EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102639/2022

Hearing held in Glasgow by Cloud Video Platform (CVP) on 21 July 2022

Employment Judge: R Sorrell

Mrs M M Dunnachie	**Claimant** **In Person**
The Coffee Shop	**Respondent** **Represented by:** **Mr J Mackie -** **Owner**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was engaged as a worker and not as an employee at the time of her dismissal and her claims for a redundancy payment and notice pay are therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim for a redundancy payment and notice pay on 10 May 2022.

2. The burden of proof is on the claimant and the standard of proof is on the balance of probabilities.

3. This hearing was scheduled to determine the claim. It was a virtual hearing held by way of the Cloud Video Platform.

4. As both parties were party litigants, I explained the purpose and procedure for the hearing and that I was required to adhere to the Overriding Objective under Rule 2 of the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013 of dealing with cases justly and fairly and to ensure that parties were on an equal footing.

5. The respondent lodged documents prior to the hearing and a further document was lodged during the course of the hearing.

6. The claimant gave evidence and the respondent called Mrs Julie Mackie as a witness.

Findings in Fact

The following facts have been admitted or found by the Tribunal to be proven:

7. The claimant's date of birth is 28 April 1952.

8. The respondent was a small coffee shop adjacent to a mill shop situated in the same building. It sold light snacks and refreshments.

9. The claimant was employed by the respondent around 2010/2011 as a coffee shop assistant.

10. The claimant's role involved the ordering and preparing of food, serving customers, taking the cash and keeping the shop clean and tidy.

11. At the commencement of her employment, the respondent provided the claimant with a contract of employment.

12. Up until about 3 years ago, the claimant worked approximately 24 hours per week over a 3 day period. Her hours were thereafter reduced to 12 hours per week over a 2 day period. She was paid monthly at the national minimum wage rate.

13. The claimant's manager was Mrs Julie Mackie. Mrs Mackie was the joint proprietor of the respondent business with Mr Jamie Mackie.

14. The claimant worked with two other coffee shop assistants. They each worked the same hours and managed their day to day work between themselves.

15. Due to the Covid 19 pandemic, the claimant and her two colleagues were furloughed in March 2020.

16. On 28 September 2020, Mrs Mackie wrote to the claimant as follows:

"Following our recent telephone conversation, I am writing to inform you that we are not able to re-open The Coffee Shop for the foreseeable future due to the downturn in business as a result of the Covid-19 Pandemic. Your salary will continue to be processed at its current level during the Furlough period until the end of October 2020 and we will make up your pay to 80% of your normal pay which is being partially reimbursed to us by HMRC. We are not able to take advantage of the newly announced Job Support Scheme for Coffee Shop employees because the Coffee shop is closed. From 1 November 2020, your contract will change to a zero-hour contract which means that you are still employed by The Coffee Shop but with no guaranteed hours of work. Any hours that are worked will be paid at your normal contract rate. We will provide regular information as the current Pandemic unfolds and if and when we return to normal working routines. Please sign the attached copy of this letter to confirm your agreement and return it to me. Thank you for your contributions to the business and if I can offer assistance in any way, please contact me." (D1)

17. The respondent did not provide the claimant with a zero-hours contract to reflect the contract variation and it was not explained to her that in the event she was made redundant, this variation could affect her entitlement to a redundancy payment and notice payment.

18. The claimant signed the letter on 2 October 2020 and returned it to Mrs Mackie. She did not ask Mrs Mackie any questions about this variation because she knew she would not be working at that time anyway due to being furloughed as a result of the Covid 19 pandemic and she was happy to help the respondent out. She also understood that having no guaranteed hours of work when the respondent business re-opened might mean she would not work the same hours as before, but was keen to return to work. She also thought it would not make a difference to her employment rights, particularly as the letter made reference to her still being employed.

19. On 23 July 2021 Mrs Mackie wrote to the claimant as follows:

"Following our recent telephone conversation I would like to confirm that we plan to re-open The Coffee Shop once the current Covid restrictions are lifted and particularly once table service is no longer compulsory. We are anticipating that this might be on 9 August 2021 when the restrictions are next due to be reviewed by the Scottish Government. However, this date is by no means certain. We are planning to open on the reduced hours of 11am to 3pm Monday to Saturday and also reduce the menu choice. As you have not worked since March 2020, having been continuously on the furlough scheme, I would ask you to kindly confirm that you will be available to return to work by signing the copy of this letter and returning it to me by Monday 2 August 2021. We are looking forward to seeing you, re-opening and getting back to business. Please sign the attached copy of this letter to confirm your agreement and return it to me. If you have any questions, please do not hesitate to contact me." (D5)

20. The claimant signed the letter on 2 August 2021 and returned it to the respondent.

21. Around the same time, the claimant received a telephone call from Mrs Mackie who offered her work for 8 hours per week over a 2 day period which the claimant accepted.

