



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Thorpe

**Respondent:** ThoBow Business Limited

**Heard at:** Remotely by Cloud Video Platform (“CVP”)

**On:** 19 April 2022

**Before:** Employment Judge Robertson

**Appearances:** For the Claimant: In person  
For the Respondent: Mr N Thorpe, director of the Respondent

## RESERVED JUDGMENT

The Claimant’s claim of unlawful deduction from wages is well-founded and succeeds.

The Respondent is ordered to pay the Claimant the gross sum of £1,878.

## REASONS

### INTRODUCTION

1. By a Claim Form presented on 15 February 2022, the Claimant, Ms Thorpe, brought a claim for unpaid wages in respect of the period commencing on 1 January 2022. She sought to amend her claim so as to pursue her claim for unpaid wages in respect of the period up to and including 3 April 2022, and I dealt with this application at this Hearing as a preliminary matter.
2. The Respondent had submitted its Response Form late, and the decision as to whether or not to accept that Response was dealt with by me at this Hearing as a preliminary matter. As set out below, I accepted the Response. The Respondent’s position was that the Claimant was not a worker and had not worked during the period in question.
3. By the time of the hearing, the Claimant had resigned from her position with the Respondent, with effect from 3 April 2022.

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

*The Hearing*

4. Neither party was legally represented at the Hearing. The Claimant attended the Hearing in person. Mr Thorpe, a director of the Respondent, attended for the Respondent.
5. The Claimant gave evidence on her own behalf. Mr Thorpe gave evidence for the Respondent.
6. The documentation before me comprised the Claimant's email setting out her schedule of loss (1 March 2022), the Claimant's payslips for July – December 2021, and the Claimant's resignation letter of 3 March 2022. The parties submitted that the Claimant's bank statements for July to December 2021 were potentially relevant but had not been produced; however, as there was no dispute that the Claimant had been paid those amounts, they were not necessary to resolve the dispute before me and it was agreed that the Hearing would proceed.
7. The Claimant confirmed that she wished to pursue her claim as an unlawful deduction from wages claim. She confirmed that her claim was for unpaid wages for the period between 1 January and 3 April 2022 inclusive. Although the claim form referred to the Claimant's removal as a director of the Respondent "fraudulently" and the Response referred to the Claimant's resignation, the Claimant did not wish to pursue any claim relating to the termination of her engagement with the Respondent on 3 April 2022 as part of this claim. She also did not wish to recover legal fees in respect of pursuing this claim.

*Late presentation of response*

8. The Respondent had submitted its Response late. It had been due on 21 March 2022 but had been received by the Tribunal office by post on 28 March 2022. Further to Tribunal correspondence of 31 March 2022, Mr Thorpe had submitted an email on 7 April 2022 which I treated as the Respondent's application for the Response to be accepted out of time. As the Claimant had only been sent this email at 13.54pm on the day of the hearing, I stood the Hearing down to allow the Claimant time to read and consider her response. Having heard and considered the parties' representations on this matter, I granted the extension of time and accepted the Response. I gave oral reasons for this at the time.

*Application to amend the claim*

9. The Claimant's claim having been presented on 15 February 2022 (before any payment of wages for the month of February would, if payable, have fallen due), she sought to amend her claim to include the period up to and including 3 April 2022 by adding the following wording into the box at 8.1 of the claim form:

*"I am claiming unpaid wages for the period 1 January to 3 April 2022 inclusive."*

10. Mr Thorpe had no objection to the amendment being granted and confirmed that the basis of the Respondent's response to the amended claim was the same, such that he did not wish to amend the Response.
11. As the amendment was to deal with matters which post-dated the claim and which were in time, and there was no objection, I granted the amendment.

*Issues*

12. The issues to be determined were agreed at the start of the Hearing and were as follows:
  - a. Was the Claimant a worker during the period between 1 January and 3 April 2022 (ie the period to which the claim relates)?
  - b. If so, was the Claimant entitled to be paid her wages for that period?
  - c. If so, had there been an unauthorised deduction from the Claimant's wages and what sum (if any) is the Claimant entitled to receive from the Respondent?

**FINDINGS OF FACT**

*Background*

13. It was common ground that the Claimant and Mr Thorpe were married and had children together, but that their relationship had broken down, they had separated and they were in the process of legal proceedings relating to their separation.
14. Together with the Claimant, Mr Thorpe had set up and run several businesses whilst he was in a relationship with the Claimant (including the Respondent's business).
15. Mr Thorpe and the Claimant each hold a 50% shareholding in the Respondent. Mr Thorpe has always been a director of the Respondent. The Claimant was a director of the Respondent from 2016 (when the Respondent was set up) until October 2021.
16. The Respondent is the holding company for Modus Properties Limited ("MPL"), a property investment company. Mr Thorpe also holds a 100% shareholding in a different company, Livdin Property Limited (formerly known as Modus Lets Limited) ("LPL"). There had been no transfer of the business or services between MPL and LPL.

*Contract and contract terms*

17. It was common ground that there was no written contract of any nature between the Claimant and the Respondent. The Claimant's arrangement with the Respondent from 2016 onwards was as follows:
  - a. The Claimant would receive a monthly payment, determined by Mr Thorpe and the Claimant in conjunction with the Respondent's accountants. I accept the Claimant's evidence, which was consistent

with the payslips in evidence, that (with the exception of the periods which are the subject of her claim) she had received £790 each month for the two years preceding the end of her engagement with the Respondent;

- b. The Claimant would provide a range of services to the Respondent and the other family businesses, depending on what was required from time to time, under the supervision and direction of Mr Thorpe; and
- c. The Claimant had generally worked regular hours in 2016 (around 16 hours per week) and 2017 but, since then, her hours of work had become more flexible and ad hoc, as she balanced her work around childcare responsibilities. She had been furloughed during the pandemic, at least during the period between July and September 2021.

18. I have made more detailed findings regarding the Claimant's services in my findings of fact below.

*Parties' intention regarding the Claimant's role*

19. As to the parties' intention regarding the Claimant's role, the Claimant maintained that she had been an employee of the Respondent from 2016 until 3 April 2022, when her resignation took effect. Her evidence was, in summary, that she received a wage from the Respondent, in return for carrying out a range of services for the Respondent and the other family businesses - latterly, on a flexible basis.

20. The Respondent's position was that the Claimant had been paid through the payroll as she was a director and shareholder of the Respondent, as spousal maintenance, and (in accordance with their accountants' advice) for the purpose of making Mr Thorpe and the Claimant's financial affairs more tax efficient. Mr Thorpe's evidence was that, as a business start-up, it was "all hands on deck", they had been juggling life and the businesses, and the Claimant's status as a director superseded the need for employment. Mr Thorpe's evidence was also that he had never understood that the Claimant's work was in return for the payment of wages. During initial discussions in the hearing and during his cross-examination of the Claimant, Mr Thorpe referred to himself and the Claimant as the only employees of the Respondent, although on one occasion he clarified that he meant individuals on the payroll. Mr Thorpe's evidence was also that the correct tax treatment had been applied at all times and he did not argue that the arrangement was a sham.

21. I find that the parties' intention was that the Claimant was an employee (and therefore, as all employees are also workers, a worker) of the Respondent. I prefer the Claimant's cogent and persuasive evidence on this issue, which is consistent with the Claimant being on the Respondent's payroll, Mr Thorpe's evidence that it had been "all hands on deck", Mr Thorpe's references to the Claimant as an employee, Mr Thorpe's evidence that the correct tax treatment had been applied at all times, and the fact that Mr Thorpe did not seek to argue that the arrangement was a sham.

*Documents*

22. It was common ground that there was no written contract of any nature between the Claimant and the Respondent.

*Pay*

23. As set out above, the Claimant had been paid on a monthly basis through the payroll since 2016, and the amount of the monthly payment was determined by Mr Thorpe and the Claimant in conjunction with their accountants. Apart from the periods of claim, the Claimant had received £790 each month for the last two years.

24. The Claimant's monthly payment was paid through the Respondent's payroll, and she received payslips until the end of December 2021 and P60s following the end of each tax year.

