EMPLOYMENT TRIBUNALS

Claimant: Miss K John

Respondent: Water Wings Swim School

Heard at: Cardiff by video **On:** 3rd March 2022

Before: Employment Judge C Butcher

Appearances:
Claimant: Mr M John
Respondent: In person.

JUDGMENT

The Claimant is a worker within the definition of section 230 of the Employment Rights Act 1996(ERA 1996)

The Respondent made an unauthorised deduction from wages by failing to pay the Claimant the full amount of wages due from on 25/10/20 and 13/12/20 amounting to £96 (8 hours).

The Respondent made an unauthorised deduction in respect of holiday pay in the sum of £144.

The Respondent failed to provide written terms of employment for which the Claimant should receive the sum of £192 (2 weeks pay)

The Respondent shall pay the Claimant the total sum of £432 from which the Claimant must pay tax and NI.

REASONS

1. The Claimant, Miss Kasey John, worked for the Respondent as a swimming instructor. By a claim form received on 24/1/21, the Claimant brought a claim for unauthorised deduction of wages in respect of loss of earnings and holiday pay on the basis that she was employed by the Respondent and a worker within the definition of section 230(3) Employment Rights Act (ERA).

2. The Respondent, Water Wings Swim School Ltd contested the claim that Miss John was a worker within the definition of section 230(3) ERA, asserting that the Claimant was self-employed and was not owed any holiday pay or any other sum.

The issues before the Tribunal were

3. What was the employment status of the Claimant? Although not specifically claimed, was the Claimant an employee of the Respondent in accordance with s230(1) ERA 2006. If not an employee, was the Claimant a worker for the Respondent within the meaning of s230 (3) and /or Regulation 2(1) of the Working Time Regulations 1996?

4. Was the Claimant therefore entitled to bring a claim before the Tribunal for unauthorised deduction of wages and holiday pay?

5. If so, did the Respondent make an unlawful deduction of wages by non-payment of holiday pay and wages?

6. If the Claimant was an employee or a worker, should she receive a payment under section 38 Employment Act 2002 for the Respondent's failure to provide a written statement of employment particulars?

The Hearing

7. I was presented with a bundle of documents amounting to 84 pages and page references to the bundle are shown in square brackets. I also heard evidence from the Claimant, Miss John and both Mr and Mrs Francis, the Respondents.

8. The hearing was beset with technical issues arising out of connectivity problems and it was necessary to pause the proceedings on several occasions to allow the parties to be reconnected. However, both parties confirmed that they had been able to ask all the questions they wished to raise, and I was satisfied that the parties were afforded sufficient time to put their respective positions to the tribunal.

9. The Respondent is a small business based in Bridgend, operating a swimming school with 10 swimming instructors, lifeguards and receptionists

10. The Respondent placed an online job advert in July 2020 for a Swimming Instructor for Water Wings Swim School in Bridgend. The job was described as part-time and offering a salary of £12.00 - £13.50 an hour. The advert described an "employment opportunity for a qualified swimming instructor" and went on to list the available hours of work with the schedule being Monday to Friday and Weekends.

11.Following a meeting between the Claimant and the Respondent, an email was sent by the Respondent offering the Claimant hours at Water Wings. The schedule was set out as follows and described as the same days and times every week.

Monday - 4-7.30 (teacher)
Tuesday - 4-7.30 (lifeguard)
Wednesday - 4-7.30 (teacher)
Thursday - 4-7.30 (teacher)
Sunday 9-1 (teacher)

Teachers' hourly rate of pay was noted as £12 for the first month, increasing following the first month dependent on retention level of swimmers. Lifeguard pay was £8.50.

A start date of 1/9/20 was agreed. The parties disputed whether there had been a discussion about the Claimant's status at that meeting. Due to a delay in the Claimant providing a Disclosure and Barring Service Certificate (DBS), it is accepted that the Claimant began work on 8/9/20.

12. The Claimant was provided with a t-shirt with the Water Wings company logo to be worn during her shifts. Her working hours were set for Sundays between 9-1pm and Tuesdays between 4-7.30. The Claimant was contacted to cover additional shifts in the event that other instructors were not available and the Claimant was also able to obtain cover should this be required [37,38,41,42, 45].

13. The Claimant was required to complete post lesson assessments and a written record of her hours worked and submit these to Mrs Francis (Company Director). Payment for hours worked were made directly into the Claimant's bank account. There were no payslips produced, nor were any tax or national insurance payments deducted. The Claimant described these documents as timesheets, whilst the Respondent referred to them as invoices and referred to pages 70-72 to illustrate this.

14. The Claimant asked the Respondent in a WhatsApp message dated 11/9/20 whether she was to provide her national insurance number. The Respondent replied that this would not be needed as she would not be an employee. It was a self-employed post and the Claimant would be responsible for tax and NI payments at the end of the year [69].

15. Due to COVID restrictions, a company headed letter was produced for the Claimant confirming that as an employee of the company, she was authorised to travel [36]. Although this evidence was provided by the Claimant, this was not a claim that she was an employee and it was not suggested during the Tribunal that this letter was for any other purpose but to comply with COVID regulations. During the firebreak period 23/10/20-9/11/20, teachers were paid for the Saturday, Sunday and Monday of lockdown to cover administration [48]. The Claimant was unable to teach between 27/11/20 – 7/12/20 having received a positive COVID test [50].

16. On 12/12/20, the Claimant informed the Respondent (Mrs Francis) via WhatsApp that she had been offered a job that day to work in France and that

her last shift would be on 15/12/20. On 13/12/20, the Claimant sent a message to the Respondent (Mr Francis) asking if her assessment sheet had been removed from reception as she had not had the opportunity complete this but would do so once a copy was sent to her [56]. The Respondent agreed to send it to the Claimant within the next 24 hours [81]. The Claimant received a message from Mrs Francis on 15/12/20 stating that they would not be comfortable having the Claimant at the pool and not to attend [57].

17. During further WhatsApp messages, the Respondent informed the Claimant that there was no money outstanding to her. The payment received during lockdown was for completion of assessments which had not been completed and would therefore be to cover the shift on 13/12/20. The payment for the 15/12/20 shift would be used to refund swimmers for the Sunday she was not going to cover [57,59].

18. The Claimant brought a claim on the basis that she was a worker of the company and that she had not received payment for her shift on 13/12/20 (5 hours) at £12 per hour. She also claimed non-payment for her shift on 15/12/20 (5 hours) and holiday pay for 1.5 days amounting to £144. The Schedule of Loss completed on behalf of the Claimant claimed an additional sum of 4 weeks statutory pay for failure to provide a statement of terms and conditions 26].

19. The Respondent disputed the above. Details of invoices issued throughout the relevant period [28] and a Schedule of Loss calculated holiday pay at £84.

The Law

20. Section 230 ERA 2006 provides the definition of employee, employment and worker as follows:
"(1) In this Act, "employee" means an individual who has entered into or who works under (or, where 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 a customer of any profession or business undertaking caried out by the individual;

and any reference to the worker's contract shall be construed accordingly.

(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.."

21. Reg 2(1) WTR 1998 adopts the same definition of worker as ERA 2006.

An unauthorised deduction of wages is defined at s13(1) Employment Rights Act which states that an employer shall not make a deduction from the wages of a worker employed by him unless:

(a) a deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

22. Section 38 Employment Act 2002 provides that an award should be made by the Tribunal in the event of failure to provide written terms and conditions of employment in respect of employees. This was extended to workers after 6.4.20.

Caselaw

23. For the purpose of this Tribunal, if the Claimant was an employee or a worker, then she can pursue all the claims she seeks to pursue. If she is found to be a self-employed contractor, she can pursue none, as the Tribunal does not have jurisdiction to hear them.

24. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, McKenna J set out the conditions required for a contract of service, namely that "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

25. There must be an irreducible minimum of obligation on each side to create a contract of service. The employer must be obliged to provide work and the employee to accept what is provided.

26. In *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening) 2014 ICR 730 and Hospital Medical Group Ltd v Westwood 2013 ICR 415* it established that the following are necessary for an individual to fall within the definition of "worker":
i. There must be a contract, whether written or oral and whether express or implied; ii. The contract must provide for the individual to carry our personal services and
iii. Those services must be for the benefit of any other party to the contract who

must not be a client or customer of the individual's profession or business undertaking.

27. The key factors to be taken into account in determining whether an individual is an employee are:-

a) The degree of control that the employer has over the way in which the work is performed;

b) Whether there is a mutuality of obligation between the parties, ie was the employer obliged to provide work and was the individual required to work if required; and

c) Whether the employee has to do the work personally;

d) Were the other terms of the contract consistent with there being an employment relationship?

Other relevant factors include:

a. The intention of the parties;
b. Custom and practice in the industry;
c. The degree to which the individual is integrated into the employer's business;
d. The arrangements for tax and national insurance;
e. Whether benefits are provided; and
f. The degree of financial risk taken by the individual.

28. In the Bates van Winklehof case, Baroness Hale describes control as including the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place when it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted".

29. The cases of *Pimlico Plumbers Ltd v Smith [2018] IRLR 872* and *Uber BV v Aslam [2018] IRLR 97* are relevant in considering whether the Claimant had the right of substitution and was able to choose her own hours. In Pimlico, the Supreme Court endorsed the principles set out by Sir Terence Etherton MR in his judgment in the same case [2017] ICR 657 at [84]:

".. I would summarise as follows the applicable principles as to the requirement of personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do the job personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality.. and..the extent to which the right or substitution is limited or occasional. Thirdly, only when the contractor is unable to carry out the work will.. be consistent with personal performance…".

Findings

30. I find that the Claimant is a worker as defined by section 230(3) ERA.

31. I accept the evidence of the Claimant that she was given set hours of work by the Respondent and was provided with a uniform to identify her as a member of

staff.

32. There was no evidence before the Tribunal that the Claimant could provide cover for her shifts from outside the company, nor that this had occurred. The messages relating to changes to shifts show that the Respondent (Mrs Francis) was largely responsible for arranging replacements from within the company. I find that there was an expectation of personal performance and a limited right of substitution.

33. In relation to hours worked, in her evidence, the Claimant was insistent that the documents were timesheets. There were no figures of value written on the sheets and they detail the hours worked. Whilst I note that the Respondent has labelled these as invoices [70], she does also refer to them as timesheets [p34]. I accept the evidence of the Claimant that any sums considered due to her were added by the Respondent that she did not submit them as invoices. They were handwritten and strongly suggestive that the Claimant was not operating a small business with the Respondent as a client of that business.

34. The Claimant's evidence was that she had completed all assessments apart from that for 13/12/20, due to it having been removed from reception. That Mr Francis removed the document is clear from the evidence and he accepted that he did. At no point did the Claimant agree that her pay should be deducted due to this assessment not being completed and there is no evidence before the Tribunal that she did so. In any event, the Respondent informed the Claimant that this sum would be used to refund patrons. It was not described, as the Respondent suggested in evidence, as an overpayment.

35. The Claimant described the payment made during lockdown as one which all teachers received and viewed it a goodwill payment. The Respondent considered it an overpayment for work not completed. I accept the evidence of the Claimant that she completed all the work she had been in a position to complete and had a reasonable expectation that she would, like the other teachers, receive payment for a shift during lockdown in circumstances where the Claimant was ready and willing to work. As above, the Claimant had not provided consent to this deduction.

36. With regard to the shift of 15/12/20, in her evidence, the Claimant acknowledged that she did not expect to be paid for work she had not done. Although the Respondent instructed her not to attend and the Claimant had indicated she was available for work, I am not persuaded that the Claimant should receive payment, in the light of her own evidence. The Respondent did not claim that the Clamant should have provided notice, but the Claimant gave only two days' notice of termination and in my view, the Respondent's instruction not to attend was not unreasonable.

37. The Claimant received no holiday pay. I accept the calculation provided by the Claimant that she should receive payment calculated as follows:

1 x 5.6/3.83 = 1.5 days @ £12 per hour which equals £144.

38. In relation to the failure to provide written terms, in my oral judgment, I erroneously indicated that as I had found the Claimant to be a worker rather than

an employee, I would be making no award. In considering this further and having regard to The Employment Rights (Miscellaneous Amendments) Regulations 2019, I award the Claimant the sum equivalent to two week's pay totalling £192.

39. It is for the above reasons that I consider the Claimant to be a worker. She was not in a business of her own, she was not able to negotiate her own fees and required permission to take time off and arrange cover. The Claimant paid no rental fee for use of premises and customers paid the Respondent directly. The Claimant was obliged to wear a t-shirt identifying her in her role and the Respondent undertook all COVID measures and operations. I did not find that the Claimant was integrated in the business to the extent that an employee would be.

40. Although no deductions were made by the Respondent for tax and NI contributions and the Respondent sent a message to the Claimant informing her that she was self-employed, I accept the evidence of the Claimant that she was unaware of the consequences of this and merely checked the money had gone into her bank account and that she had not previously operated a business.

41. I therefore find that the Claimant's claim is well founded and that the Respondent made unauthorised deductions from the Claimant's wages amounting to £240 and the sum of £192 for the failure to provide written terms of employment, from which the Claimant must pay tax and NI.

Employment Judge C Butcher

3rd March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON 21 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche