



EMPLOYMENT TRIBUNALS

The Claimant: Susan THOMAS

Respondent: Cornerstone Care Solutions Ltd

Heard at: Remotely **On:** 11/12 May 22

Before: EJ Hay

Representation

The Claimant: Mr Pettifer Sols

Respondent: Mr Baran Csl

JUDGMENT ON A PRELIMINARY ISSUE

It is the Judgement of Tribunal that the Claimant was at all times engaged by the Respondent on a self-employed basis, and was neither an employee nor a worker, and as such the tribunal has no jurisdiction to hear her the Claims.

REASONS

Introduction

1. The Claimant was an accountant who responded to a job advert posted by the Respondent seeking to recruit a bookkeeper to provide remote office support to the Respondent's consultancy service. Following an in-person interview the Claimant accepted an offer to work with the Respondent's company on 5th April 2019. She worked with the Respondent's company until a date in March 2021. She claims, among other things, that she was unfairly dismissed. In April 2021 the Claimant approached ACAS concerning early conciliation and a certificate was issued on 27 April 2021 and the Claimant lodged a claim with the Tribunal on 25 June 2021.

The Claims and issues

2. The Claimant claims:

Unfair dismissal.
Holiday pay.
Arrears of pay.
And other payments which were not clarified at the preliminary hearing as it was not necessary to deal with them.
3. These claims are dependent upon the Claimant being either an employee or a worker, and in respect of the claims for unfair dismissal, that she had been so engaged for a period of at least two years.
4. The Respondent says that the Claimant was neither an employee nor a worker, but was self-employed, and so the Tribunal has no jurisdiction to hear her case.

Procedure

5. The question of the Claimant's status was determined as a preliminary issue at a two- day hearing before me, held on 11 and 12th May 2022. For the purposes of that hearing the parties agreed the issues to be:
 - 1) – was the Claimant an employee, a worker, or self-employed?
 - 2)– If she was either an employee or a worker, did she have two years qualifying service necessary for her claim of unfair dismissal?
6. I was provided with a 145-page bundle which was agreed between the parties in advance of the hearing. I heard evidence from the Claimant, and on her behalf from Eleanor ("Ellie") Hawley a nurse who had worked for the Respondent. I also heard evidence from Lucy Corner a director of the Respondent Company, Laura GANE and Tim Linford.
7. At the start of the hearing I gave permission for the ET1 and particulars to be amended by consent between the parties. This amendment acknowledged that the Claimant had access to and authority to deal with payroll matters; and that she had been instructed to set up a payroll for the Respondent but that only Lucy Corner should be included; and that the Claimant was subsequently only asked to add one other person to that payroll.
8. It became apparent during the first day of the hearing that evidence was taking longer than had been anticipated or allowed for, so at the end of day one I set out a timetable for day two designed to ensure there was sufficient time in the listed hearing for me to fairly consider the evidence and reach a reasoned decision on the relevant issues. This timetable was complied with in part but left relatively little time for me to consider my decision and fully formulate my reasons.

Fact finding

9. The respondent posted a job advert on the website Indeed, which the Claimant answered. There followed a recruitment process which culminated in a face-toface

interview at the end of which it was agreed the Claimant would be “engaged” by the Respondent.

10. Respondent’s witnesses took notes at that meeting & the content of those notes was not substantively disputed. Those notes indicate the Claimant was interviewed as a self-employed chartered accountant, and an intention she would be engaged for 20 hours per week at an hourly rate. The notes also record an intention to “job share” with Laura Gane.
11. It is agreed both in the Claimant’s witness statement para 9 and in her evidence that the agreement was she would be taken on as self-employed. This was a “status” with which she was well familiar having worked freelance and selfemployed for majority if not all of her professional life. There was a reference to this on her Linked In profile at pg 119, plus her own evidence.
12. She began working with the Respondent on 5 April 2019.
13. She received an offer letter dated 5 April 2019. That listed a number of terms including references to rate of pay, hours, holidays, a probationary period and sickness benefits. These were said at that time to be subject to the condition “When PAYE confirmed”. There is no evidence she was ever provided other documentation connected with her appointment.
14. There was a significant amount of questioning about whether this letter was a true statement of her position as it was understood by her and by the Respondent on 5th April 2019. In particular LC’s answers about the offer letter, and other documents relied on by the Claimant were evasive and at times incredible; for example when LC asserted that anyone who had received an electronic version of a document with her signature could use it to create whatever document they wished to and it could purport to show it was her document. I do not believe that a person capable of establishing and operating a business such as the one LC did would be so blasé about potentially legally significant documents.
15. However, the questions LC’s evidence raised and any criticism of her as a witness do not displace the Claimant’s own evidence below:

Ques: re P 9 “initially I would be taken on as self- employed” purely bc no payroll was set up?

Answer: – yes

Ques: So if you ended up employed, at some point things changed Answer: -yes? It should have done Ques: but it didn’t did it?

Answer: No

Question: At no point did you go from self-employed status to employed status? Answer: The paperwork was never dealt with Ques: Other than that did anything else change?

Answer: No

16. At the time of the Claimant’s engagement the Respondent was providing turnaround services to a number of care home businesses. They provided flexible solutions to care homes in difficulty or insolvency (if that is the correct term) and would turn them around and sell them on. Each home was considered a separate “project”, and consultants often worked on different and varying projects. The

Claimant worked on more than one “project” as her attribution of hours to different homes on her invoices makes clear.

17. At that time the Respondent had no employees, not even Ms Corner, who had established and controlled the business. All of the “staff” who worked with them were consultants working on a self-employed basis. Laure Gane, with whom ST was to share the job, had to register as self-employed when she commenced working with the Respondent which was at about the same time as the Claimant.
18. Shortly after the Claimant began working with the Respondent she requested a payslip for the purposes of obtaining a mortgage. It was explained to her that a payslip couldn’t be provided for a number of reasons including the fact that the company was not set up on any PAYE system.
19. This exchange was shown in the WhatsApp messages at pg 53 in which the Claimant asks LC if she can have permission to register for Cornerstone as an employer saying “mortgage guys needs a payslip”. To this LC replied explaining that she needed other things in place before she started doing payslips, inc contracts. Later in that exchange dated 28 May 2019, LC pointed out “Obviously self-employed rates do not inc holidays/etc so need to work out the rates” indicating that the only figures LC had available to her were “self employed rates”. She then went on to refer to NI and benefits which she also did not understand, to which the Claimant replied “from a personal point of view all I really need is a payslip so I can sort out the mortgage and they’re chasing me” to which LC replied “I know but how do I generate a payslip without all the other stuff in place – and the payslip won’t reflect the same as the contract”.
20. This exchange makes it plain that the Claimant was not seeking to change her employment status with the respondent but was simply trying to generate a document she could present to a mortgage company.
21. The Claimant went on to explain this request was made by her because the mortgage company wanted confirmation she was NOT self-employed, but this reason for her request was not communicated to the Respondent who instead of a payslip provided a letter to the Claimant in satisfaction of the purposes for which she needed it (pg ref 66-67 and 69-70). There was some dispute about who created or edited these different versions of the document, but I found neither the Claimant or LC were consistent or credible in the evidence they gave about how it came into existence, but in light of my other decisions that did not need to be resolved.
22. There were a number of occasions thereafter when the issue of the company’s status as an employer were raised. On none of those occasions did the Claimant join the PAYE scheme. These occasions included when the Claimant received the offer letter; when it transpired that setting up PAYE for Cornerstone itself was not a priority as she claimed she was lead to believe it was and would result in her going PAYE; when she set up PAYE for LC, and again when she set it up for Laura Gane (nee Dymond) in June 2020. Additionally there was a letter sent to the Claimant in July 2020, only a month after she had undertaken the PAYE exercise for Laura, in which she was addressed by LC as a contractor (pg 93). Had The Claimant wanted to pursue a change to or seek clarification of her status that afforded her a natural opportunity to do so but she did not.
23. To get paid for her work the Claimant submitted invoices. She was the same as every other person working with the Respondent in that regard.

24. Her invoices always exceeded the number of hours which had been agreed she would work, even from the first that was submitted and labelled invoice 1 (pg 64) and eventually, after more than a year of working w the Respondent it was agreed that she could invoice up to a max of 40 hours pw.
25. There is no document which specifies where, when, or how those 40 hours were to be completed. Tim Lindford explained that many of the contractors worked office hours because the nature of their work involved liaising with companies who also kept those sorts of hours, but there were also times when contractors / consultants would work in the evenings because there were less distractions from phone calls etc. It was the clear from the evidence of Ellie Hawley that the Claimant would make herself available at all sorts of hours, including at evenings and weekends. Although EH formed the impression the Claimant's work was being directed by LC, there was no evidence of any specific direction being given to the Claimant as to what she should do although in June 2020 there was from LC some direction as to what she should NOT do and a letter dated 20 July 2020 at pg 93. This letter was written to the Claimant as a contractor and was to the clarify what her role included which was not to do all the work herself.
26. The Claimant continued working and invoicing for hours, and the Respondent continued to pay her for them. If there were occasions when a particular task was not available to her she turned her attention to something else; eg when the SAGE system went down because she had wrongly made her computer the main computer. She was free to do so without any ref to LC or anyone else at the Respondent and she doesn't dispute this. It was the unchallenged evidence of LC that ST "was given certain projects to do on a certain basis and it was apparent that the projects were not there or were selling (homes were selling) and the work was less and she found work to do that was part of the job description of people working in the home and keep up her hours".
27. The Claimant used her own computer – specifically saying she wasn't given a laptop – although she was reimbursed for postage and ink. She wasn't provided with any hardware to complete her work and although the Respondent paid for the SAGE software, that was intended to be for all who needed to use it in connection with their work for the Respondent, not just for the Claimant.
28. In that way she was no different to the other people working with or for the Respondent.
29. During her time with the Respondent the Claimant did not take annual or sick leave – with one exception. Shortly after her engagement she went to Spain for a wedding. She told LC that she was going, she did not ask permission – as she explained it "It was discussed that I had been invited AND WAS GOING TO GO and LC agreed". she did not submit or make any claim for annual leave or holiday pay for this trip.
30. On multiple various occasions she took breaks from her work to take her husband to medical appointments and she never asked for permission to do so. No compliant was made about this by the Respondent.
31. At some point various of her tasks were in fact completed by other accountants – specifically year end. All though this was work paid for by the Respondent the accountants who completed it were found or identified by the Claimant. LC gave

evidence of three occasions that others did the work the Claimant should have done; use of an external accounting firm in April / May 2021, a payroll project she wasn't able to do, and other people inc Laura, Tim, or Ahsley Searle picking up her work.

32. In Dec 2019 the Claimant had a conversation with an owner or director of one of the homes the Respondent were working with as a result of which she was asked by LC to ensure that in future she gave the impression she only worked for the Respondent and the Claimant agreed to give this impression.
33. She also updated her LinkedIn profile to show she was then working with the Respondent. This profile also records her as associated with, query working with or for, other businesses at the same time as she was engaged with the Respondent at pg 119.
34. The relationship continued in this way until Feb 2021 when she submitted an invoice which was queried by LC. LC challenged this because she had discovered a number of issues with the Claimant's work which she raised with the Claimant at the very latest by 22 March 2021 and I have seen a series of WhatsApp messages in the bundle at pg 90
35. Next day Tim Lindford a contractor with the Respondent called at the Claimant's home address to collect some paperwork.
36. There was an incident of some sort, the precise details of which I have not determined at this stage because of the time available to me but it prompted LC to contact the Claimant via Whatsapp and express shock at the Claimant's behaviour (pg 63). I note this maybe has been wrongly attributed to the Claimant as opposed to her husband but effect is same;
37. Response from the Claimant was an email sent to LC at 6.13pm (pg 108)

"Please see attached my invoice no. 25 covering the hours that I have worked this month. As previously suggested I have reduced the hourly rate for hours worked at HPNH to bring in line with all other hours.

Adding this invoice to the balance outstanding on my February invoice (£2,157.09) this makes a total of £4,115.48 due to me.

You have made it obvious that you no longer want me to work for you. Months of unpleasantness, bullying and disputing charges on my February invoice followed by blocking my access to Cornerstone emails this morning has made this very the clear.

So please pay me this amount outstanding by the end of tomorrow, 24th March, and we can go our separate ways without the need for further action."

38. I have checked the bundle and noted the sequence was: 6.13pm email from the Claimant to LC; 6.46pm WhatsApp from LC to the Claimant pg 62
39. The WhatsApp message the following morning 24 March 2021 at 11.22 from the Claimant read "This is libellous. I am not paid in full by 6pm tonight my lawyer will

commence action". LC responded to this at 11.48 explaining she didn't have access to the bank and also raising her concerns. The response to that was at 6.18pm from the Claimant "boxes outside".

40. It was suggested by the Claimant's representative that this was an invitation to discuss the issues and that the Claimant was hoping they could move forward, but that proposition is unsustainable in light of the language used and the curtness of response from the Claimant which indicated that no further contact from the Respondent would be engaged in other than full payment of a disputed invoice.
41. Thereafter there was no further correspondence until the ET1 was lodged and the claims arising from employment were made.
42. I acknowledge the Claimant submissions on the status of the "offer letter" but do not accept that that alone is sufficient to make her an employee or a worker. She was never provided with any other documentation and was expressly not permitted to join the co PAYE scheme when it was established.
43. Her status did not change.

Law

44. I remind myself categorization of status is an objective test.
45. The documents referred to, particularly the offer letter are relevant but not determinative, and there are a number of other factors I have to consider, each of which may bear a different weight in different circumstances but recent case law makes it clear that the Tribunal is to take a purposive approach to its examination of the facts.
46. Employee? Case law has established an irreducible minimum of terms from which can be inferred that the agreement between the parties is a contract of employment. These include: control (by the "employer", personal performance (by the "employee") and mutuality of obligation. Revenue and Customs Commissioners v Atholl House Productions Ltd [2022] EWCA Civ 501 repeated what had been previously stated that although the first and third of these are necessary preconditions to there being a contract of employment, any assessment will require an overall assessment of all relevant factors: it will always be a multi-factorial approach.
47. Worker? Is defined in s230 of the Employment Rights Act 1996 and includes employees with a contract of employment.
ERA 1996 s230 (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
 - 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 a profession or business undertaking carried on by the individual;And any reference to a worker's contract shall be construed accordingly"

48. The key concept is of “personal service”:

Conclusions

49. My reasons for concluding the Claimant was not an employee are as follows:
50. She was never provided with, nor ever sought, full contract of employment, any copy of terms and conditions, or an employee handbook or any information about disciplinary and grievance procedures. They would not have been provided because they did not, at that time, exist.
51. She was never provided with payslips – the only time she asked for one she was given a list of reasons why one could not and would not be provided.
52. She will have appreciated the significance of the absence of these documents.
53. She had no minimum no of hours – there was a maximum intended but she regularly, and unilaterally, exceeded these but save for a query over her invoice she never faced any disciplinary or other sanction for this.
54. She was free to choose when, and how she worked – by which I mean completed her allocated tasks – the fact she would respond to EH demonstrates that she chose when she would work. She was not the closely line managed by LC beyond LC directing her what the needs of the business were that she was tasked with meeting. Again, when she did not do this, this was raised as a potential invoice issue, as shown by that letter dated July 2020, and not as an employee disciplinary issue.
55. She didn't have to account for her hours other than as a purely accounting exercise through the submission of invoices which is itself significant; when and how she completed those hours was up to her and did not require any permission being given for any absence. As a courtesy she told others she would be absent but her absences did not impact the business of the Respondent because other contractors would step in and complete her tasks.
56. She was therefore not subject to the level of “control” expected to be exercised over an employee.
57. She was able and permitted to take work for other clients and she continued to advertise or market herself as available. Although she may not have taken much other work, she was free to do so if she wished.
58. Either the Claimant or the Respondent could have terminated their working relationship unilaterally and immediately, subject only to payment of any outstanding invoice. This is what the Claimant tried to do when sending her messages to LC following the incident at the Claimant's home address.
59. These two factors indicate there was insufficient mutuality of obligation between the Claimant and the Respondent as would be expected between employee and their employer.

60. She must have understood the nature of the Respondent's business because she worked with a number of homes and "projects" and had been through the process of a sale during the time she worked with the Respondent (ref to the sale of "The Grange"). She would have appreciated the Respondent's business model and that it was not compatible with having employees. All the other people she worked with engaged by the Respondent were – like her – self-employed contractors. She may have hoped for a different status but, as even she accepted in evidence, her status never changed.
61. Core items needed for her role were her own – laptop and office space – and although this is of relatively little importance in the context of this case it tends to indicate that she was not an employee who needed to be provided with the tools necessary to do their work.
62. My reasons for concluding the Claimant was not a worker are as follows:
63. She could have engaged someone else to undertake the tasks assigned to her, and on some occasions that is what happened when other companies or entities did work that the Respondent envisaged she would do. On occasions when she did not complete her tasks other contractors simply stepped in to do so. This is inconsistent with a contractual obligation that she personally completed all relevant tasks.
64. She was not dependent upon the Respondent to give her work, because to some extent she created work for herself by stepping in and taking on roles or tasks that were not hers to undertake. This was treated by the Respondent as an invoicing issue – as per letter of 20 July – indicating they did not have an employment relationship with her.
65. The fact it was necessary to ask her to give the impression she was employed or worked exclusively for the Respondent arose precisely because she did not and was not – and the need to make this request arose because the Claimant had made it clear to the owner of the home that she was free to work as she decided and was not dependent upon the Respondent.
66. I therefore conclude that the Claimant commenced work with the Respondent as self-employed, which was agreed by her in her evidence even if not by her representative in his questioning or submissions, and that this never changed.
67. I accept that for many reasons she may have wanted it to change but she never brought about or effected that change.
68. Because of my findings on the first question, I do not deal with the effective date of termination.

Employment Judge Hay
Date: 22 June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
04 July 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE