



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Shovlin

**Respondent:** Hallgarth Court Residents Ltd

**Heard at:** Newcastle

**On:** 1 November 2022

**Before:** Employment Judge Atkinson

## Representation

Claimant: In person

Respondent: Dr MacDonald, Director

**JUDGMENT** having been sent to the parties on 22 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. By a claim form dated 25 June 2022 the claimant complained of unfair dismissal, breach of contract, a failure to pay redundancy pay and unauthorised deductions from wages. She maintained that she had been employed by the respondent from 1 May 2014 until her dismissal on 30 March 2022 and that she had been unfairly dismissed and was not paid notice pay, redundancy pay or holiday pay, all of which she believed due to her.
2. By a response form of 2 August 2022 the respondent resisted the complaints. The respondent's case was that the claimant had never been a company employee and so was not entitled to make any complaints to the Tribunal.
3. At the outset of the hearing an issue arose regarding the non-attendance of one of the claimant's witnesses, Mr Kay. The claimant had served a witness statement from him, but had not arranged for him to attend the hearing. The claimant told me that she did not realise his attendance was required. The claimant indicated that she wished the hearing to proceed without the Tribunal taking account of Mr Kay's evidence.

## Issues

4. The issues to be determined by the Tribunal were agreed at the outset of the hearing as follows:
  - a. Was the claimant an employee or worker of the respondent?
  - b. If the claimant was an employee, was her dismissal on 30 March 2022 fair or unfair under section 98 of the Employment Rights Act 1996?
  - c. If the claimant was an employee, had the respondent breached her contract of employment by failing to pay notice pay?
  - d. If the claimant was an employee, was she dismissed by reason of redundancy?
  - e. If the claimant was an employee or worker, had the respondent failed to pay her in lieu of untaken holidays at the point of her dismissal?

### **Evidence**

5. I heard evidence from the claimant in person. On behalf of the respondent I heard from two company directors, Dr MacDonald and Mr Dodds. The parties provided a joint, paginated, bundle of documents.
6. At the hearing the claimant gave evidence on her own behalf. The respondent was represented by a company director, Dr MacDonald, who also gave evidence along with another company director, Mr Dodds.

### **Relevant Legal Framework**

7. The definitions of “employee” and “worker” are provided in section 230 of the Employment Rights Act 1996 (ERA):
  - (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” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where 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;

and any reference to a worker's contract shall be construed accordingly.”

8. A contract of service is not further defined by statute. This issue has been the subject of a number of cases in the courts. In ***Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance* [1968] 1 All ER 433** it was held that:

“A contract of service exists if these three conditions are fulfilled. (i) 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. (ii) 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. (iii) The other provisions of the contract are consistent with its being a contract of service.”

9. This decision was approved by the Supreme Court in ***Autoclenz Ltd v Belcher* [2011] UKSC 41** where Lord Clarke described this as “the classic description of a contract of employment.” Lord Clarke went on to confirm this includes that an irreducible minimum of obligation on each side to create a contract of service.

10. In ***Hall (Inspector of Taxes) v Lorimer* [1994] 1 All ER 250** the Court of Appeal warned that a checklist approach should not be taken in relation to this issue. Not all details are of equal weight and an evaluation of the position can only be obtained by taking an overall effect of all the relevant factors.

11. Section 94 of the ERA provides employees with the right not to be unfairly dismissed.

12. Section 98 states that for the purposes of determining whether a dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and that it is either for a reason in subsection (2) or for “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

13. The reasons in subsection (2) are:

- (a) the capability or qualifications of the employee;
- (b) the conduct of the employee;
- (c) the employee was redundant, or
- (d) the employees continued employment would be in breach of a restriction or duty imposed by law.

14. Section 139 of the ERA defines redundancy as being where an employee is dismissed wholly or mainly due to either, the employer ceasing or intending to cease carrying on the business for which the employee was employed or at the place where the employee was employed, or the fact the requirements of the business for employees to carry out the kind of work of a particular kind have diminished or ceased.

15. Section 13 of the ERA provides that an employer may not make unauthorised deductions from a worker's wages.
16. Regulations 13 and 13A of the Working Time Regulations 1998 provide the entitlement of workers to holiday pay. Regulation 13 entitles a worker to four weeks annual leave in each leave year, whilst regulation 13A entitles a worker to a further 1.6 weeks annual leave in each leave year.

### **Findings of Fact**

17. There was no dispute as to a significant number of the facts in the case. The respondent is a company established by the residents of a block of twelve apartments known as Hallgarth Court. The purpose of the company is to manage the building. The owners of the company are all residents of Hallgarth Court, as are the directors.
18. On 1 May 2014 the respondent, via then director Mr Kay, engaged the services of the claimant as a cleaner. Her role was to clean the communal areas of the building. Mr Kay is the claimant's father. He is no longer a company director, but remains the company secretary.
19. The claimant was to carry out 2.5 hours cleaning each week. She was paid the sum of £150 per calendar month.
20. The respondent kept no record of the claimant's attendance. There was no requirement that her work was carried out on any specific day or at any specific times. There was no specific set of tasks the claimant was required to undertake. This was something the respondent considered did not consider establishing until after the claimant was dismissed and a new cleaner appointed. The claimant was free to carry out no work in one week and simply perform two weeks' worth of cleaning the following week. The claimant never requested to take paid annual leave.
21. Whilst the respondent provided cleaning equipment and materials to the claimant, when she was dismissed, the claimant treated these items as her own, disposing of mops and a bucket, and initially taking a vacuum cleaner, before delivering it Mr Kay at a later date.
22. Early in 2022 the respondent's directors decided they were not happy with the standard of the cleaning carried out by the claimant and felt they may obtain better value for money with another cleaning provider. The directors therefore decided to dismiss the claimant. Dr MacDonald sent a letter to the claimant, dated 8 March 2022, setting out that the company directors had reviewed the respondent's current and future cleaning requirements and concluded that "we no longer require your services."
23. The claimant ceased work on 30 March 2022. She was paid for all work undertaken, plus an additional £150 which the respondent's directors considered to be a gesture of goodwill.

24. The respondent's directors, taking the view that the claimant was not an employee, did not believe the claimant was entitled to paid holidays and therefore no payment in lieu of untaken holiday was made. Likewise no redundancy payment was considered.

## **Submissions**

25. At the conclusion of the evidence each party made an oral submission.
26. The claimant submitted that all the requirements of a contract of employment were present, she had been employed and that her dismissal was unfair within the meaning of section 98 of the ERA.
27. The respondent submitted that there was no contract of employment and so the claimant was not entitled to make any of the complaints before the tribunal.

## **Analysis and conclusions**

28. The first matter I have to decide is whether the claimant was an employee. If she was not, she is not entitled to bring a claim for unfair dismissal, redundancy pay, or breach of contract.
29. The nature of the agreement between the respondent and the claimant was a contract. The claimant agreed to provide cleaning services and the respondent agreed to pay her for them. The fact that she was initially engaged by her father, acting as a then director of the respondent, is not such that it suggests a lack of intent to create legal relations.
30. Whether or not this contract was a contract of employment, however, requires further consideration. There was no evidence that the claimant had any right of substitution, there was a requirement of personal performance. That is to say that she had to provide the cleaning services herself, she could not send someone else on her behalf. The contract was required claimant was to provide 2.5 hours cleaning each week.
31. The respondent was therefore required to provide work for the claimant and she was required to undertake it. Whilst the claimant did on occasions not provide cleaning in some weeks, she made up her hours in the subsequent weeks (to allow her to take holidays). I am satisfied that this amounts to a mutuality of obligation, despite the degree of flexibility in the way in which the claimant completed her work.
32. The respondent, however, had little control over the way in which the claimant conducted her work. As set out in my findings of fact, there was no record of attendance, no specific tasks to be undertaken beyond general cleaning, and the respondent's directors were unaware that on occasions the claimant did not attend in some weeks in order to take holidays. The respondent's directors believed the claimant was self-employed and they treated her accordingly. Whilst the directors' beliefs are not conclusive, this is a relevant factor to be taken into account.

33. The lack of control in the contract between the claimant and the respondent is not in keeping with a contract of employment and I conclude the claimant was not an employee. The claims for unfair dismissal, redundancy pay, and breach of contract are therefore not well-founded and are dismissed.
34. The entitlement to holiday pay, however, does not require the claimant to have been an employee. Holiday pay must be paid to workers.
35. The relationship between the parties was not one of client or customer of a profession of undertaking carried on by the claimant. The claimant did not act as a cleaner for others for payment. She was engaged by the respondent after initially remarking that she enjoyed cleaning and was personally known to some of the residents and directors of Hallgarth Court.
36. The claimant was a worker and so entitled to holiday pay. The claimant took no paid holiday whilst working for the respondent. There is, however, no statutory entitlement to carry forward holiday pay. Nor was there any express contractual provision regarding this. This is not a case where the respondent has refused to allow a worker to take holidays (in which case carrying forward of leave may be permissible), but rather a situation where the claimant did not request holidays. It follows that her entitlement is confined to the leave year in which the claimant's contract with the respondent was terminated.
37. The claimant began working for the respondent on 1 May 2014. Her last leave year ran from 1 May 2021 until 30 March 2022. That is 10 months. The claimant is entitled to 5.6 weeks holidays per year. She was therefore entitled to 4.7 weeks leave in the year until her dismissal. The claimant earned £34.62 per week and so I order the respondent to pay to her £162.71.

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Employment Judge Atkinson

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Date 4 January 2023