



EMPLOYMENT TRIBUNALS

Claimant: Ms C Thompson
Respondent: L M Merchandising Limited
Heard at: Reading (By CVP) **On: 1 June 2022**
Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Not attending and not represented
For the Respondent: Mrs L Mayo (Managing Director)

JUDGMENT

The claimant's claim for a redundancy payment is dismissed. The claimant was not an employee within the meaning of section 230 Employment Rights Act 1996.

REASONS

1. In a claim form presented on the 14 August 2020 the claimant made a claim for a redundancy payment. The respondent denied the claim contending that the claimant was self-employed and not entitled to a redundancy payment.
2. The claimant did not attend the hearing today. The claimant has written to the employment tribunal and asked that the hearing proceed without her because she did not have the "a web cam or equipment needed so would not know how to log on" to a CVP hearing. The claimant has also said that "I suffer with bad anxiety, anything stressful I am advised to avoid by my doctor". I understand that the claimant did not request or require the hearing to take place in person so that she could attend.
3. Section 135 Employment Rights Act 1996 (ERA) provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy.
4. Section 136 (1) (a) ERA provides that an employee is dismissed by her employer if (and only if) (a) the contract under which she is employed by

the employer is terminated by the employer (whether with or without notice).

5. Section 139 (1) (a) ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that her employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by her, or to carry on that business in the place where the employee was so employed.
6. Section 230 provides that an “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment means a contract of service or apprenticeship whether express or implied.
7. For a contract of service to exist it is necessary that three elements exist, control, personal performance and mutuality of obligation. It is necessary to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists between the claimant and the respondent.
8. The claimant has provided a witness statement (undated) which was sent to the employment tribunal attached to an email of the 1 March 2021. The claimant also provided a number of documents which were included in the trial bundle. The respondent relied on the evidence of Mrs Lilian Mayo who provided a statement dated 3 March 2021. I was also provided with a trial bundle of documents containing 40 Pages of documents.
9. Form the sources referred to I made the following findings of fact.
 - 9.1 The respondent is a merchandising company. Merchandising activities involve visiting stores to put out stock, tidying the stands, rearranging fixtures, stock taking and placing orders. Mrs Mayo says that the respondent is an “owner managed business, operating from a wooden shed in my garden”. Mrs Mayo is employed by the respondent as Managing Director.
 - 9.2 Mrs Mayo states that the respondent took legal advice in 2007 “to confirm the self-employed status of merchandisers” and subsequently wrote to every merchandiser to make sure they were fully aware and requested written acknowledgement from them of their self-employed status. The evidence of Mrs Mayo is that the claimant signed such a document. Mrs Mayo was unable to produce the document signed by the claimant. When her evidence was tested it became clear that she had not real recollection of the document or the content of the document which was in fact created by Mrs Mayo’s late husband.
 - 9.3 The claimant first started working for the respondent in 2005. The claimant stopped working for the respondent for a period of two years and

then returned to work with the respondent.

9.4 The claimant and the respondent entered into a written agreement dated 20 March 2012. The agreement is signed by Mrs Mayo on behalf of the respondent on 20 March and by the claimant on the 11 April 2012.

9.5 On 10 February 2020 Mrs Mayo announced that the respondent's business would be ceasing trading 31 March 2020.

9.6 At the beginning of 2020 the respondent had around ninety merchandisers working for them and two employees, Mrs Mayo and a part time administrator. It is in issue whether the claimant was an employee or self-employed.

9.7 The evidence from Mrs Mayo, uncontested by the claimant, was that the claimant was able to send others to do her work (see clause 10). The claimant had on one occasion covered for another Merchandiser while they were on holiday. The claimant in her statement said that she had completed "another colleague's ...calls". Mrs Mayo confirmed that the claimant had never in fact asked to provide a substitute for her work.

9.8 Mrs Mayo stated that the claimant was responsible for how and when to work (see clause 5). The claimant was not entitled to reimbursement of any expenses, these were only reimbursed at the discretion of the respondent.

9.9 The claimant had the right to accept or reject work (clause 2). Mrs Mayo states that the claimant was responsible for how and when the work was done. Mrs Mayo explained that once the work was allocated the claimant was required to complete the work within two weeks but when the work was done was a matter for the claimant. The claimant says in her statement that when the claimant did not complete work to the respondent's liking she was criticised or did not accept work out of her area. The claimant in her witness statement infers that she was able to refuse work.

9.10 The claimant provided her own equipment such as hand sanitizer, box cutters, screwdrivers/hammers, camera or camera phone (clause 7). These are all things that might be used in carrying out the work.

9.11 The claimant was able to work for other companies (clause 16). The evidence of Mrs Mayo was that the claimant in fact did do work for other companies throughout.

9.12 Mrs Mayo states that although the contract says that there is no entitlement to notice (clause 12) the claimant was in fact given 7 weeks' notice to terminate the agreement.

9.13 In addition to her statement the claimant sent a letter to employment tribunal (received on 29 March 2022) in which she stated that: *"Have enclosed some paperwork to show L M Merchandising Limited said*

I was self-employed but treated there merchandisers as if they were employed by them. We were only self-employed when it suited LM Merchandising. They wanted it both ways” The claimant did not expand on this or give examples to illustrate the matters she relies on.

9.14 The claimant submitted invoices for work done and the invoices would be settled monthly by the respondent.

10. I have concluded that the evidence shows that the claimant and respondent agreed that the work that the claimant would do for the respondent's customers would be carried out by the claimant as a self-employed person. The claimant was offered work, which she could agree to undertake or refuse to undertake. The claimant would submit an invoice to the claimant when the work has been completed and her submitted invoices would be settled on a monthly basis by the respondent. There is no control by the respondent over the claimant in respect of when and how the work is carried out. The claimant had the right to substitute, but never in fact did so, but she did substitute for another of the respondent's merchandisers. The claimant provided her own tools necessary to carry out the work.

11. I have come to the conclusion having regard to all the matters set out above that the claimant was not an employee of the respondent. The claimant's claim for redundancy payment therefore fails because the claimant is not an employee.

Employment Judge Gumbiti-Zimuto

Date: 1 June 2022

Sent to the parties on: 18/6/2022

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For the Tribunals Office

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