# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms J Chandler**

**Respondent:** **Look Who's Walking Limited**

**Heard on:** **Preliminary hearing on 9th and 10th June 2022**

**Before:** **Employment Judge Pritchard**

**Representation**
Claimant: In person
Respondent: Ms K Kaur, solicitor

# REASONS

1. These written reasons are provided at the parties' request.

**Issues**

2. By case management order dated 2 March 2022, Employment Judge Corrigan ordered that the following issues be addressed at the preliminary hearing:

   2.1. whether the complaints of unfair dismissal and wrongful dismissal should be dismissed because the claimant is not entitled to bring these claims if she were not an employee of the respondent as defined in section 230(1) and (2) of the Employment Rights Act 1996;

   2.2. whether the complaint of holiday pay should be dismissed because the claimant is not entitled to bring it if she were not a worker of the respondent as defined in section 230(3) of the Employment Rights Act 1996.

3. At the commencement of the hearing, the Respondent conceded that the Claimant was a worker for the purposes of section 230(3) of the Employment Rights Act 1996.

4. The Respondent also conceded that the Claimant was an employee for the purposes of the Equality Act 2010. Although not an issue for determination at the preliminary hearing, that concession was recorded in the judgment.

5. The remaining issue for determination was whether the Claimant was also an employee for the purposes of the Employment Rights Act 1996.

6. The Tribunal heard evidence from the Claimant, Hannah Unett (a former manager employed by the Respondent) and from Gill Bennett, owner and director of the Respondent company. The Tribunal was provided with three bundles of documents to which the parties variously referred during the course of the preliminary hearing. At the conclusion of the hearing, the parties made brief oral submissions.

## Findings of fact

7. Mrs Bennett describes the Respondent's business a dog walking agency and doggy day care. At material times, the business operated over the five working days of the week. The Respondent would collect customers' dogs, walk them, then care for them during the day before returning them to customers in the afternoon/evening. During the day, the dogs would run in a yard on the Respondent's premises. Sometimes dogs would "board" by staying overnight at the homes of various members of the Respondent's staff.

8. In about 2014, the Claimant undertook dog walking for the Respondent. The Claimant accepts this during this initial period of work, she was a self-employed independent contractor.

9. The Respondent engaged a number of dog walkers on this basis. Ms Unett gave an example of how this arrangement worked. Although clients would be invoiced for the full amount of day care bookings, for other services such as walks, cat visits and overnight boarding, the customer was asked to split the payment. Thus, if a customer was charged £16.00 for a dog walk, the Respondent would invoice the customer £6.00 and the customer was asked to pay £10.00 direct to the dog walker.

10. In 2015, when a full-time employee was about to leave the business, the Claimant and another colleague, Sarah Fraser, agreed with Mrs Bennett that they would work set hours 7.00 am to 10.30 am undertaking "day care" duties. These were part of the duties undertaken by the departing employee who had been paid on a PAYE basis and acknowledged by the Respondent to have been an employee. The Claimant and Sarah Fraser shared the shifts, the Claimant usually working three days each week and Sarah Fraser working two days. Occasionally, the Claimant and Sarah Fraser would swap shifts with each other.

11. In 2016 or 2017, after Sarah Fraser said she no longer wished to do this work, the Claimant undertook all of the 3 ½ hour shifts five days each week.

12. The Claimant was paid at the rate of £10 per hour for these hours rising to £10.75 per hour by end of her employment. If the Claimant worked more than her set hours for the Respondent, she would be paid accordingly.

13. Until she left the Respondent's employment in 2019, Ms Unett was the Claimant's manager. Ms Unett was a full-time employee working 8 hours each day. On occasions, the Claimant and Ms Unett would swap some of their hours: Ms Unett working 7.00 am to 3.00 pm, the Claimant working 3.00 pm to 6.30 pm. The Claimant covered for Ms Unett as acting manager when she was away on holiday. After Ms Unett left the company, a new manager, Holly, was engaged to replace her.

14. Ms Unett or Holly would provide the Claimant weekly with a list the customers from whom dogs were to be collected and the order of collection. She updated the Claimant each evening with any changes to collection arrangement.

15. The Claimant was insured to drive the Respondent's van to collect the dogs. The Respondent paid for all costs associated with the vehicle. The van was equipped by the Respondent for the transport of dogs. The Respondent would provide the necessary equipment: poop bags, muzzles if needed, and dog leads if those provided by the customer were unsuitable. Any business expenses incurred by the Claimant were reimbursed by the Respondent.

16. For a few months in 2020, during lockdown, the Claimant worked full-time hours, with some variation to those hours as required by the Respondent. She continued to be paid the applicable hourly rate. In July 2020, the Respondent required the Claimant to revert to her former hours of work, namely 7.00 am to 10.30 am.

17. The Claimant, as with all the Respondent's staff, was required to complete a weekly document showing hours worked or not worked. The Claimant paid her own tax and national insurance. The Claimant took leave when she was ill or for holidays, both of which were unpaid. Because she was one of only a few persons insured to drive the company vehicle, the others being Mrs Bennett and the manager, holidays were taken by mutual agreement with Mrs Bennett and the manager to ensure the business could continue to operate during holiday absence. The Respondent did not have employment policies in place, such as grievance or disciplinary procedures.

18. Mrs Bennet terminated the Claimant's employment on 18 August 2020.

19. For the purposes of the preliminary hearing, the Respondent sought to rely on the terms of a service agreement which, according to Mrs Bennett, had been provided to the Claimant in or around 2017. The Claimant denied having seen this document until it was disclosed in course of these proceedings.

20. Ms Unett told the Tribunal that she was aware that a document had been sent to all staff seeking to restrict them from poaching customers but that she had not been able to open the email attachment and that no-one signed it. Ms Unett herself was never provided with a contract of employment.

21. The service agreement relied on is undated, unsigned and contains the incorrect hourly rate applicable to the Claimant. In evidence, Mrs Bennett conceded that the Claimant might not have seen this document before. Ms Unett's evidence as to the Respondent's provision of documentation generally tends to support this conclusion. The Tribunal prefers the Claimant's evidence that she had never been provided with the service agreement.

22. In addition to the work she undertook for the Respondent, the Claimant was employed by an estate agency which allowed her to work flexible hours. She also undertook other paid work, including dog walking, and operated a sole trader in a spiritual well-being business.

**Applicable law**

23. Section 230(1) of the Employment Rights Act 1996 defines "employee" as an individual who entered into or works under a contract of employment. Sub-section (2) defines "Contract of Employment" as a contract of service or apprenticeship, whether expressed or implied, and whether oral or in writing.

24. There is extensive case law on the question of who is an employee. In Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 it was said that a contract of employment exists if these three conditions are fulfilled:

    24.1. 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.

    24.2. 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.

    24.3. The other provisions of the contract are consistent with it being a contract of service.

25. The judgment in that case makes clear that the first and second conditions, mutuality of obligation and a right of control, are necessary elements of a contract of employment. An obligation to do work subject to another's control "is a necessary, although not always sufficient, condition of a contract of service". In Carmichael v National Power plc 2000 IRLR 43 the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

26. Factors which might be relevant when considering the third condition include:

    26.1. (Although of little assistance in the case of a person carrying on a profession or vocation, such as an actor or singer without the normal trappings of a business) whether the person performed the services in business on his/her own account.
    26.2. The degree of control exercised over the person doing the work;
    26.3. Whether the person doing the work hires any staff to help her;
    26.4. What degree of responsibility for investment and management she has;
    26.5. Whether and how far she has an opportunity of profiting from sound management in the performance of her task;
    26.6. The express or implied rights or duties of the parties;
    26.7. Whether the person doing the work provides her own tools and equipment and the nature of the equipment involved in doing the work;
    26.8. The degree of financial risk that she takes, for example, as a result of delays in the performance of the services agreed;
    26.9. The understanding or intentions of the parties;
    26.10. Whether the person performing the services has set up a business-like organisation of her own;
    26.11. The degree of continuity in the relationship between the person

performing the services and the person for whom she performs them;

26.12. How many engagements she performs and whether they are performed mainly for one person or for a number of different people;

26.13. Whether the person performing the services is accessory to the business of the person to whom the services are provided or is part and parcel of the latter's organisation;

26.14. How the parties have labelled or characterised their relationship;

26.15. The treatment of tax and national insurance; and

26.16. Any other matters that form part of the working relationship.

27. However, no single feature is in itself decisive, each of which may vary in weight and direction and given such balance to the factors as seems appropriate to determine whether the person was carrying on business on her own account. See for example O'Kelly v Trusthouse Forte plc [1984] 1 QB 90.

28. The Tribunal has also had regard to the recent decision of the Court of Appeal in HMRC v Atholl House Productions [2022] EWCA Civ 501. Among other things, it was made clear in Atholl that the question for the Tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could reasonably be supposed to be known, to both parties. It was also stated in that case that factors to which the tribunal may have regard are not limited to only to the terms of the contract and the effect of those terms.

29. The Tribunal is not bound by the label the parties attach to their relationship (although it carries some weight). See for example: Autoclenz v Belcher [2011] UKSC 41, a case which considered the significance of the terms of a written agreement.

**Conclusion**

30. The Tribunal finds that the terms of the service agreement were neither expressly or impliedly agreed between the parties nor represent the terms of the agreement under which the Claimant worked for the Respondent.

31. The terms of the agreement between the parties must be ascertained from oral evidence of the parties and the other documents presented in evidence.

32. The Respondent conceded that the Respondent was obliged to provide work for the Claimant but submitted that the Claimant had the option to refuse to do that work, other than her core hours which the Tribunal understands to be 7.00 am to 10.30 am five days a week.

33. The Respondent also sought to persuade the Tribunal that the Claimant was not required to provide her services personally in that, if the customers agreed and vehicle insurance could be arranged, the Claimant could have sent a substitute to do her work instead. Given that the definition of a worker within section 230(3) of the Employment Rights Act 1996 is an individual who "undertakes to do or perform personally any work or services for another party", the Tribunal finds this a curious submission in circumstances in which the Respondent has admitted that the Claimant was a worker.

34. The Tribunal is unable to accept that the limited right of substitution contended for by the Respondent formed part of the agreement between the parties. The evidence shows that the business would have been quite unworkable had that been the case.

35. The Tribunal is satisfied that the first condition set out in Ready Mixed Concrete is satisfied. There was a mutuality of obligation in respect of those core hours (described by both parties as normal hours) when the Claimant was required to provide her own work and skill in the performance of her duties, not that of someone else.

36. The Tribunal finds that the Claimant was required to carry out the tasks reasonably required of her by the Respondent. The Tribunal does not accept, to the extent that it was being suggested by Mrs Bennett, that the Claimant had much autonomy in her role. She was provided with a list of dog collections and the route she should follow. The fact that she might have been permitted to deviate from this route is nothing to the point. She was required to collect the dogs and bring them back to the day centre. She was also required to exercise them. The Claimant was given instructions as to the duties required of her and the times when she was required to undertake them. Other duties would either be instructed by the Claimant's manager (either Ms Unett or Holly) or by the demands of the Respondent's business.

37. As for time off, the reality is that the Claimant was obliged to book her leave in accordance with the requirement of the Respondent's business to ensure continuity of service to customers.

38. The Tribunal finds that there was sufficient control such that the second condition in Ready Mixed Concrete is satisfied.

39. Turning to the other provisions of the agreement and other features of the relationship between the parties.

40. The Claimant had no responsibility for investment in the business nor opportunity from profiting from it. She was paid a set hourly rate for the hours she worked.

41. The pay rises she received were made purely at the Respondent's discretion.

42. The Claimant took no financial risk. The Respondent was responsible for all costs and expenses associated with the business.

43. The Claimant used the Respondent's tools and equipment such the van and other dog care items. Her work was based at or around the Respondent's premises.

44. Apart from the times when she took leave or was ill, the Claimant provided her services continuously from 2015 to 2020.

45. It was common ground that the customers were those of the Respondent. Indeed, the Respondent attempted to take steps to protect its business from its customers being poached by staff. At all times the Claimant was required to refer customers in the Respondent's direction and the evidence suggests she did so.

46. Mrs Bennett admitted in cross examination that what she said in her witness statement about the Claimant not wanting to be presented on the Respondent's website or social media was incorrect and that the Claimant was reluctant only at the beginning of the engagement. Mrs Bennett appeared to agree when questioned, that the Claimant was both well-known to customers and was part and parcel of the business.

47. Landlord references provided by the Respondent referred to the Claimant as an employee.

48. Notwithstanding the fact that the Claimant was not required to wear a uniform, the Tribunal too finds that the Claimant was part and parcel of the business and no mere accessory.

49. There was no evidence to suggest that the parties positively applied their minds to the status of the Claimant's engagement or label it in any particular way (apart from the Respondent referring to the Claimant as an employee in reply to landlord reference requests).

50. There was no credible evidence to suggest that the Claimant performed the services for the Respondent in business on her own account.

51. The factors above are all consistent with the relationship being that of employer and employee.

52. There are factors pointing in the opposite direction however.

    52.1. At various times between 2015 and 2020, the Claimant provided dog walking services as an independent contractor to three other agencies.

    52.2. The Claimant felt responsible for paying her own tax and national insurance on the pay she received from the Respondent.

    52.3. There was no evidence to suggest the Claimant demanded payment for holidays or sickness absence.

    52.4. Dog walking alone by others, and the dog walking element of the Claimant's duties previously untaken by her, were performed on an independent contractor basis.

53. Notwithstanding these factors, the overall picture is one of employment. The factors in favour of employment far outweigh those that do not.

54. The Tribunal finds that the Claimant was an employee for the purposes of section 230(1) and (2) of the Employment Rights Act 2010 from August 2015 until the termination of her employment on 18 August 2020 in respect of her core hours of work 7.00 am to 10.30 am five days each week.

Note

**Employment Judge Pritchard**

Date: 21 June 2022