25. As to whether the payment was in respect of the Claimant's services, Mr Thorpe's evidence was that the Claimant's payroll payment was instead of spousal maintenance, paid through the payroll to help and support the Claimant and for tax efficiency, and related to her appointment as a director and shareholder. The Claimant gave evidence that that was not the case; she said that if it had been spousal maintenance, Mr Thorpe would have ended her employment earlier and continued paying £790 as spousal maintenance himself (rather than paying it through the business). As set out above the Claimant's evidence was, in summary, that she received a wage from the Respondent, in return for carrying out a range of services for the Respondent and the other family businesses - latterly, on a flexible basis.

26. When asked how Mr Thorpe squared his position that the Claimant had never been a worker, with the fact that the Respondent had made payments to her through the Respondent's payroll until January 2022 and claimed furlough payments in respect of the Claimant, he explained his position as above. Mr Thorpe confirmed that the correct tax treatment had been applied in respect of the Claimant, and was based on their accountants' advice.

27. I prefer the Claimant's evidence on this issue and find that the Claimant's payroll payment was in respect of the services she provided, or undertook to provide. The Claimant agreed to provide the services (which I deal with further below) and the Respondent agreed to pay her in return for those services. She had been paid the same amount prior to and following the breakdown of their relationship. The payments were not affected by the breakdown of their relationship and were not related to it.

28. I accept Mr Thorpe's evidence that the Claimant had never invoiced the Respondent for her services.

29. It was common ground that the Claimant had not been paid in respect of the period of claim. There was no evidence that such non-payment was required or authorised to be made by virtue of a statutory provision or relevant provision of the Claimant's contract, or that the Claimant had previously signified in writing her agreement or consent to the non-payment. I find that there was no such requirement, authorisation, agreement or consent to the non-payment of the payroll payment for the period of claim.

*Services provided by the Claimant to the Respondent*

30. I accept the Claimant's evidence that she had worked in whatever role she was needed at the time. This was consistent with Mr Thorpe's evidence, which I also accept, that it had been "all hands on deck" when he and the Claimant had set up the businesses. The Claimant carried out the work she was asked to do by Mr Thorpe, a director of the Respondent.
31. It was common ground that, in 2016, much of the Claimant's work had involved supporting the property lettings side of the family businesses. Mr Thorpe's evidence was that this business was carried on by LPL. I accept the Claimant's evidence that, at that time, she had been carrying out viewings, dealing with property maintenance, and updating the company's system in relation to viewings and people moving in and out of the properties. In 2016 and 2017, she had worked around 16 hours each week.
32. After 2017, I preferred the Claimant's evidence that she continued to work, and balanced her times of work with her childcare responsibilities. Although Mr Thorpe's evidence was that the Claimant had not carried out any work since 2017, this was inconsistent with his other evidence that she continued to perform ad hoc tasks including administration, cleaning and social media posts. Mr Thorpe conceded that one could argue about which business or company the Claimant's work benefitted. The Claimant worked in whatever role she was needed, for the Respondent directly and for the other family businesses.
33. When asked whether the Respondent's earlier arrangement with the Claimant had been varied or terminated at any point, Mr Thorpe referred to MPL having recruited 15 employees in early 2020 (although in view of his other evidence that neither MPL nor the Respondent had traded since the beginning of the pandemic, he might have intended to refer to LPL). Mr Thorpe's relationship with the Claimant had broken down around March or April 2020. Mr Thorpe's evidence was also that the Respondent had not traded since the beginning of the pandemic and the Claimant had done no work since then because there was nothing to do. The Claimant ceased to be a director of the Respondent in or around October 2021. There was no evidence that any or all of these matters had led to a variation or termination of the Claimant's arrangement with the Respondent (other than specifically in relation to furlough).
34. I find that the Claimant's engagement with the Respondent was not terminated prior to the Claimant's resignation with effect from 3 April 2022. This is consistent with the evidence of both parties. The fact that the Claimant was furloughed in 2021 and continued to be paid the same amount through the Respondent's payroll until January 2022 is consistent with a subsisting and unvaried engagement between the parties.
35. With the exception of periods of furlough, I prefer the Claimant's persuasive evidence and I so find that, during the pandemic and following the breakdown of their relationship, she had continued to either work from home or to try to work from home up to and including 3 April 2022. However, the Claimant had been prevented from working effectively as the laptop computers had broken and the systems and passwords were updated, which meant that she could not gain access. The Respondent's office premises also changed. To the extent that her work reduced or ceased while she was furloughed, this was consistent with being on furlough. Even when not actually working, I find that

the Claimant was ready, willing and able to work up to and including 3 April 2022.

36. The Claimant undertook to (and did) carry out her services personally and did not send a substitute to provide services on her behalf. There was no evidence that she ever could or did so.

37. I accept the Claimant's evidence that she did not carry out similar services for other businesses (other than the family businesses).

## SUBMISSIONS

38. The Claimant's position was, in summary, that she was an employee and deserved to be paid what she was owed. She submitted that she had had nothing to do with the management of the company.

39. Mr Thorpe's position was that what had been put in place for tax efficiency reasons had been turned into a claim. He submitted that the Claimant had only carried out ad hoc bits of support, had no access to company systems or a laptop, and had not been employed for 16 hours per week. He submitted that, as the Respondent had not properly traded, the Claimant was not an employee or a worker as this was not viable. He submitted that the Claimant's position that she was not aware which company she was working for was not a 'defence' as she had been a director.

## RELEVANT LAW

40. All of the statutory provisions referred to in this judgment are contained within the Employment Rights Act 1996 ("ERA").

### *Creation of a contract*

41. The first question for me to consider is whether there was a contract between the Claimant and the Respondent at all. In order for there to be a contract, there must be the following key elements:

- a. offer and acceptance;
- b. consideration – i.e. something of value must be exchanged by the parties; and
- c. the parties must intend to create legal relations.

### *Contract terms*

42. The starting point in determining whether an individual is an employee or a worker for the purposes of s230 of the ERA is to identify the terms of the contract and what they mean. The express terms of a contract are those expressly agreed, in writing or orally, by the parties. Where there is a written contract, the issue may arise whether it contains the whole of the agreement between the parties (as per the Supreme Court's decision in *Autoclenz Ltd v Belcher* [2011] ICR 1157). However, this is a case where the parties agreed that no written contract existed. The definition of worker in S.230(3) ERA requires the existence of a contract of employment or a contract for personal work or services but it is possible for a contract to be implied.

43. I must have regard to key factors including those set out below when determining the terms of a contract in the absence of any written terms:
- a. the intention of the parties at the time at which the contract was entered into;
  - b. the conduct of the parties during the period for which the contract subsisted;
  - c. any terms implied into the contract by the courts; and
  - d. any terms implied into the contract by statute.

*Worker status*

44. Section 230 of the ERA provides:

*‘(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” ... 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 the client or customer of any profession or business undertaking carried on by the individual; ...’*

45. There is no statutory definition of ‘contract of service’ for the purposes of s230(3)(b) ERA and the definition of ‘worker’ must be determined by reference to the statutory definition and the caselaw. This definition concerns the dividing line between those who are truly self-employed, carrying on a profession or business undertaking on their own account and entering into contracts with clients or customers to provide work or services for them, and those who, while self-employed, in fact provide their services as part of a profession or business undertaking carried on by someone else.

46. The authorities identify a number of tests or approaches, each of which may be useful in seeking to draw the distinction in the individual case. In *Bates van Winkelhof v Clyde and Co LLP [2014] ICR 730*, Baroness Hale, giving the leading judgment, emphasised that there is not “a single key with which to unlock the words of the statute in every case,” and noted that there can be no substitute for applying the words of the statute to the facts. She acknowledged that this is not always easy to do but could not accept that the addition of some mystery ingredient of ‘subordination’ would help. In her view, there is ‘no magic test’ other than the words of the statute themselves.

47. In *Uber BV and ors v Aslam and ors 2021 ICR 657*, the Supreme Court has recently confirmed that the question of whether work is performed by an individual as a worker or as an independent contractor is to be regarded as a matter of statutory, rather than contractual, interpretation.



48. In *Nursing and Midwifery Council v Somerville 2022 EWCA Civ 229*, the Court of Appeal held that there was no need to introduce, and no purpose served in introducing, the concept of an ‘irreducible minimum of obligation’ – i.e. an obligation on the part of the putative worker to perform a minimum amount of work – in order for there to be a worker’s contract.
49. One of the criteria set out in S.230(3) ERA is that a worker must undertake ‘to do or perform personally any work or services for another party to the contract’. In *Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT*, the EAT held that cases on what constitutes personal service in relation to a contract of employment are relevant here. So, while a ‘freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service... a limited or occasional power of delegation may not be’ (per Mr Justice McKenna in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*).

### Wages

50. Section 13 of the ERA provides:

*‘(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or 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.*

*(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised –*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.’*

### CONCLUSIONS

51. Applying the law to the facts, my conclusions on each of the key issues are set out in the paragraphs below.

*Was the Claimant a worker during the period between 1 January and 3 April 2022 (ie the period to which the claim relates)?*

52. I conclude that the Claimant satisfies the necessary tests to be categorised as a worker under section 230(3)(b) of the ERA for the following key reasons:

- a. There was a contract between the Claimant and the Respondent, containing the contract terms set out in my findings of fact. The key reasons for my decision are that:
  - i. When the Respondent's business was set up in 2016, the Respondent offered the contract terms set out in my findings of fact to the Claimant and she accepted them. The parties had agreed these terms;
  - ii. There was consideration. It was not disputed that the Claimant was paid by the Respondent until January 2022. Although the Respondent disputed that this payment was in respect of the Claimant's services, I have found that the payment was made in return for the services which she provided or undertook to provide. I have found that this agreement had not been varied subsequently, except specifically in relation to furlough;
  - iii. The parties intended to create legal relations. I have found that the parties' intention was that the Claimant was an employee (and therefore, as all employees are also workers, a worker) of the Respondent.
- b. The absence of a written contract between the Claimant and the Respondent is not determinative of this issue; and
- c. The Claimant received a regular monthly payment from the Respondent.

53. I have found that the Claimant carried out the work she was asked to do by Mr Thorpe, a director of the Respondent. I have found that she undertook to (and did) carry out her work personally and was not able to send a substitute. She was not providing her services to the Respondent as a client or customer of any profession or business undertaking carried on by her; I have found that she was not providing similar services to other entities. I have found that she worked in whatever role she was needed at the time, and that the Claimant's work was for the Respondent and the other family businesses. Although during the period between 1 January to 3 April 2022 the Claimant had been prevented from working effectively, I have found that she remained ready, willing and able to work.

54. I conclude that the Claimant's contract with the Respondent continued up until 3 April 2022, when her contract with the Respondent terminated. The Respondent did not take steps to terminate the Claimant's contract at any time prior to that, including after the Claimant's appointment as a director ended in October 2021. The Claimant continued to receive her monthly payroll payments until January 2022.

*If so, was the Claimant entitled to be paid her wages for the period between 1 January and 3 April 2022 (ie the period to which the claim relates)?*

55. In light of my findings, I conclude that the Claimant remained ready, willing and able to work until 3 April 2022 and as such, her wages for this period are properly payable.

56. I have also found that the Claimant was entitled to a monthly payment of wages of £790.

*If so, had there been an unauthorised deduction from the Claimant's wages and what sum (if any) is the Claimant entitled to receive from the Respondent?*

57. It was common ground that the Claimant had not been paid her wages for this period. The deduction was not required or authorised to be made by virtue of a statutory provision or relevant provision of the Claimant's contract, and the Claimant had not previously signified in writing her agreement or consent to the making of the deduction.

58. I therefore conclude that there has been an unauthorised deduction from her wages.

#### REMEDY

59. I award the Claimant £1,878 in relation to this non-payment of the Claimant's wages. This is the gross sum from which the Respondent is to deduct any appropriate tax and NI deductions prior to payment to the Claimant.

60. This comprises £790 for each of the months of January, February and March 2022, plus £78 (being 3 days' pay for 1-3 April 2022).

Employment Judge Robertson

Date: 12 May 2022