22. The claimant understood that she was not obliged to accept the hours of work offered to her by the respondent and did so because she wanted to return to work.

23. The claimant returned to work on 10 August 2021. The claimant worked these hours for 5 weeks after which the respondent decided that the business opening hours could not be sustained due to the downturn in business.

24. In September 2021 the opening hours of the coffee shop were further reduced to 3 days a week for 6 hours a day to coincide with the opening hours of the adjacent mill shop. The claimant was offered 6 hours work for 1

day per week which she accepted. Her last day of work was 24 September 2021.

25. After 2 weeks the respondent decided the reduced opening hours were not sustainable and that the level of downturn in business was such that it could not continue to operate for the foreseeable future.

26. Thereafter, the claimant did not hear from the respondent for a while. The claimant telephoned Mrs Mackie before the Christmas period to see what was happening about the business. Mrs Mackie told the claimant she hoped to re-open the business over the Christmas period. However, due to the Covid 19 pandemic, this did not happen.

27. After Christmas, the claimant went to the mill shop to speak to Mrs Mackie about the business re-opening. Mrs Mackie informed the claimant that it was going to remain closed and thereafter telephoned her to explain that the business would have to permanently close due to insufficient business.

28. On 2 February 2022 Mrs Mackie confirmed the position in writing to the claimant as follows:

"Following our telephone conversation on 31 January 2002, I confirm that we have decided to permanently close The Coffee Shop. The current trading conditions have unfortunately made the business commercially unviable. Although you have been on a zero hours contract since November 2020 we feel it is only fair to make this decision now and release you from any further commitment to us. This letter gives you one month's notice of termination of your contract of employment which will officially end on 28 February 2022. You will receive any monies due to you at that time along with your P45. We are sorry that, after much deliberation, we have had to take this decision and would like to express our most sincere thanks for all your hard work. If you have any matters that you wish to discuss then please do not hesitate to let us know." (D4)

29. With effect from 1 November 2020, the claimant was engaged by the respondent as a worker and not as an employee.

Submissions

Respondent Submissions

30. Mr Mackie submitted on behalf of the respondent that the claimant's employment status was fundamentally changed with the introduction of the zero-hours contract and that she became a worker rather than an employee. There was no mutuality of obligation. There was no obligation on the respondent to offer work and no obligation by the claimant to accept the hours of work she was offered. The claimant is therefore not entitled to a redundancy payment or notice pay. The claimant didn't have continuous notice to qualify for statutory redundancy pay or notice pay because of the 22 weeks she was on furlough. If the Tribunal finds otherwise, the claimant is still not entitled to notice pay because she did not work in the 12 weeks reference period before the business was closed. The respondent tried to follow the rules and do what was right.

Claimant Submissions

31. The claimant submitted that although her contract changed, there was nothing in writing to say that she would be a worker and not an employee. The letter of 28 September 2020 states that she is still employed by the respondent. She has looked into this as the respondent has tried to get away with paying her this money by not giving her a certain number of hours of work. She was a loyal employee for many years. She is quite upset by this and has not been treated fairly. A zero-hours contract employee should be entitled to this money like anyone else.

Relevant Law

Employment Status

32. Section 230 (1) of the Employment Rights Act 1996 defines an 'employee' as *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*" Section 230 (2) provides that *"a 'contract of employment' means a contract of*

service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

33. Section 230 (3) of the Employment Rights Act 1996 defines a 'worker' as *"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 customer of any profession or business undertaking carried on by the individual."*

34. In determining employment status, a Tribunal will approach it by examining a range of relevant factors, known as the 'multiple test.' In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 ALL ER 433, QBD,** the Court set out the following questions:

    (i) Did the worker agree to provide his or her own work and skill in return for remuneration?

    (ii) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

    (iii) Were the other provisions of the contract consistent with it being a contract of service?

35. This test has been subsequently developed in **Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA** and endorsed by **Carmichael and anor v National Power plc 1999 ICR 1226, HL** to introduce the concept of an 'irreducible minimum.' This concept requires the separate elements of control, mutuality of obligation and personal performance to each be present in order for a contract of employment to exist. Whilst control can take many forms, an employer is required to have ultimate authority over the performance of an employee. Mutuality of obligation obliges an employer to provide work and the employee to accept and perform the work offered.

Personal performance requires that the employee agrees to provide his or her own work and skill. Other relevant factors to consider are the intentions of the parties', the method of payment used and whether taxes and national insurance contributions are deducted at source.

36. Section 27A (1) of the Small Business, Enterprise and Employment Act 2015 defines a zero-hours contract *as "a contract of employment or other worker's contract under which – (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker."*

37. A key element of a zero-hours contract is that there is no entitlement to a minimum amount of work. Whether a particular contract is 'zero-hours' or not is a question of interpretation to be decided on the particular facts. If a contract does not oblige an employer to offer work and the other party to the contract is not obliged to accept any work that is offered, it is likely to lack the mutuality of obligation necessary to form a contract of employment. On the face of it, a zero-hours contract will therefore be a contract for services, not a contract of employment, thereby affording only 'worker' status to the person working under it.

38. The case of **Autocleanz Ltd v Belcher and ors 2011 ICR 1157** held that a Tribunal can examine a working relationship between parties to consider the reality as well as the written contract and if the contract is not reflective of that reality, it is open to the Tribunal to decide that it was not conclusive.

Redundancy Payment

39. In the event that an employer had made an employee redundant, section 135 of the Employment Rights Act 1996 provides that an employer must pay a redundancy payment under section 155 of the Act to an employee who has 2 years continuous employment with an employer.

Breach of Contract and Notice Pay

40. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee is able to bring a breach of contract claim to recover damages in respect of the contractual notice period. Damages in a wrongful dismissal claim will be limited to the employee's losses occurring during the period between the date of dismissal and the date at which the contract could lawfully have been brought to an end by the employer in accordance with the contractual notice period. Section 86 of the Employment Rights Act 1996 sets out minimum periods of notice required to terminate a contract of employment. If the contract provides for more notice, it is the longer notice period which prevails.

Issues to be Determined by the Tribunal

41. The Tribunal identified the following issues require to be determined:

    i) Was the claimant an employee?

    ii) Is the claimant entitled to a redundancy payment?

    iii) Is the claimant entitled to a notice payment?

Conclusion

42. Overall, I considered that the claimant and the respondent witness, Mrs Jackie Mackie, gave their evidence in a clear way giving an honest account of events as they remembered them.

43. The primary facts that led to the claimant's dismissal were not in dispute. The material issue in determining this case was whether the claimant's employment status as an employee was varied to a worker after she was informed by the respondent that her contract would change to a zero-hour contract with effect from 1 November 2020, which the claimant consented to in writing.

44. In order to ascertain the claimant's employment status after 1 November 2020, I am required to apply the law to the particular facts of this case.

45. The respondent letter of 28 September 2020 informed the claimant of the variation to her contract and the effect of that: *"From 1st November 2020, your contract will change to a zero-hour contract which means that you are still employed by The Coffee Shop but with no guaranteed hours of work. Any hours that are worked will be paid at your normal contract rate."*

46. The claimant was not provided with a zero-hours contract by the respondent to reflect the contract variation and Mrs Mackie gave evidence she did not inform the claimant that this variation could affect her entitlement to a redundancy payment and notice payment in the event she was made redundant.

47. The claimant was clear and consistent in her evidence that she did not ask Mrs Mackie any questions about the zero-hours contract because she knew she would not be working at that time anyway due to being furloughed as a result of the Covid 19 pandemic and she was happy to help the respondent out. She understood that having no guaranteed hours of work when the respondent business re-opened might mean she would not work the same hours as before, but was keen to return to work. She also thought it would not make a difference to her employment rights, particularly as the letter of 28 September 2020 made reference to her still being employed.

48. The claimant was equally clear in her evidence that under the zero-hours contract, she had the option not to accept the respondent's offer of any work, but did so because she and her two other colleagues wanted to get back up and running again.

49. In light of these facts, I found that there was no mutuality of obligation under the zero-hours contract because the respondent was not obliged to offer work to the claimant and the claimant was not obliged to accept and perform any work that was offered.

50. In reaching this view, I have also considered the working relationship between the parties. Whilst the Covid 19 pandemic restrictions in force after 1 November 2020 affected the re-opening of the respondent business, the claimant did undertake work offered by the respondent in August and

September 2021. However, I did not find that this 7 week period of work between November 2020 and January 2022 amounted to a regular pattern of work being established and undertaken by the claimant.

51. In applying the cases of **Nethermere, Carmichael and Autocleanz ("supra")** to these facts, I considered that the essential element of mutuality of obligation was therefore not present in order for a contract of employment to exist. Accordingly, I found that the zero-hours contract was a contract for services, not a contract of employment and that with effect from 1 November 2020, the claimant's employment status changed from an employee to a worker.

52. On the basis that from 1 November 2020 the claimant was a worker and not an employee, I have concluded that the claimant is not entitled to a redundancy payment or a notice payment.

53. Not-withstanding the above, whilst I do not underestimate the challenges faced by the respondent business as a result of the Covid 19 pandemic, I considered it understandable that the claimant was upset at the circumstances she finds herself in, given that she worked for the respondent for over 10 years and that it was apparent from her evidence she agreed to the zero-hours contract in good faith.

54. For all these reasons, the claims for a redundancy payment and notice pay fail.

Employment Judge: **R Sorrell**
Date of Judgement: **11 August 2022**
Entered in register: **11 August 2022**
and copied to parties