scots contract law that silence is not acceptance and so contracts (and, by extension, the terms of the contracts) can only be created by positive acceptance; there is a plausible alternative explanation for why the parties did not address this and that is that both parties were proceeding on the common understanding that the Claimant would be performing the work personally and so there was no need to discuss it.

109. The question for the Tribunal is whether it is prepared to imply into the contract that there was an obligation for personal performance or whether there was no such obligation and there was a right of substitution.

110. The Tribunal finds no assistance from the conduct of the parties as the issue of substitution never arose in practice. Similarly, there was no evidence of custom and practice that was sufficient to persuade the Tribunal to imply a term on either basis. Indeed, the evidence of industry practice was that, although homeworkers were used in the travel industry, there was no consistent business model or terms and conditions for such workers. The only evidence of a practice within the Respondent was the reference to the buddy system but the Claimant was entirely unaware of this and it was described as informal practice operated by only some homeworkers. The Tribunal is not prepared in such circumstances to find that this was so "reasonable, notorious and certain" (if anything, it was not notorious) as to imply a substitution clause into the Claimant's contract.

111. The Tribunal, therefore, turns to the "officious bystander" test and the "business efficacy" test to consider what term, if any, can be implied by these routes. The Tribunal certainly does not consider that the officious bystander would have considered it obvious that a substitution clause would form part of the contract nor does it consider that business efficacy requires such a clause.

112. The question, then, is whether an obligation of personal performance could be implied by applying these tests. In considering this, the Tribunal has taken into

account the nature of the bargain being struck between the parties and, in particular, what the Respondent was getting from it. It was quite clear from the evidence that the Claimant was being recruited by the Respondent as a homeworker because she could bring them business via the client base that she had built up over the years.

113. In these circumstances, it was the Claimant who brought these clients and so there was a very personal element to the work being done. This is clearly reflected in the fact that the Claimant would trade under the "Heather Malcolm Travel" brand rather than the Respondent's brand. It was the reason why the Respondent the domain name and ensured that both email and paper correspondence were being issued with the Claimant's name front and central.

114. Further, it was also the reason why the Claimant sought to be involved in the admin process as much as possible. She gave evidence that clients would raise queries when they received correspondence which was not in her name.

115. The Tribunal also takes into account that all the discussions about the working arrangements were addressed to how the Claimant could work. She was told that she could work when she wanted. She was told that she would be given access to the Respondent's systems and that passwords would be set up for her. She was told how she would be paid commission. At no point in any of the discussions at the outset of the relationship was there any evidence that the parties contemplated anyone other than the Claimant doing the work involved. The Tribunal infers that the reason for this was that it was common ground that it would be the Claimant doing the work.

116. There is certainly no evidence that the Respondent considered that it was contracting with a business operated by the Claimant in which people other than the Claimant could be involved in doing the work.

117. The Tribunal draws further support from the comments in *Byrne Bros* that it would be common experience and common sense that where an individual is offered work then it would be expected to do the work.

118. In these circumstances, the Tribunal considers that the officious bystander, looking at all of the facts of the case, would say that it was obvious that there

was an obligation of personal performance on the Claimant. The Tribunal, therefore, finds that such an obligation is implied into the contract between the Claimant and Respondent.

119. For the sake of completeness, the Tribunal should make it clear that it would reach the same conclusion for the same reasons set out above in applying the test in *Redrow Homes* of how a reasonable man would construe the contract.

120. There was a submission by Mr Gibson that any such obligation was not one to do any work or services for the Respondent. This submission was made on the basis that the purpose of the contract was to generate bookings and not do work or provide a service.

121. With all due respect to Mr Gibson, the Tribunal considers that he is seeking to split the very finest of hairs. In any sales role such as the Claimants, the ultimate purpose of the role is generate sales (and, therefore, money) for the business but that does not mean the agreement between the worker (or employee) and the employer is not one in which the worker agrees to do work for the employer.

122. The generation of sales (or, in this case, bookings) does not happen in vacuum and there would be no bookings if the Claimant had not done the work involved. It is correct that the amount which the Claimant was paid was not linked to the amount of work done but that is an inevitable consequence of any commission based pay system and does not mean that purpose of the contract was not one by which the Claimant agreed to personally perform work or services for the Respondent.

123. The generation of bookings was inextricably linked to the Claimant doing the work. If she did no work then there would be no bookings. In these circumstances, the clear purpose of the agreement was that the Claimant would carry out the work involved in producing bookings for the Respondent from her client base.

124. For these reasons, the Tribunal rejects the submission that the contract was not one by which the Claimant agreed to do or perform work or services for the Respondent. The evidence before the Tribunal clearly indicated that the Claimant had agreed to perform work or services for the Respondent.

125. The Tribunal, therefore, considers that the contract between the Claimant and Respondent is one which falls within limb (b) and the next question is whether the "business undertaking" exception applies.

126. In relation to this matter, the Tribunal notes that, prior to being recruited by the Respondent, the Claimant had not been in business for herself and, rather, had been working for another travel business. There was no evidence that the Claimant had been operating any business undertaking prior to working for the Respondent and that this was a case of her contracting with a new client.

127. The Tribunal will consider the relevant factors in assessing whether the exception applies, particularly those advanced by the Respondent, in turn starting with the issue of control.

128. It was certainly the case that the Respondent did not exert close, day-to-day control over the Claimant. They did not set or monitor her hours and nor did they supervise her work in the way that might be done in a traditional office or retail setting.

129. However, it is wrong to say that the Respondent did not exert any control over the Claimant. She had to follow processes set by them in terms of booking holidays and taking payments. More than that, it is clear from the evidence that the Respondent had control over whether the Claimant could work at all; it was the Respondent who had control over the phone line and email used by the Claimant which they could remove at their discretion; similarly, they also could remove access to their systems which would prevent the Claimant from making bookings or taking credit card payments; the Claimant could only operate because she was covered by the Respondent's ABTA and ATOL licences and if they removed her from this then she could not operate in the travel business until she was covered by such a licence.

130. It was certainly clear that the Respondent did exercise control over the Claimant in practice; they prohibited her from carrying out any business with them during the investigation.

131. In these circumstances, the Tribunal does not consider that there was such a lack of control over the Claimant by the Respondents to indicate that she was involved in a business undertaking.

132. In relation to exclusivity, this is another matter on which the express terms of the contract is entirely silent. It was the Claimant's evidence that the rules regulating the travel industry prevented her for working for any other travel business due to conflict of interest. If that is correct then it is unsurprising that there was no express discussion of exclusivity; there would be no need to set out something which everyone understood to be the case. The Tribunal notes that the Respondent did not challenge this assertion in cross-examination or lead evidence to the contrary.

133. It is certainly the case that it must be implied by the application of either the officious bystander or business efficacy test that the Claimant could not have traded as "Heather Malcom Travel" with another travel business. This brand was clearly expressed as a trading name of the Respondent (therefore covered by their licences) and it must be the case that the contract had to have a term prohibiting the Claimant from using one of the Respondent's trading names for her own business or that of a competing business. To suggest otherwise would fly in the face of all business or common sense.

134. The Tribunal, therefore, considers that there was a degree of exclusivity particularly in relation to the use of the "Heather Malcolm Travel" brand such that it cannot be concluded that the Claimant was engaged in a business undertaking on the basis of this factor alone.

135. In relation to the integration factor, the Tribunal notes that the Respondent's business model makes use of homeworkers, and has done for some time, as a means of generating business along with its retail shop and franchises. The Tribunal, therefore, considers that homeworkers are an integral part of how the Respondent trades.

136. More than that, and specific to the Claimant, all of the work which she did was under a brand that was described as a trading for the Respondent. On the face of that, she was an integrated part of the Respondent's business. The Tribunal

does consider that the Respondent is "having its cake and trying to eat it" by asserting what are contradictory positions at different times; when the Claimant was working for them then they have held out to the public and official bodies such as ABTA that the brand under which she works is the Respondent by another name; they now seek to assert to the Tribunal that she was a separate business undertaking in defending the claim. Both of these positions cannot be correct. The Tribunal considers that the former is the true position.

137. The Claimant was told that she was protected by the Respondent's ABTA and ATOL licences and this was not a case where she was required to obtain her own licences.

138. It is correct that the Claimant her own equipment but this was minimal, being a mobile phone and a laptop. However, balanced against this is the fact that the Respondent provided (and owned) the phone line and email domain used by the Claimant. They also provided the systems used by the Claimant to make bookings and take credit card payments.

139. Again, it is correct that the Respondent did not provide the Claimant with a line manager. However, as addressed in relation to the control factor above, the Respondent could and did exercise power over the Claimant in relation to the work which she did.

140. Taking all of these matters into account, the Tribunal considers that the Claimant was integrated into the Respondent's business to such a degree that it cannot be said that she was carrying out her own business undertaking.

