EMPLOYMENT TRIBUNALS

Claimant: Mrs O Augustin

Respondent: Elizabeth Strover

Heard at: Watford Employment Tribunal

On: **14 April 2021**

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the Claimant: In Person
For the respondent: No appearance and no representation

RULE 21 JUDGMENT

1. The Claimant was not an employee of the Respondent. Therefore, there is no jurisdiction for the employment tribunal to consider a complaint of breach of contract.

2. The Claimant had a contract with the Respondent such that the Claimant performed work for the Respondent between 31 March 2020 and 10 April 2020. That contract falls within the definition in section 230(b) of the Employment Rights Act 1996 and therefore the Claimant was a "worker" of the Respondent's for that period.

3. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the net sum of £1100, which are earnings and the Respondent must account to HMRC for any tax and national insurance.

REASONS

The Hearing and Evidence

1. A public hearing took place. It had been listed to take place in person, and notification was sent to the Claimant and the Respondent. This was a hearing in accordance with Rule 21(2). The Respondent had failed to present a response by 9 July 2020 and nor did she make any application in response to the letter dated 10 October 2020 informing her that a rule 21 judgment might be issued, or in response to the notice of hearing sent by post on 24 January 2021.

2. As a result of the documents supplied by the Claimant, and her answers to my questions, I am satisfied that I can properly make a determination on the claim.

The Claims & Issues

3. Was the Claimant an employee, and, if so, does a breach of contract claim succeed for unpaid salary and reimbursement of agreed expenditure.

4. Was the Claimant a worker, and if so, does a complaint of unauthorised deduction from wages succeed? (The complaint being brought under section 23 the Employment Rights Act 1996 alleging breach of section 13).

5. The sums claimed by the Claimant are £1100 as wages (11 days at £100 per day) and aggregate expenditure of £210.30.

The Law

6. As per *Limoine v Sharma EAT 0094/19,* it is an error of law to enter judgment simply because the claim is undefended without proper consideration of the matter. Furthermore, the Presidential Guidance on the correct approach must also be taken into account.

7. Judgment should not be granted at a hearing under Rule 21 unless, taking account of the fact that the Claimant's assertion are uncontested, I am satisfied that, in law, the factual basis for doing so is made out. In doing so, I must decide, and take into account, where the burden of proof lies. I should also take into account all of the available information.

8. Section 230 of the Employment Rights Act 1996 reads (so far as is relevant):

> 230.— Employees, workers etc.
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) 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.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

9. In assessing whether a person is an employee, *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, *[1968] 1 All ER 433*, suggests that there are three questions to be considered:

(1) Did the worker undertake to provide their own work and skill in return for remuneration?

(2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?

(3) Were there any other factors inconsistent with the existence of a contract of employment?

10. However, no single test to be applied to a contract, or one single feature of a contract, determines the issue of whether it falls into the definition of "contract of employment". A multi-factorial approach must be adopted, whereby various different features of the contractual relationship are analysed, some of which might point to the person being an employee and some others might point in the opposite direction or be neutral. The significance of each feature must be weighed and a decision made as to whether, in all the circumstances, the individual contract is a contract of employment.

11. In accordance with the Employment Tribunal Extension of Jurisdiction Order 1994, only people who were employees (and whose employment has terminated) can bring breach of contract claims in the employment tribunal. The legislation does not remove the right (if any) to pursue a breach of contract claim by other means, such as a claim in the county court.

12. Since section 230(3)(b) refers to any other contract, it is clear that a contract cannot fall within both s230(3)(a) and also s230(b). It can fall within the former (so limb (a), a contract of employment) or the latter (so limb (b), which a "worker contract"), or, of course, it could fall into neither.

13. In *Byrne Brothers (Formwork) Ltd v Baird and ors* 2002 ICR 667, the EAT gave guidance on section 230(3) and, in particular, on the factors that might help a tribunal to decide whether a particular contract fell into the definition in limb (a) or the definition in limb (b) or into neither. It held that the intention was to create an intermediate class of protected "worker" made up of individuals who were not employees but who could not be regarded as carrying on a business. Factors to consider could include the degree of control exercised by the alleged employer, the exclusivity of the engagement and the typical duration(s) of assignment(s), the extent to which the individual is integrated in the alleged employer's organisation, the method of payment, who supplies equipment, and how risk is apportioned.

The Facts

14. The Claimant met the Respondent because she worked in the school attended by the Claimant's daughter. Since 2013, approximately 6 times per

year, the Claimant has provided services to the Respondent, each assignment lasting a few days or a small number of weeks. The Respondent is not present while the Claimant provides the services and, much of the time, the Claimant does the work while at home. It follows that she is not under immediate supervision of the Respondent. Rather she carries out the work within agreed parameters, and the Respondent speaks to her by phone from time to time in connection with the work.

15. The Claimant is not in business on her own account. She does not provide these services to anyone else, and does not advertise to do so. She only does this work for the Respondent because both parties decided that it was mutually convenient.

16. The Claimant cannot use a substitute. She and the Respondent have agreed that the Claimant and only the Claimant will provide the services.

17. For the assignment which lasted 31 March 2020 to 10 April 2020, there was an agreed rate which would leave the Claimant to receive £100 per day after the Respondent had made appropriate PAYE deductions on the gross sum. The arrangement has always been that the Respondent pays the Claimant net, after deduction of PAYE, but the Claimant has never seen proof (from the Respondent or from HMRC) that the payments have been made.

18. It was also agreed between the parties that the Claimant would incur particular expenditure. She would seek approval from the Respondent by text or email or instant message, and/or by speaking to the Respondent on the phone. Subject to that, the Claimant would use her own money for the purchases and the Respondent would reimburse her later.

19. The payment of all sums was due in cash by the end of the assignment, that is by 19 April 2020. The Respondent has acknowledged that she has not paid, and still has not paid, any part of the agreed sum.

Analysis and conclusions

20. I am satisfied that the Claimant is not a limb (a) worker. That is she is not an employee. She is not sufficiently under the control of the Respondent to be an employee, but rather she has a particular task to perform, and it is up to her to decide the details of how she performs it.

21. I am satisfied that the Claimant is a limb (b) worker. There is, for each assignment, a contract between the Claimant and the Respondent, for which payment rate is agreed and the general parameters of the work which the Claimant will do are agreed. She does the work personally (and is required to do it personally). She is not in business. She has no other “clients”. She does not advertise or prepare accounts, or have her own stationery or business premises. She obtains consumables, but only with the Respondent’s pre-approval and only on the basis that the Respondent will reimburse her.

22. Because the Claimant is not an employee, the tribunal cannot consider whether or not she might have a claim for breach of contract in relation to the expenses.

23. However, because the Claimant is a worker, there is jurisdiction to consider unauthorised deduction from wages. The sum of £100 per day (net) falls within the definition of wages, as that is the amount which the Respondent agreed to pay the Claimant for the work. (The Respondent agreed to pay the gross sum which leaves £100 after PAYE deductions). However, the sums for expenses are not within the definition of wages and I can make no award for those items.

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Employment Judge Quill

Date: 26.04.21

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE