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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103350/2022

Preliminary Hearing held in Edinburgh on 18 to 20 April 2023

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Employment Judge R Mackay

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Ms J Godfrey

**Claimant
In Person**

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Kinship Care Midlothian SCIO

**Respondent
Represented by:
Mr G Bathgate, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is as follows:

1. The claimant did not at any time have the status of "employee" within the meaning of Section 230(1) of the Employment Rights Act 1996 ("**ERA**").
2. In the period from 8 July 2021 to 17 February 2022, the claimant had the status of "worker" within the meaning of Section 230(3) of ERA.

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REASONS

1. The claimant has brought a range of claims, some of which require the status of employee; some the status of worker.
2. This preliminary hearing was fixed to determine whether the claimant had the status of employee. The note fixing the hearing did not address the question of worker status. It was agreed by the parties, however, that this tribunal would determine that as well.
3. The claimant's position was that she was at all relevant times an employee, failing which a worker. The respondent's position was that the claimant was a self-employed contractor or casual worker who did not have either employee or worker status.
4. The preliminary hearing was also intended to deal with a time bar issue as it related to certain of the claims brought by the claimant. The relevant claims were withdrawn by her such that it was not necessary to deal with that aspect.
5. The tribunal heard evidence from the claimant herself as well as her mother, Ms Jennifer Godfrey, who was the chairperson of the respondent during the period of the claimant's engagement, and Mr Ian Edwards, a family friend who accompanied the claimant to a meeting with trustees of the respondent.
6. For the respondent, evidence was led from Mrs Lynda Maguire. At the material times, she was engaged as an unpaid volunteer for the respondent and acted as a trustee.
7. The respondent's solicitor produced a bundle of documents running to almost 400 pages. The bundle was neither paginated nor tabulated. This led to an avoidable and unacceptable delay in commencing the hearing.

Findings in Fact

8. The respondent is a small charity based in Midlothian. It is involved in the support of kinship care children. These are people under the age of 26 who

cannot be cared for by their own parents. It is governed by a board of trustees. At the time of the claimant's engagement, it operated without employees. The administration of the charity was carried out by Mrs Maguire who acted as an unpaid volunteer.

- 5 9. Following discussions between Mrs Maguire and the claimant's mother Mrs Jennifer Godfrey (who were close friends as well as fellow trustees), the possibility of engaging the claimant in the charity was discussed. Her previous employment had recently come to an end.
- 10 10. At a board meeting on 30 April 2021 chaired by Mrs Godfrey, there was agreement to take steps to employ a member of staff. Mrs Godfrey is noted as having suggested an additional requirement to recruit a part-time fundraiser.
- 15 11. The claimant met with Mrs Maguire on 5 May 2021. A potential role for the claimant was discussed. It was explained to the claimant that the role would involve making funding applications with a view to achieving funding to support the employment of an individual. The respondent was not in a position to engage an employee without such funding in place. The charity was looking to expand into East Lothian. The intention was that the claimant might be trained up to run the Midlothian branch with Mrs Maguire becoming responsible for the new East Lothian branch.
- 20 12. A further meeting took place on 21 June 2021. At that meeting, it was agreed that the claimant would perform the role as outlined and be paid through administrative funds held by the respondent. It was agreed that she would be paid £15 per hour and would require to invoice the charity for her services as she could not be paid as an employee. The time commitment agreed at this stage was 20 hours per week.
- 25 13. The claimant was not provided with any written contract or other documentation relating to her position.

