

EMPLOYMENT TRIBUNALS

BETWEEN

MRS LAURA BEESON

Claimant

AND

ENVY BRIXHAM LIMITED

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD at Southampton by VHS

ON

3rd November 2022

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: Mr Brian Bishop (the claimant's father)

For the Respondent: Mr Peter Maratos of Peninsula

JUDGMENT

The judgment of the tribunal is that the claimant is not an employee or worker of the respondent and so the claimant's claims are all dismissed

REASONS

1. This is the judgment following a hearing to determine the employment status of the claimant as a preliminary issue. In this case the claimant Mrs Beeson has brought claims alleging breach of contract, unlawful deduction from wages, and for accrued but unpaid holiday pay and statutory sick pay. She has also claimed that she has not been provided with particulars of her employment. The claims are all denied by the respondent who alleges that the claimant was in partnership with Mrs Neeley McPhail and so was not employed by the respondent. This tribunal's jurisdiction to hear these various claims turns on the claimant's employment status.

2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by VHS. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 167 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant and from Mr Brian Bishop, the claimant's father, who acted as her representative. I have also heard from Mr Peter Maratos on behalf of the respondent and from Mrs Neeley McPhail, the owner and sole director of the respondent, on its behalf. Mrs McPhail also provided a witness statement. Further witness statements were also received from Paula Eggins, Anne Kelly and Lindsey Bentley on behalf of the respondent; these were all unsigned and the Tribunal was not able to hear from them in the time available, meaning that less weight has been placed on those statements.
4. The proceedings were adjourned early as the claimant became unwell. However, I subsequently determined, after receiving representations from the parties, that I had heard sufficient evidence in order to make a determination and it would not be in the interests of justice or the overriding objective to resume. Both parties have been able to submit written closing submissions, the last being an email from the claimant's representative on 19th December 2022.
5. I have considered all the evidence provided, including the submissions received after the hearing was adjourned.
6. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

7. The claimant is an experienced hair stylist.
8. The respondent operates a hair salon in Brixham, Devon. The company was set up in November 2021 by Mrs McPhail and took a lease of its premises in January 2022, opening for trade on or around 25th January 2022. The salon traded under the name Envy Brixham.
9. The business was set up jointly by the claimant and Mrs McPhail who were friends at the time. I find that they intended this to be a partnership between them. However, there was no written agreement as to the terms or the existence of the partnership.
10. Both the claimant and Mrs McPhail worked together to establish the salon, including in relation to the premises, the branding and the products. The claimant was also involved in establishing the social media profile for the business. The intention was that Mrs McPhail would run the business with the claimant acting as a senior stylist.

11. The business employed various other stylists and they were treated in a different way to the claimant, receiving wages and acting as employees. The claimant was treated by them in a different way, as one of the owners, on a par with Mrs McPhail. There was no form of employment contract for the claimant.
12. The claimant had experienced some difficulties in her personal life and so did not have access to funds to invest into the business; these costs were therefore all met by Mrs McPhail, either through loans or her own resources. She also controlled the finances, including the business bank account. I find that there was an expectation that the claimant would contribute in due course, either through in kind contributions by working or by adjustment of payments out.
13. The claimant did not receive any wages, with one exception – on 9th April £200 was transferred to her, which was characterised as “wages”. I accept this was simply a shorthand description of the payment rather necessarily actual wages. It is also clear that the claimant and Mrs McPhail talked about dividends being paid from the business in due course and the fact that the cashflow was currently insufficient to support this.
14. The respondent itself is a limited liability company established by Mrs McPhail. The claimant had no interest in that company, either as shareholder or a director. I find that she had an expectation she would be a director. When raised with Mrs McPhail, she stated that the claimant would be added as a director once she had contributed her share of the partnership capital, possibly over a period of four years.
15. It is clear that relations between Mrs McPhail and the claimant deteriorated quickly. Various allegations of wrongdoing were directed by both parties at the other but it is not necessary for this Tribunal to determine the veracity of these accusations. I do however find that trust between the two became undermined by various perceived actions by the other and in particular that Mrs McPhail was increasingly concerned with money being spent by the claimant without a financial contribution from her.
16. Matters came to a head in April 2022, when it is asserted that Mrs McPhail's husband told the claimant's husband that the claimant was an employee and that if she wanted to be a partner, she would need to invest £10,000. This was the first suggestion received by the claimant that she was an employee and she challenged Mrs McPhail on this the next day. I find that Mrs McPhail denied that the claimant was an employee. Whilst it is evident that she was questioning the partnership that she had established with the claimant, there is no evidence of any steps being taken to end that partnership or to move the claimant to a different status. By the same token, there is no evidence of the claimant ending the partnership until she left the business.
17. The assertions in relation to the claimant's status led to a breakdown of relations between her and Mrs McPhail. The claimant left the business in May 2022.
18. On 28th April 2022, the claimant asked Mrs McPhail to confirm the relationship between them and whether she was a partner or an employee. Despite chasing on 13th May 2022, Mrs McPhail never responded either way. I do not find that

the lack of a response is evidence either way of the claimant's status, just more evidence of the total breakdown of relations between them.

Law

19. Having established the above facts, I now apply the law.
20. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. Under section 230(3) of the Act a 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 business undertaking carried on by the individual. (A worker who satisfies this test in sub-paragraph (b) is sometimes referred to as a "limb (b) worker").
21. Under section 13 (1) of the Act the right not to suffer an unlawful deduction from wages applies to workers, and not just employees.
22. This tribunal has jurisdiction to hear breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). This jurisdiction is subject to certain preconditions, including that in paragraph 3 (c) of the Order, namely that the claim arises or is outstanding on the termination of the employee's employment. Accordingly the right to bring a breach of contract claim before this tribunal is limited to employees.
23. The claimant's claim for accrued but unpaid holiday pay is brought under regulation 14 of the Working Time Regulations 1998 ("the Regulations"). The Regulations apply to workers, rather than just employees. The definition of "worker" for the purposes of the Regulations effectively replicates the definition under section 230(3) of the Act.
24. I have considered the following cases to which I have been referred: Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA and [2011] UKSC 41; Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Pimlico Plumbers Ltd & anor v Smith [2017] EWCA Civ 51; Aslam Farrar & Others v Uber BV and Others 2202550/2015; Addison Lee Ltd v Lange and Others UKEAT/0037/18/BA; Nethermere (St Neots) Limited v Gardiner [1984] ICR 612; Express and Echo Publications Ltd v Tanton [1999] IRLR 367.
25. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz in the Supreme Court: "18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "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 ... Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". 19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must ... be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."

26. The Supreme Court has upheld the Court of Appeal in the Autoclenz decision, and the approach to be adopted where there is a dispute (as in this case) as to an individual's status. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?
27. I adopt and apply this test in that order. First, as to the terms of the contract, these are set out in the findings of fact above. The contractual terms or factors which point to employment status are as follows:
 - a. the lack of financial investment by the claimant in the business of the respondent
 - b. the lack of shares or director status of the claimant in the respondent
 - c. the lack of signing authority on the business' bank accounts
 - d. the payment to the claimant that was identified as wages
 - e. the comment by Mrs McPhail's husband to the claimant's husband that she was an employee
28. The contractual terms or factors which point to status as a partner are these:
 - a. the clear intention to establish a partnership
 - b. the working together to establish the business
 - c. the views of employees that the claimant was one of the owners
 - d. the separate status of employees within the business

- e. the lack of any employment or service contract
 - f. the promises of involvement in the ownership and management of the respondent
 - g. the express verbal statements by Mrs McPhail that she viewed the claimant as a business partner
 - h. the express verbal statements by the claimant that she viewed herself as a business partner
 - i. the intention to be remunerated from a share of the profits and the lack of a wage initially
29. The contractual terms or factors which point to self-employed status as an independent contractor on the other hand are these:
- a. the lack of an employment contract
 - b. the ability for the claimant to come and go as she wanted
 - c. the lack of fixed working hours
 - d. the lack of a wage
30. Looking at these three overall, there would appear to be no contract between the claimant and the respondent, instead an arrangement between Mrs McPhail and the claimant to establish a business together for mutual profit.
31. As to the second limb of the Autoclenz test, I find that the claimant was not contractually obliged to the respondent to carry out services personally. There was no "irreducible minimum" of employment status. As there was no contract between the claimant and the respondent, the latter could not require the claimant to provide any services. As a perceived owner of the business, the claimant could work as little or as much as she wanted. Employees of the business could perform beauty related roles if asked to do so by the claimant or Mrs McPhail. There was an unqualified right to appoint a deputy at her own expense, even though the claimant had not chosen to do so. On balance I find that there was no "irreducible minimum": there was no mutuality of obligation; no requirement for personal service; insufficient direct control; and other factors inconsistent with a contract of service.
32. As to the third and fourth limbs of the Autoclenz test, I find that the claimant did not carry out services personally for the respondent either in the capacity of client or customer. Turning finally to the "limb (b) worker" definition I have considered carefully whether under section 230(b) the claimant meets the wider definition of "worker" and have concluded that she does not.
33. Other legal principles are relevant in this case. First, in the absence of a contract, there clearly can be no employment relationship. A contract can only be implied where it is necessary to do so, see James v Greenwich London Borough Council. Where the inference is that the parties would have acted in exactly the same way if there had been no contract, and this will be fatal to the implication of a contract, see Tilson v Astom Transport. In addition, a volunteer is not an employee where there is the absence of consideration moving from the recipient of the volunteer's services. Where there is no obligation on that party to make payment, and in the absence of any payment, then there will be no consideration, and no contract, see Melhuish v Redbridge Citizens' Advice Bureau.

Decision

34. In conclusion therefore the claimant was not an employee or a worker but was in partnership with Mrs McPhail with the intent of establishing the business carried out by the respondent.
35. As the claimant was neither an employee or a worker, this tribunal does not have jurisdiction to determine the terms of that partnership or disputes in relation to them. Similarly, it does not have the jurisdiction to determine any claims for breach of contract or in relation to holiday pay. Any claims in relation to the partnership between the claimant and Mrs McPhail are for a different court.
36. As a result, all claims by the claimant are dismissed.
37. For the purposes of rule 30(6) of the Employment Tribunals Rules of Procedure, the issues which the tribunal identified as being relevant to the claim are at paragraph 1; all of these issues were determined; the findings of fact relevant to these issues are at paragraphs 7 to 18; a concise statement of the applicable law is at paragraphs 19 to 26; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 27 to 36; and no compensation was awarded.

Employment Judge H Lumby
Dated 8 January 2023