EMPLOYMENT TRIBUNALS

Claimant: Miss Caitlin Brine

Respondents: Ontos Limited (1)
Mrs Anneke Edmonds (2)

Heard on: 16 December 2022 by Cloud Video Platform

Before: Employment Judge Saward (sitting alone)

Representation
Claimant: Mr Gareth Brine (claimant's father)
Respondents: Dr Andrew Edmonds (second respondent's husband)

RESERVED JUDGMENT

1. The claimant's application to strike out the respondents' response is refused.

2. The claimant was not an employee or worker of either respondent within the definition of section 230 of the Employment Rights Act 1996. The claims are dismissed.

REASONS

Claims and Issues

1. By a claim form presented on 18 October 2021 the claimant complained of unfair dismissal, failure to pay the National Minimum Wage, breach of contract, unauthorised deductions from wages, failure to provide a written itemised pay statement, failure to provide a written statement of employment particulars, and failure for her to take or to be paid for her statutory annual leave entitlement.

2. The claim was brought against Ontos Limited, the first respondent. At an open preliminary hearing on 30 August 2022, the Tribunal exercised its discretion to add Mrs Anneke Edmonds as a respondent (the second respondent).

3. The claims are resisted on the basis that the claimant was never an employee of either respondent, she was self-employed working freelance.

4. The issue before this open preliminary hearing conducted on 16 December 2022 was whether the claimant was an employee and/or worker of either respondent within the meaning of section 230 of the Employment Rights Act 1996 (ERA).

Preliminary matters

5. Before hearing any evidence there were preliminary matters requiring resolution.

Application for postponement

6. The respondents sought a postponement of the hearing on the basis that they wished to call Mrs Ann Hall as a witness, but she was too ill to attend. The respondents consider Mrs Hall to be the only objective person who saw and heard everything and could give evidence as to what occurred between the parties and was also aware of their work practices.

7. The respondents stated that the application for postponement had been made to the Tribunal on 17 November 2022. This had not been sent to the claimant and was not in the bundle of documents before me. However, the bundle contained a letter from Mrs Hall explaining her circumstances, which was sent to the Tribunal on 11 December 2022.

8. It was anticipated that it would be at least 3 months and probably longer before Mrs Hall would be able to attend a hearing.

9. The claimant opposed the application to postpone because (i) there was no indication until the day before that Mrs Hall was to be a witness (ii) the claimant had not been informed of the request to postpone, and (iii) it was reflective of a pattern of behaviour that was detrimental to the claimant.

10. The Tribunal has jurisdiction to make case management orders under Rule 29 of the Employment Tribunals Rules of Procedure 2013 (the 2013 Rules) and this extends to postponing proceedings under Rule 30A. This requires an application for postponement to be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

11. The application was considered in light of the overriding objective in Rule 2 of the 2013 Rules to enable the Tribunal to deal with cases fairly and justly. This includes dealing with cases proportionately and avoiding delay, so far as compatible with the proper consideration of the issues.

12. I refused the application to postpone. The issue before the Tribunal was to decide the employment status of the claimant. I was not satisfied that Mrs Edmonds' evidence was necessary to decide that question. The persons most able to answer questions regarding the relationship between the parties was Miss Brine and Mrs Edmonds, both of whom were present.

13. It was unclear when Mrs Hall might be available to attend but appeared unlikely to be for 3 months at the very least. It would not be proportionate to delay the proceedings given the likely contribution that Mrs Hall could make to the issue before the open preliminary hearing.

Application for strike out

14. The claimant made a written application to the Tribunal on 2 November 2022 to strike out the respondents' response. The application was renewed on 2 December 2022. By Order of 15 December 2022, the Tribunal directed that the Judge would consider whether the substantive preliminary issue of employment status could be determined on 16 December 2022 at the start of the preliminary hearing. In the event that the hearing did not proceed, then the Judge may consider whether to strike out the respondents' response in its entirety or on the issue of employment status only.

15. Before considering the application for strike out, I established that bundles for both sides had been submitted. Whilst the respondents' bundle was only filed the afternoon before, it was forwarded to me early on during the course of the hearing. Both representatives confirmed that the documentary material on which they sought to rely on the issue of employment status had been placed before the Tribunal. Having received this assurance, I was content that the Tribunal had the information required to proceed, bearing in mind also that the parties were present to give oral evidence.

16. The application was made under Rule 37 of the 2013 Rules on the grounds:-

    (i) that the manner in which the proceedings had been conducted by or on behalf of the respondents had been unreasonable (Rule 37(a));
    (ii) non-compliance with case management orders of the Tribunal (Rule 37(c)); and
    (iii) that the response had not been actively pursued.

17. The application had also been made on ground (e) of Rule 37 that it was no longer possible to have a fair hearing of the claim. This was withdrawn at the hearing.

18. The claimant's reasons for the application were given in writing. Those reasons referred to how the dates and actions in preparation for this second preliminary hearing were discussed in some detail during the preliminary hearing on 30 August 2022. Both parties were in full agreement and had agreed what was required and by whom. No attempt had been made by the respondents to engage in meaningful dialogue or share documents for the agreed bundle. The claimant had sent an indexed and paginated pdf document to the second respondent and offered to extend the period for submission but received no response.

19. No documents had been sent by the respondent in compliance with the case management orders of 30 August 2022. The claimant considers that there has been a pattern of unreasonable conduct and behaviour by the second respondent throughout.

20. An oral response was given. The respondents maintain that the documents sent to them by the claimant were not in the correct format. The second

respondent's husband had been unwell at the end of October/early November and incapable of dealing with matters. The respondent's husband had continually contacted Watford Employment Tribunal to find out what he should do after applying for a postponement. He had apparently been told not to reply until a response had been given to 'the application for a delay'.

21. I decided that the claimant's application for strike out should be refused. The overriding objective in Rule 2 of the 2013 Rules is to enable the Tribunal to deal with cases fairly and justly.

22. I have serious and significant concerns over the respondents disregard of the Tribunal's case management orders of 30 August 2022. They were not requests but directions which should have been adhered to. There was a failure to agree with the claimant a file of documents by 14 October 2022, exchange witness statements by 11 November 2022 and to file an electronic bundle with the Tribunal by 9 December 2022. There is no information before me of the Tribunal agreeing to waive the case management orders.

23. However, the key question for the Tribunal was whether a fair hearing was still possible. Albeit extremely late, the bundles had now been received which the claimant had had opportunity to read.

24. In the circumstances, a fair hearing could still be achieved, and on balance, the weight of prejudice falls in the respondents' favour to be heard.

Procedure, documents and evidence heard

25. The claimant was represented by her father, Mr Brine. The respondents were represented by the second respondent's husband, Dr Edmonds. Both Miss Brine and Mrs Edmonds gave evidence under sworn affirmation.

26. The Tribunal had been provided with a zip file containing a claimant's folder of 33 indexed documents and a respondents' folder with one document of some 44 pages, a document titled 'entities in evidence', details of laptop purchase, letter from Mrs Halls and witness statement from Sean Cruise.

Findings of fact

27. Mrs Edmonds is the sole director of Ontos Limited, the first respondent. It is shown at Companies House as an 'active' company. Mrs Edmonds produced a balance sheet filed at Companies House to show that the company accounts were dormant as of 31 May 2021.

28. It was the evidence of Miss Brine that when she brought her claim she thought that Ontos Limited was her employer. She now believes that Mrs Edmonds was her employer.

29. Miss Brine and Mrs Edmonds met in January 2020 at Falmouth University where Mrs Edmonds was a senior lecturer and Miss Brine had a temporary placement as a project co-ordinator for Falmouth University Launchpad. They kept in touch after Miss Brine's temporary position ended. It is agreed that they had become friends with shared interests, including sewing.

30. In email exchanges on 17 June 2020, Miss Brine stated that she was "*very much on the job hunt*" and that she was "*applying to more of less everything at the moment, just so that I can secure an income whilst I search for the 'right' job.*" Mrs Edmonds responded that she was undertaking consultancy work with "*a StartUp*" and that she had "*started a tech company*". Mrs Edmonds went on to say that "*I had thought of asking you to help with a project, but wasn't sure of your availability or your fee*."