14. By email of 24 June 2021, the claimant emailed Mrs Maguire asking when she could start. She commenced the engagement on 8 July 2021. She worked from home at that time. Her initial tasks were upskilling on software platforms and progressing funding applications. She was provided with a laptop computer and given a respondent email address.
15. She worked largely independently. She was not given instructions as to what she should do or when she should do it. She was free to manage her own time. Communications between the claimant and Mrs McGuire were limited. The first contact between them after the claimant commenced the engagement was on 15 July 2021.
16. The main priority for the claimant was to secure funding so as to allow the respondent to engage an employee. In one of the funding applications prepared by the claimant, the claimant is described as "*imminently anticipated first employee of the [respondent]*". In an email of 28 July 2021 to a voluntary organisation, the claimant sought advice on certain matters to do with having "*a first employee*" in the context of an application for related funding.
17. On email correspondence the claimant was referred to as a "volunteer". On the basis that she was remunerated, she did not in fact hold that status.
18. In mid-August 2021, questions were raised by the respondent's treasurer about the claimant's position. Mrs Maguire described her as working "*freelance*". The treasurer questioned the extent of the work and the unaffordability of the role for the charity. After some further discussions, Mrs Maguire was instructed to cease the arrangement with the claimant on 17 August 2021 in order that funding for the position could be formalised. It became clear that the board had not approved the appointment.
19. By email of 17 August 2021 from Mrs Maguire to the claimant, Mrs Maguire explained that the charity could not employ someone until there was a budget and funding available. Mrs Maguire did not have the time to bid for funding herself and no other person was qualified to bid.

20. The claimant ceased providing any work or service on 17 August. There was no agreement at that point as to when the claimant would come back to the respondent, but there was an expectation that that would happen once the board had considered the position.
- 5 21. A board meeting took place on 14 September 2021. It was resolved at that meeting that the respondent should engage a suitably qualified person in business administration to eventually lead, administer and manage the respondent's Midlothian branch. It was also resolved in a section head "A Short-Term Solution", that there be the engagement of an identified "key
10 *worked* to work in a reduced capacity of 10 hours per week to assist with the charity's office and its administrative functions. The note goes on to state that when and if, funding permits the possibility of extending the hours of the key worker, she should be considered and with mutual consent, to be formally contracted to lead and develop the Midlothian operation. The key worker
15 referred to is the claimant.
22. The claimant next became engaged by the respondent on 8 November 2021. In the intervening period, she did not provide any work or perform any services at all.
23. With effect from 8 November 2021, the claimant's role and the way in which
20 she performed it remained the same as had been before. The priority was still to make funding applications. She worked flexibly. At that time, she based herself either at home or in the respondent's office where she was given a desk. Very limited contact took place between the claimant and Mrs Maguire.
- 25 24. Around 2 December 2021, the claimant became unwell. In an email to Mrs Maguire on that date, she stated that she had been struggling with her mental health. She went on to state "*If I was in a regular job I would have sought a doctor's note or self-certified myself unwell. Obviously there is no point in doing that with [the respondent] as I don't get sick pay.*"

25. From 3 December 2021 to 17 January 2022, the claimant did not perform any work or services to the respondent. Around this time, the claimant suffered a bereavement and took time to focus on dealing with that.
26. On 13 January 2022, Mrs Maguire spoke to the claimant's mother and enquired after the claimant. She had phoned the claimant three times but had not received a reply. There had been no response to emails since 3 December 2021.
27. The claimant emailed Mrs Maguire the following day and returned to the respondent on 18 January 2022. Her role and the way in which she performed it remained very much as they had been before.
28. In an email exchange between the claimant and Mrs Maguire on 24 January 22, Mrs Maguire stated that the claimant was not employed by the respondent but was doing "*voluntary work*" and being remunerated through budget accrued for administering different projects. Being employed she said was dependent on the respondent raising funds for an employee project. In response the claimant replied that she saw her current work as "*akin to freelance working*" even if the role is sometimes called volunteer and sometimes called community development worker or other. She stated "*7fully understand I am not a contracted employee*".
29. By email of 17 February 2022, the claimant wrote to the trustees of the respondent. In that email she asserted employee status and set out what she considered to be her statutory entitlements. Her engagement with the respondent ceased with effect from the following day. The claimant responded to the effect that she saw being asked to step down as a suspension and that she expected to be paid. By email of 25 February 2022, the respondent's treasurer responded to the effect that the claimant was not under suspension, that she should not do any work for the respondent and should not be incurring any expenses pending a board meeting.

