



EMPLOYMENT TRIBUNALS

Claimant: Miss J Manning

Respondent: Crediton Commercials Ltd

Heard at: Exeter via CVP **On:** 13 May 2021

Before: Employment Judge Smail

Representation

Claimant: In Person

Respondent: Mr K Sonaike, Counsel

PRELIMINARY HEARING

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS ON PRELIMINARY ISSUE

1. This is a Preliminary Hearing to determine the claimant's employment status. The claimant was engaged by the respondent as a Bookkeeper. The parties had always regarded her as self-employed, and so the start and finish dates are not entirely clear. The Claimant now contends, however, that she is an employee. The local CAB advised her that this was the case. She claims unfair dismissal. She does not claim anything else, for example, she does not claim holiday pay or any rights where she needs to be a 'worker'.

THE LAW

2. By section 230(1) of the Employment Rights Act 1996, an employee means an individual who works under a contract of employment. By section 230(2) a contract of employment means a contract of service or apprenticeship, whether express or implied, and if it is express, whether oral or in writing. Here there is no written contract. The contract of whatever status was oral. Following the judgment of Lord Clarke in Autoclenz Limited v Belcher & Others, at paragraph 29, I am concerned with determining 'what was the true agreement between the parties'.

THE FACTS

3. When Covid broke out the claimant stayed at home to look after her son. She was also considered vulnerable to Covid because of asthma. She indicated a willingness to return to work on 4 August 2020 but by then the respondent had made other arrangements. It had asked her to return to work in May 2020, but the claimant was not ready to return. The end date of the engagement is either around August 2020 or May 2020. Those end dates are capable of identification. The start date is less clear. It is common ground that the claimant started working for the respondent ten years ago or so. It is also common ground that she took eleven months off from December 2013 to have a baby. Otherwise since then her engagement was uninterrupted leading up to Covid.
4. The claimant tended to work fixed hours Mondays and Fridays 9.00am – 5.00pm There have been examples of when the claimant left early to catch a bus at 1.45pm when her car had broken down but these occasions were very occasional and do not reveal the true intention of the parties as to what her employment status was. The claimant did the respondent's work at the respondent's premises on the respondent's equipment. She could not field a substitute to perform her work. There was an understanding of mutuality of obligation. The claimant was to attend work during those hours and the respondent was to provide work and pay her for the hours. She would invoice monthly and was paid gross without deduction of tax and national insurance. Whilst the claimant was left to get on with her work the respondent however, controlled the work the claimant did.
5. As the respondent's director conceded, the claimant might have been an employee throughout the entire period of her engagement. I accept from him that he asked her whether she wanted to be employed at the outset of the arrangement. I also accept from him that he asked her whether she wanted to be employed when she returned from the period of maternity.
6. The fundamental evidential point in this Preliminary Hearing in my judgement is that the claimant chose to be treated as self employed at the commencement of the engagement and she maintained that position. It was her decision and her position. That is how she wanted to contract with the Respondent.
7. At the beginning, she was also working self-employed as a hairdresser. She worked Tuesdays, Wednesdays, Thursdays and Saturdays at a hairdressers' salon in Exeter. She rented a hairdressers' chair and her business was treated as self-employed. She asked to be treated as self-employed also for this engagement and that never changed. She did not return to hairdressing following her period of maternity. She returned to work with the Respondent around November or December 2014.
8. She did take on a bookkeeping job for three hours a week at Tailored and Mat Supplies (Devon) Ltd, that job has been treated as employment.
9. She also had a self-employed cleaning job for a morning a week.

10. Throughout her working time and prior to Covid she had an accountant to advise her. She will have had an understanding of tax advantages of being self-employed.
11. She did not request to at any point to change to employment. I do find on the balance of probability that it was raised whether she wanted to return as an employee upon return from maternity. She has no recollection of that, it seems, but I accept it from Mr Bosacki, the respondent's director. Mr Bosacki had eight employees at the respondent and two self-employed part-time bookkeepers. It would not have been a problem for him to have the claimant as an employee.
12. I find that it was her choice that she was not employed and to contract as self-employed. She tells me that she did not realise that she had a choice. I find however, that she did - and she exercised that choice at the beginning and maintained it throughout. The position being self-employed was not forced upon her, it was not a sham, it was a position she arrived at from an arms length position. She might have been an employee, as I have said, but it was her choice that she was not.

CONCLUSION

13. Accordingly, I do not see a basis where it is appropriate for me to intervene and restate that position which was freely arrived between the claimant and the respondent. The position of self-employment represents the true intention of the parties. I do not interfere with it. I find that the claimant for the purposes of unfair dismissal legislation was not an employee and accordingly, cannot bring a claim of unfair dismissal which is hereby dismissed.

**Employment Judge Smail
Date: 08 June 2021**

Judgment sent to the Parties: 21 June 2021

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