31. A further email from Mrs Edmonds to Miss Brine on 17 June 2020 said: "*I could possibly do with some help on market research, or maybe organising/project management on one of my projects. Can you send me your CV, and then we can set up a call to see if there is something we can work together. How does that sound?*" In a reply on the same day, Miss Brine said: "*That sounds wonderful*" and attached her CV.

32. A discussion took place between the pair via a communication platform on or around 18 June 2020 where Mrs Edmonds told Miss Brine her ideas for a start-up business called "StitchArt".

33. Miss Brine emailed Mrs Edmonds on 22 June 2020 saying, "*I'd absolutely love to work with you*…" and suggesting a catch up the following day. There followed further discussions. Then on 24 June 2020, Mrs Edmonds asked Miss Brine signed a 'non-disclosure agreement' (NDA) with Ontos Limited with regard to its 'proprietary information'. In the covering email Mrs Edmonds refers to the NDA as "*Just a standard document that I use with all parties I work with. We also briefly discussed the option of work between 2 days (15 hours approx) or 20 hours a week, whichever works best for you. Happy to review this in 3 months, or sooner if you find you have an opportunity of permanent employment that you're considering taking up which would impact on our arrangement. So that's what is in my head currently, but feel free to come back to me with your thoughts*."

34. When returning the NDA on 25 June 2020, Miss Brine said: "*With regards to working hours, I was hoping to run the potential of 2 full days plus some time scattered throughout the week to both meet the 20 hour ideal and allow for me to pick up part time work as needed alongside this. My line of thinking was perhaps one weekday and one weekend day dedicated to this, and the remaining hours split across days during the week (likely in the afternoon/evening)? Let me know your thoughts and if there are alternatives that would work better for you."*

35. This all culminated in Miss Brine starting work with Mrs Edmonds on 29 June 2020. There was no written agreement setting out the basis of the relationship or any terms and conditions.

36. It is undisputed that the arrangement agreed upon was initially for 15 hours per week, half of which was paid at £10 per hour and the remainder was unpaid in exchange for mentoring and training. From 27 July 2020, the hours increased to 20 hours per week with half paid at the same rate and half

unpaid as before. With effect from 22 November 2020, the hours increased again to 30 hours per week under the same arrangement.

37. Whilst it was the evidence of Miss Brine that Mrs Edmonds was unhappy about the claimant taking on other roles, both acknowledge that the claimant was free to work elsewhere. Indeed, in June 2021 the claimant was offered and accepted remote work for 3-4 months doing her old job at Falmouth University Launchpad. The claimant informed Mrs Edmonds by email that the offer was on a part-time basis and "*for me to work around my job with you…*". The claimant began work at Falmouth University on 18 June 2021. At that same time, and at the claimant's request, it was agreed with Mrs Edmonds that the claimant would work a core of 15 hours per week and to remove the element of mentoring and training.

38. Miss Brine maintains that she agreed to be available for a fixed number of hours per week. The respondents say that the claimant could invoice up to the agreed number of hours. Whatever the precise terms, the claimant did invoice for the agreed maximum number of hours. Mrs Edmonds was keen to ensure that her budget was not exceeded. It strikes me as most likely from the email exchanges that there was a commitment to provide the specified number of hours of work.

39. The claimant had no formally defined job role or title. There was no agreement over her working hours. The claimant worked irregular hours, often in the evenings particularly when Mrs Edmonds was in Florida and unable to return to the UK during national lockdown. Meetings between the pair regularly took place over a computer platform at a mutually agreed time.

40. Miss Brine worked on a variety of projects. This included work for Mrs Edmonds personally in her PhD research, her work for the University of Bedfordshire and administrative tasks for Dr Edmonds' company as well as Ontos Limited along with helping to develop the StitchArt start-up company. The claimant was able to choose when she worked, how she did tasks and how long to take. There were no fixed work days and the days of the week that she worked varied.

41. A signed but undated witness statement from Sean Cruise describes working as a volunteer on a project led by Mrs Edmonds in the summer of 2021. While volunteering Mr Cruise says he met Miss Brine who was doing some administrative tasks. He states that they both had the option to choose the projects and tasks they worked on, essentially setting their own schedules. Given that Miss Brine was not a 'volunteer', and the nature of their roles was not the same, comparisons cannot be readily drawn. Moreover, as an unsworn and untested statement, it carries limited weight only.

42. The claimant's assertion that she acted as line manager, in effect, to two 'interns' was quite vague and there is no supporting evidence that she was given management responsibilities.

43. It was the understanding of both parties that Miss Brine would undertake tasks personally and would not delegate. There were no arrangements over holidays, sick pay or the deduction of National Insurance contributions. At all times, the claimant worked from home. There was no discussion over any probationary period, termination arrangements, disciplinary procedures or pension.

44. An end date was never discussed. The claimant hoped that the arrangement would be long term if projects were successful. The claimant received three sessions of training from the respondent involving a presentation followed by tasks to complete in the session for the claimant to then apply that learning to the StitchArt project.

45. Originally Miss Brine used her own computer. Dr Edmonds then provided the claimant with a second-hand laptop. The claimant says it was provided in order to do work for the respondents. The respondents say it was a gift from Dr Edmonds because the claimant's own device was slow. The claimant continued to use her own internet connection and additional computer screen. The claimant returned the laptop to Dr Edmonds using tracked parcel post on 24 August 2021.

46. The claimant was paid when she raised an invoice. The invoices were individually numbered and sent by email to Mrs Edmonds. Payment was due the day after invoice. Of a total of 12 invoices, 3 were paid by PayPal, 3 were paid direct by Mrs Edmonds and 3 were paid by her husband's company. The claimant was given a 'Christmas bonus' of £100 by Dr Edmonds' company.

47. A dispute arose between the parties over the amount invoiced for June and July 2021. The claimant chased up payment on 18 August 2021.

48. On 19 August 2021, all access to Ontos Limited email and IT packages was removed from Miss Brine.

49. On the claimant's LinkedIn profile from August 2021, she described herself as "Supporting StartUps". The claimant gave her experience as a freelance Coordinator with Ontos Ltd from June 2020 – August 2021 and full-time Programme Coordinator with Falmouth Launchpad between June 2021 to present.

50. From July 2020 the claimant was advertising and selling handmade facemasks online under the trading name of 'MOOKI'. During the relevant period, the claimant had also applied unsuccessfully to also work part-time for a tailers and contemplated working in a coffee shop.

51. Having completed an online questionnaire with HMRC, it suggested that the claimant was employed for tax purposes. This result was suggested and only based upon the answers given. It is not determinative.

Relevant law – employment status of the claimant

52. Sections 230(1) and 230(2) of the ERA define 'employee' and 'contract of employment'. Section 230(3) defines 'worker':

> (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 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 busine ss undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

53. The term 'employee' is not precisely defined in the ERA. The test for determining employee status is objective. The Tribunal must consider all terms to determine whether there is a contract of employment. Case authorities identify important considerations for the Tribunal to take into account to determine if the terms achieve the irreducible minimum of a contract of employment. These include control, mutuality of obligation and personal service. It is not an exhaustive list and there is no precise definition of these phrases.

54. Case law is emphatic that their meaning depends on the circumstances of the case. No one factor or combination is determinative. However, to achieve the irreducible minimum both control and mutuality of obligations must be found. The Tribunal should consider the cumulative effect of contractual terms, the reality of how they operate in practice in all the circumstances of the relationship between the parties.

Conclusions

55. The claimant was interested in becoming an entrepreneur and establishing her own business/es. It is evident from the content of email exchanges that she considered Mrs Edmonds to be an expert in the field of start-ups to whom she looked up to. The claimant was unemployed at the time the arrangement began in June 2020. The arrangement offered an opportunity to earn some income whilst also developing her skills to assist her in the job market. As both Mrs Edmonds and Miss Brine had become friends, they apparently saw no need to discuss the details or formalise the basis of their working relationship.

56. The boundaries further became blurred as the claimant undertook a mix of roles both for Mrs Edmonds personally as well as assisting in the development of her commercial enterprises and tasks for the two different companies established by Mrs and Dr Edmonds.

57. Although hours per week were briefly discussed by email, there are no written terms and conditions of a contract between the claimant and either respondent placed before the Tribunal. There is no evidence of a contract between the claimant and Ontos Limited. Miss Brine and Mrs Edmonds had agreed that the claimant was to undertake functions in return for remuneration in part. The amount and means of securing payment were agreed and how many hours would be paid per week. An oral contract was entered into between the claimant and Mrs Edmonds.

58. Mrs Edmonds has often undertaken freelance work and thought that was the basis on which they were proceeding. The claimant was young and lacked work experience and did not question how things would work. Nevertheless, she had held a part-time job before and shortly after starting this arrangement, had established a separate source of income selling facemasks as a business activity.

59. There is no exhaustive list to establish if there is a contract of service and a checklist approach should not be taken.

60. There is consensus that there was an implied obligation of personal performance by the claimant. There was also mutuality of obligation i.e., to pay at the agreed rate for half the hours worked each week limited to the fixed agreed number. The question turns to the issue of control which includes the power of deciding the thing to be done, the way, the means, the time and place. The significance of control is that it determines whether, where a contract is in place, it can properly be classified as a contract of service rather than some other kind of contract.

61. In this instance, the claimant had a high level of freedom and choice when to work (which days and hours per day) and how and which tasks were undertaken, time taken and the level of priority. The claimant reported and discussed progress with Mrs Edmonds from time to time. Miss Brine was a home worker. It was not prescribed from where she must work. Whether there was, to a sufficient degree, a contractual right of control over Miss Brine is difficult to tell when so much was left unsaid, or at least unrecorded, between the parties.

62. It is necessary to look at all the factors and not just issues of mutuality, personal service and control.

63. Clearly, a person could have more than one part-time job and be an employee in each. Therefore, I do not find it material that the claimant was seeking other work. That said, the flexibility in working hours was deliberate in order to allow the claimant to take on other roles, such as the claimant's part-time position at the University. This arrangement is more suggestive of a contract for services than a contract of employment.

64. There are other factors, which although not conclusive, point towards this being a contract for services. Notably, the claimant invoiced the second respondent in order to obtain payment. She was paid upon demand rather than Mrs Edmonds taking responsibility for the payment of wages. The claimant was responsible for her own National Insurance contributions and income tax, if arising. The claimant plainly viewed herself as 'freelance' in setting her work profile on an online employment related platform. The term is commonly used to denote a self-employed person.

65. Signing an NDA may be more typical in business relations but could be entered in any scenario where access may be gained to confidential or commercially sensitive information. In this instance, the agreement was made with the first respondent with whom there was no other contract and thus there was reason to require the document irrespective of the relationship between Miss Brine and Mrs Edmonds.

66. The claimant was provided with a laptop computer to undertake her work but not at the outset. There was no provision for holiday pay, time off or notice provisions. There is no supporting evidence that the claimant was given line management responsibilities for the two interns.

67. All things considered and looking at the circumstances in their totality, I conclude that there was not a contract of employment between Mrs Edmonds and Miss Brine. Thus, Miss Brine was not an employee.

68. Whilst an employee is also a worker, not all workers are employees. Workers benefit from rights including protection from unlawful deduction of wages, entitlement to the national minimum wage and paid annual leave. For worker status, there does not need to be a contract of employment if the second limb at section 230(3)(b) is met. However, I am not satisfied that the definition is met on the evidence before me. It leads me to conclude that it was more likely that the claimant took on the role with Mrs Edmonds as a client to whom services were provided. That is consistent with the billing arrangement, flexible working pattern, freedom to take on multiple jobs and the claimant's own description of 'freelance'.

69. I find that Miss Brine was self-employed. She was not 'a worker' for the purposes of the legislation. Accordingly, the claim must be dismissed.

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Employment Judge Saward

Date 21 December 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 January 2023

FOR THE TRIBUNAL OFFICE