



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr H Sant-Cassia

v

**(1) One & Only Pro Limited
(2) Mr Imran (aka Emraan)
Javed**

Heard at: London Central
(via Cloud Video Platform)

On: 3 February 2021

Before: Employment Judge Joffe

Representation

For the Claimants: In person

For the Respondent: Mr Javed, in person for both respondents

RESERVED JUDGMENT

1. The claimant was an employee of the first respondent;
2. The first respondent made unlawful deductions from the claimant's wages in the sum of £30,000 gross and must pay that sum to the claimant;
3. The first respondent was in breach of section 1 Employment Rights Act 1996

4. The first respondent must pay the claimant a further sum of four weeks' pay in the sum of £1320, pursuant to section 38 Employment Act 2002;
5. The claim for holiday pay is dismissed on withdrawal by the claimant.

REASONS

Claims and issues

1. The claimant's claim was for unpaid wages between March 2018 and December 2019, during which period he said he was employed by the first and/or second respondent as chief executive officer of the first respondent. The respondents said that he was never employed by either of them and that the claimant had provided services to the first respondent 'as an expert in fund raising'. They said that there was no agreement for payment of money but the claimant was to receive shares in the first respondent if he was successful in raising start up capital for the first respondent. The claimant withdrew a claim for holiday pay at the outset of the hearing.

2. The issues were therefore as follows:

Employment status

- i) Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?
- ii) Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

Unauthorised deductions

- iii) Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted:
 - a) What if any wages were properly payable to the claimant during his engagement by the respondent?

Failure to provide written particulars

- iv) Did the respondents fail to provide the claimant with written particulars in accordance with section 1 Employment Rights Act 1996?

Facts

The hearing

1. There was much that was unclear about the progress of these proceedings. Although Mr Javed was able to produce a document which showed that a response had been submitted on behalf of the first respondent on 12 June 2020, the form ET3 was not available, although a narrative attachment to that form was produced. In the absence of the file, it was not possible to determine whether the first respondent's response had been submitted in time. I saw a letter from the Tribunal to the parties dated 21 July 2020 which informed the parties that no response had been received. Employment Judge Stewart, at a case management hearing on 20 July 2020, had ordered that the second respondent be joined but there was no response from the second respondent. Mr Javed said that he had been confused about the proceedings and had not realised he needed to produce a response for himself as an individual. I saw a notice of claim from the Tribunal which had been sent to the respondents after the July 2020 case management hearing which notified the respondents that a response was required but I could see why that notice might have caused confusion to a litigant in person.
2. Faced with uncertainty over whether there were any valid responses to the claim and in circumstances where it was not possible to access the case file due to the closure of Victory House, the options available to me were either to adjourn the hearing so that the matter could be investigated or to ask the claimant whether he was content for the respondents to participate in the proceedings. The claimant took a pragmatic approach and agreed to Mr Javed taking part in the proceedings.
3. I note that the claimant had failed to appear at a previously listed full merits hearing in front of Employment Judge J Burns on 2 December 2020 and his claims had been dismissed. That judgment was set aside when the claimant

applied for a reconsideration on the basis that the claimant had not understood the hearing was going ahead.

4. I was provided with a number of documents. The claimant produced a witness statement with a number of documents appended to it. He gave oral evidence and answered questions about his statement.
5. The respondents relied on a statement from Katherine Neary, who had undertaken payroll and employment administration for the first respondent between May 2018 and March 2020. Ms Neary was not available to give oral evidence. The respondents also relied on a screen shot of text messages between the claimant and the second respondent on 12 and 13 April 2019. Mr Javed gave oral evidence in chief without a witness statement and responded to questions from the claimant and from the Tribunal. The parties and I also looked together at information about the first respondent available on the Companies House website.
6. The hearing was a remote hearing as it was not possible for it to be held in person. The parties did not object and there were no material issues with the technology. Everyone was able to see and hear one another.

Facts relevant to the claims

7. The first respondent is a company which I understand was set up to develop software which was designed to predict changes in property values. When the company was registered, the second respondent owned the entire share capital. He was also and remains a director of the first respondent.
8. The second respondent emailed the claimant on 7 March 2018 asking the claimant for 'assistance in getting funding for a website that I am currently building'. The claimant had previously provided marketing and other copy writing services to the first and/or second respondents. The claimant said that at the time when the second respondent approached him he had been

working for a few years as a professional copy writer but was winding down that work and looking to return to the venture capital world. He had recently returned from abroad and was 'between commitments'. He had two offers at the time: one from the respondents and one from a start up manufacturing company in Birmingham to do advisory work. In relation to the latter work he received shares for his work. He was not advertising his services or seeking further work during the period he was performing services for the respondents, nor performing other work apart from his advisory work for the manufacturing start up.

9. The claimant and the second respondent met to discuss the claimant's potential involvement with the first respondent at a Birmingham hotel in March 2018. It appears from some handwritten notes made by the second respondent that there was some discussion of the claimant being paid in shares.
10. The claimant wrote to the second respondent the day after the meeting (in an email which appears to be dated 15 March 2018). In the email he proposed that he receive shares in the company and some profit from subscriptions. He also said: 'We are agreed that you would retain full control over everything, with decision making on every aspect of my work. I would not be allowed to make deals independently and would work to your instructions.'
11. In further emails between the claimant and second respondent, the second respondent said: 'I really only view you as a copywriter and a front man.'
'There are 1000 shares. Each share between you and me we will always value at @£640
Instead of paying you in cash you have the option to convert it into shares. So
12.8 hours would = 1 share
As when I met you your hourly rate was \$50 but lets just call it pounds...Once we reach 10% we forget this arrangement and move to the rolling arrangement.'
He asked what the claimant anticipated in terms of payment on subscriptions.

12. On 19 March 2018, the claimant replied

‘On the stock, I agree, it is fair, it means the more I work the more I can earn as a percentage...On the subscription and other income streams: I have to trust you, so I’m happy if you keep me on a similar arrangement to the coder, and hope that we can talk about getting paid when the time comes.’

13. There were also discussions between the claimant and the second respondent in which the second respondent asked the claimant to be the chief executive officer, tasked with raising investment and being the public face of the company. The second respondent told the claimant that matters such as payroll and formal contracts would be dealt with when the company was up on its feet. The claimant was told he would be needed at least two days per week and had to be prepared to work unusual hours.

14. The claimant undertook fundraising and other work for the first respondent from around late March 2018. He did not keep a log of the hours he worked. The second respondent claimed that the claimant had submitted time sheets but none were produced to the Tribunal. The claimant estimated that he was working significantly more than 40 hours per week for the respondents over the period of the claim but was claiming 600 hours on a ‘conservative basis’. It was difficult to understand that calculation since it seemed to be a fraction of the number of hours he said he was working. He was emailing potential investors, filling out funding application forms, managing the production of documents for potential funders, visiting potential funders and performing other related tasks. He represented the first respondent as CEO at events, in interviews and in videos.

15. As time went on, the claimant said that the second respondent assured the claimant that he would soon be able to draw a salary; he said that the second respondent told him that once external funding was obtained, the claimant could build additional salary for himself into the company’s financial model.

16. The claimant evidently had growing concerns about the situation. He never asked in writing about being paid or his employment status but said that the matter was discussed with the second respondent. The claimant said he was trying to be flexible because the first respondent was a start up and he initially trusted the second respondent. On 11 August 2019, he emailed the second respondent saying: 'I have still not been paid and nor have I got any form of paperwork. This is going on far too long, and while I'm excited to be working on this, I need to be paid. Also I am getting lots of requests for clarity around our pricing model / revenue streams and we cannot keep dodging these questions.'
17. From the claimant's perspective, the relationship broke down when he discovered that the second respondent had added directors to the register who had never agreed to be directors of the first respondent. I saw an email dated 8 December 2020 from one of these individual, Will Miller, to the claimant. Mr Miller confirmed he had no relationship with the first respondent and that he was seeking to have himself removed as a director. He had reported the matter to the police and Companies House. The second respondent produced some text messages which showed that at one stage the claimant had believed Mr Miller would come on board as an investor. The claimant said Mr Miller had lost interest and no agreement was ever reached. The second respondent suggested that he had told the first respondent's accountants to register Mr Miller as a director when the claimant told him Mr Miller was interested in investing.
18. The claimant was also concerned that the second respondent was refusing requests from funders and was using various spellings of his own surname to obtain mortgage finance on his property portfolio.
19. The claimant said he challenged the second respondent about these matters and the second respondent said that his hard work would be in jeopardy if he did not keep on working. There was a confrontation on 16 December 2019 when the claimant again challenged the second respondent about the fact he had not been paid anything. The second respondent told the claimant he was not the CEO and had never been employed. The claimant stopped carrying

out work for the respondents and contacted ACAS to commence early conciliation.

20. The claimant produced a copy of a business card he was provided with by the respondents on which he was described as 'CEO & Founder' of the first respondent.
21. The claimant said that he was never paid any sums nor did he receive any shares in the first respondent. It appeared from the documents on the Companies House website that the claimant was said to hold 4 ordinary shares (out of 1000). The claimant said that he had never been notified of the transfer of any shares and that he had no share certificates.
22. The claimant understood at the time he commenced work that he was working for the first respondent, a legitimate limited company, wholly controlled and owned by the second respondent. He later became concerned about the legitimacy of the first respondent, particularly when directors were named as having been appointed who had not agreed to that appointment.
23. The untested evidence of Ms Neary was that there had been a 'few' employees of the first respondent for whom she had administered contracts of employment and PAYE enrolment. That had not included the claimant, whom she understood was going to help the business raise investment funds.
24. The second respondent's evidence was difficult to understand, partly because he appeared to be minimising his involvement with the first respondent. He said he had been asked to attend the hearing by the 'owner' of the business, which appeared to mean the person who now had a majority shareholding, Mr Sohail Akram. Mr Akram had appeared at the hearing on 2 December 2020. The second respondent's position was that the claimant was a director of the first respondent. He said that the claimant had wanted to own shares and be seen as a co-founder. He said that the claimant had agreed to be a director. The claimant said that the respondents had registered him as a director of the first respondent without his knowledge and pointed to the fact that on the Companies House website his appointment appeared to

date to from 3 April 2017, before he became involved with the first respondent. The second respondent was very unclear as to how the claimant and several other individuals who had not agreed to be directors had come to be appointed and seemed to suggest that the first respondent's accountants had been responsible.

25. The second respondent said that the agreement was that the claimant would be remunerated in shares for hours worked, in respect of which he submitted time sheets. He said that the first respondent's accountants had allocated shares to the claimant but he did not produced any evidence of share allocation.
26. The respondent produced some text messages in April 2019 in which, in response to a message from the second respondent that the claimant should do something that day, the claimant responded 'Listen, I'm not some kind of employee or servant'. The claimant said he responded as he did because he had not liked the second respondent's tone and he was under a lot of pressure. He said he snapped slightly because he was not being treated like a CEO.
27. I found the evidence of the second respondent to be largely lacking in credibility. His explanations as to how directors had come to be recorded at Companies House and his attempts to downplay the level of his involvement with the first respondent were not believable in view of the documents which evidenced his involvement.

Submissions

Law

Worker status

28. Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as an individual who has entered into or works under

- a contract of employment; or
- any other contract, whether express or implied and (if 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.

29. For an individual to be a 'worker':

- There must be a contract, whether oral or in writing;
- The contract must be for the worker to provide personal services;
- Those services must be for the benefit of another party to the contract, who is not a client or customer of the worker's profession or business undertaking.

30. The degree of integration of an individual into the respondent's business may be relevant to the issue of whether the respondent is a 'client' or 'customer' on the individual's business: Hospital Medical Group Ltd v Westwood 2013 ICR 415, CA.

31. Cases of this sort are particularly fact sensitive; a relevant factor may be the extent to which the individual markets services to the world in general or is recruited to work for the respondent as an integral part of its organisation: Cotswold Developments Construction Ltd v Williams 2006 IRLR 181, EAT.

32. The question of what the 'dominant purpose' of the contract is may also assist – is the dominant purpose of the contract the obligation personally to perform work – in which case the contract sits in the employment field – or a particular outcome or objective, with the obligation to provide personal service a secondary consideration – in which case the contract will lie in the business field: James v Redcats (Brands) Ltd 2007 ICR 1006, EAT.

33. 'Subordination' may not be necessary to a worker relationship: Hospital Medical Group Ltd v Westwood 2013 ICR 415, CA.

Employee status

34. An employee is 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment': S.230(1) ERA. A contract of employment is 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing': s 230(2).

35. A contract of service exists if these conditions are met:

- Mutuality of obligation;
- A requirement to provide personal service
- A sufficient degree of control
- The other provisions of the contract are consistent with it being a contract of service.

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD.

Unlawful deductions from wages

36. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

37. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

Failure to provide employment particulars

38. Under section 1 of the Employment Rights Act 1996, an employer is obliged to provide an employee with a written statement of particulars. Although the section has been amended to extend the right to workers, prior to 6 April 2020, it was only employees who had a right to written particulars.

39. Under section 38 of the Employment Act 2002, where a tribunal finds in favour of a worker in respect of a number of types of claim, including unlawful deductions from wages, and, when the proceedings were begun, the employer was in breach of its duty under s 1 ERA 1996, if the tribunal makes an award it must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. The minimum amount is two weeks' pay and the maximum amount is four weeks' pay. The duty to make the award does not apply if there are exceptional circumstances which would make an award unjust or inequitable.

Piercing the corporate veil

40. Petrodel Resources Ltd v Prest [2013] UKSC 34; [2013] 2 A.C. 415; [2013] B.C.C. 571 sets out the circumstances in which a court or tribunal will disregard the separate legal personality of a limited company so as to affix responsibility to those who control the company. There are two principles or circumstances where this may be appropriate:

- the concealment principle, where one or more companies have been interposed to conceal the identity of the true actor;
- The evasion principle – where a person under an existing legal obligation or liability or subject to an existing legal restriction interposes a company under his control to evade the obligation or restriction or frustrate enforcement.

Circumstances in which it is appropriate to lift the corporate veil are rare.

41. Because the claimant appeared to be raising issues about whether the corporate veil should be pierced and the second respondent made liable as his employer and there was very little time to consider the legal issues with the parties in the three hour listing, I agreed with the claimant that I would send the parties details of any case law which seemed relevant so that any further submissions they might wish to make in writing could be taken into account. None of the parties made any further submissions.

Conclusions

Issue: Worker status?

42. It was unnecessary for the purposes of the claimant's unlawful deductions claim for me to determine whether he was an employee of the respondents. If he was a 'worker' within the meaning of the ERA 1996, he had a right to bring a claim for unauthorised deductions.

43. I was satisfied that there was a contract between the claimant and the first respondent which was partly oral and partly contained in the emails between the parties in March 2018.

44. It was clear from the evidence that it was the claimant's particular skills which were sought by the respondent and that the claimant was expected to carry out the work personally. The respondents did not suggest that he could have substituted someone else to carry out the fundraising work and as a matter of fact he did not do so.

45. Although the claimant had another role for the manufacturing company at the time, he was not marketing his services to the world in general and he had a significant degree of integration into the first respondent's business, since he was held out as its chief executive officer. There was however, also a level of subordination to the second respondent as discussed between the parties in the first meeting and confirmed in the email messages.

46. I carefully considered whether the arrangements were arrangements which did not fall within the employment sphere because this was in effect a business deal and the claimant had come on board as a co founder with a share of equity, sharing with the respondents the risks and rewards of what was in effect a joint venture.

47. However, that did not reflect the reality of the agreement. The claimant was offered payment on an hourly basis which he had the option to convert into shares, to be a 'copywriter and front man'. It was clear he was subordinate to the second respondent and most importantly, he had no or no significant equity in the company. He would only acquire that equity if he opted to convert the sums he worked for into shares.

Issue: employee status

48. Ultimately and looking carefully at aspects of the multiple test, I was satisfied that the claimant's contract was also a contract of employment. He was entirely integrated into the first respondent as its CEO but subject to the ultimate direction of the second respondent as (then) owner of the business. Although there was no clear agreement as to the hours the claimant was required to work, he was required to work at least two days per week. The failure by the respondents to actually pay the claimant or to pay his tax and National Insurance did not seem to me to point strongly away from the contract being a contract of service in all the circumstances.

Issue: which respondent was the employer?

49. It was apparent that the claimant understood from the outset that he was to be engaged by the first respondent to do fundraising for the first respondent and act as its CEO. Nothing he said about his discussions with the second respondent suggested to me that it was his understanding that he was being engaged by the second respondent personally or that that was how the parties understood the bargain between them.

50. What the claimant seemed to be saying to me was that the first respondent might have no substance and therefore might not satisfy any judgment obtained against it. That particular concern is not one which would justify a finding that a shareholder / owner of a limited company was in fact a claimant's employer.

51. The claimant also referred to 'corporate fraud', by which he meant the appointment of directors without their agreement and not paying the claimant.

52. Nothing the claimant said to me about the situation indicated that the circumstances fell into one of the relatively rare circumstances in which it is appropriate to disregard the separate personality of the limited company. In simple terms, the second respondent had not interposed the limited company to defeat an existing obligation to the claimant (evasion principle) nor was it apparent that the limited company was from inception merely a vehicle for the second respondent (concealment principle).

Issue: what wages were properly payable

53. Although it was apparent that the discussions between the parties started off from the perspective that the claimant was hoping to earn shares in the first respondent, the bargain between the parties was ultimately that the claimant be paid £50 per hour with the option to convert the payment into shares at a particular rate. The respondents neither disputed the amount of work the claimant had performed nor produced evidence that he had been paid for that work in shares as suggested by the confirmation statements filed at Companies House (which in any event showed him as having received four ordinary shares out of 1000).

54. I concluded that the wages properly payable to the claimant were wages of £50 per hour for a total of the 600 hours he was claiming for work, a total of £30,000 gross.

Issue: Is the claimant entitled to compensation for failure to provide written particulars?

55. As an employee, the claimant was entitled to written particulars and did not receive them at any time during his employment. Having made an award of unauthorised deductions, I am obliged to make an award under s 38 Employment Act 200, unless there are exceptional circumstances. Looking at the wholesale failure of the respondent to provide the claimant with any particulars or to make any payment to him for the work he carried out, I concluded that an award of four weeks' pay would be just and equitable.

56. The claimant did not have a regular weekly wage so I had to calculate his weekly wage by dividing the number of hours he claimed for by the number of weeks in the period. There were 91 weeks in the period he had claimed for so he weekly hours claimed are 6.6 and the total is £330 per week. The total award under this head is therefore £1320.

Employment Judge Joffe
London Central Region
15th March 2021

Sent to the parties on:
15/03/2021

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For the Tribunals Office