141. The Tribunal does not consider that the fact that the Claimant was paid by commission provides any basis to conclude that she was engaged in a business undertaking. It is well known, and certainly within judicial knowledge, that many sales roles which would be considered to be "workers" and even "employees" are predominantly or wholly paid by commission.

142. Further, commission falls within the definition of "wages" in s27 ERA in the context of a claim under Part 2 ERA, a claim which vests in "workers". It would be an entirely illogical position for someone to be excluded from being a "worker"

simply because the type of wages which they receive is one which workers are entitled to recover.

143. Similarly, the tax position is not a factor which the Tribunal considers sufficient, on its own, to satisfy the business undertaking exemption. Tax status is not determinative of employment status and, at most, it is simply one factor which the Tribunal should weigh in the balance.

144. The Tribunal did not agree that the Claimant bore any element of risk beyond that of any worker or employee paid on a commission-only basis (that is, they do not get paid if they do not generate sales). There was nothing which suggested that the Claimant bore the sort of risk which would be associated with some engaged in a business undertaking.

145. In particular, it was quite clear that any business done by the Claimant was done as part of the Respondent. She was covered by their licences in respect of ABTA and ATOL and it was the Respondent who would make refunds as happened in the present case. There was no evidence that the Claimant would have had any financial or other risk had anything gone wrong with “Heather Malcolm Travel”.

146. The Tribunal also did not consider that the issue of business accounts had any real weight. There was no evidence that the Claimant accepted that she had to prepare such accounts and no evidence put to her that demonstrated such a requirement.

147. Finally, there was the issue of the fact that the amount of work done by the Claimant had no direct correlation with the amount she was paid. The Tribunal has already addressed this issue above and its conclusion that the Claimant had to do the work to generate the bookings in order to generate her commission stands. This is no different from any other sales role and certainly does not indicate that the Claimant was engaged in a business undertaking.

148. Taking each of these factors on their own and as a whole, the Tribunal does not consider there is sufficient evidence to find that the Claimant was engaged in a business undertaking.

149. In these circumstances, the Tribunal does consider that the Claimant meets the "limb (b)" definition of worker in s230(3) ERA as she worked under a contract to personally do or perform work or services for the Respondent in circumstances where the Respondent was not a client or customer of a business undertaking carried out by the Claimant. The Tribunal, therefore, does have jurisdiction to hear the claim.

150. Turning now to the substantive issues, the Tribunal has no hesitation in finding that the failure to pay the Claimant the commission owed to her amounts to an unauthorised deduction of wages contrary to s13 ERA. The Respondent did not seek to argue that the Claimant was not legally entitled to the payment of commission nor did they advance any defence in terms of s14 ERA that the deduction was authorised by the terms of the contract or that the Claimant had given prior written authorisation for the deduction to be made.

151. The final question for the Tribunal is the amount of the deduction. The Claimant sought the sum of £3076 as being the commission she believed that was owed. However, there was no detail as to how this was calculated, although this is not surprising as the Claimant is only due commission when the holidays booked through her are paid and she could not know which had or had not once she no longer worked for the Respondent.

152. The Claimant sought to rely on a document at p71 but the figures on this page were so blurry as to be illegible. At the continued hearing on 30 November 2020, the Claimant sought to introduce a new version of this document during her cross-examination of Mr Glen. Mr Gibson objected to this on the basis that this document had not been spoken to by the Claimant in her evidence and he had not had the opportunity to cross-examine her on it. The Tribunal upheld that objection.

153. Similarly, the Respondent produced no evidence, beyond the oral evidence of Mr Glen, regarding the commission. Mr Glen accepted in evidence that the Claimant was owed £2600 but nothing was produced to show how this figure was reached and the Tribunal notes that the necessary information is wholly within the Respondent's hands.

154. The Tribunal does not accept Mr Gibson's submission that no award should be made because the Claimant has not proved what she is owed. This ignores the fact that Mr Glen gave evidence that £2600 was owed and so the Respondent must be conceding that, at the very least, this is the sum owed.

155. However, there is no evidence before the Tribunal that any further sum is owed to the Claimant and so the Tribunal does not consider that it can award the sum sought by the Claimant.

156. In these circumstances, therefore, the Tribunal awards the Claimant the sum of £2600 in respect of the unauthorised deduction of wages made by the Respondent.

Employment Judge: Peter O'Donnell

Date of Judgment: 15th December 2020

Entered in register: 22nd January 2021

Copied to parties