30. A meeting of the board took place on Friday 4 March 2022. The claimant was invited to attend and was accompanied by Mr Ian Edwards.

31. By letter dated 11 April 2022, the treasurer emailed the claimant disputing her allegation of employment status. The claimant is described as having been
5 a "volunteer" with the remit of applying for external funding to enable the respondent to employ a member of staff. She was told that the relationship was at an end with effect from 18 February 2022.

32. During the period of her engagement with the respondent, the claimant did not work or provide services to anyone else.

10 **Observations on the Evidence**

33. Leaving aside the legal question as to the status of the claimant, much of the evidence in the case was not in dispute. The claimant herself was clearly very well prepared and had a detailed knowledge of the documentation. On
15 occasion, however, when being asked to explain points which did not necessarily support her position, she had a tendency to be somewhat evasive and to avoid giving direct answers. That said, the tribunal was satisfied that in all material respects, she was a reliable witness.

34. The evidence of Mrs Godfrey was of little direct relevance to the subject matter of the hearing. It is clear, however, that she too had a tendency not to
20 accept clear points from the documentation which were unsupportive of the claimant's position. An example is her seeking to maintain the position that she thought the claimant was already an employee of the respondent in circumstances where she as chair of the board signed minutes referring only to the potential of a first employee being recruited in the future.

25 35. The evidence of Mrs Maguire was credible and reliable. She had pulled together a detailed chronology of the relevant steps which aided the fluency of her evidence. The only criticism of Mrs Maguire's evidence was her tendency to seek to apply labels to the claimant's role which were either

incorrect (volunteer) or clearly devised after the event (self-employed contractor). That said, these are matters for the tribunal to determine looking at the evidence as a whole.

5 36. The evidence of Mr Edwards was peripheral and whilst the tribunal was grateful to him for his attendance, nothing of substance flows from the involvement he had.

Relevant Law & Submissions

37. An employee is defined as:

10 *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" (section 230(1), ERA).*

38. 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" (section 230(2), ERA).

15 39. A worker is defined as: *"an individual who has entered into or works under (or, where the employment has ceased, worked under) either of the following:*

- *A contract of employment.*
- *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."*

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(Section 230(3), ERA).

40. To establish protection under any of the two categories, an individual must establish that they have a contract with an organisation.
41. A contract is formed by offer and acceptance. The offer is a proposal from one party which is: sufficiently definite in its terms to form a contract, capable of acceptance and made with the intention of being bound by acceptance. Acceptance is a statement (in writing or verbal) or conduct by an offeree indicating assent to the offer. The assent must be unqualified.
42. To form a contract there must be: agreement on essential terms, intention to create legal relations and certainty of terms. In general, the essential terms are: the parties to the agreement, the subject-matter of the contract, and the price or the mechanism for pricing arrangements. There must be an intention by the parties to create a legally binding arrangement. Where no such intention can be attributed to the parties, there is no contract.
43. Where there is a dispute as to status, case law has developed a number of tests which may be applied. The leading authority in this context remains the case of ***Ready Mixed Concrete (South East) Ltd v The Minister of Pensions & National Insurance*** [1968] 2 QB 497. The core elements of a contract of employment include: (1) an agreement to provide the individual's own work or skill in the performance of service for the employer in return for a wage or remuneration; (2) in the performance of that service, the employer has a sufficient degree of control over the employee; and (3) the other provisions are consistent with a contract of employment.
44. Commonly referred to as "the irreducible minimum", an employment contract must have personal service. There must be sufficient control and there must be mutuality of obligation. Other factors include the provision of equipment, the degree of financial risk adopted, the degree of integration into the business, whether a person is paid when absent due to sickness and whether the person is paid a fixed wage or salary.

45. Also relevant are the parties' intentions and how they describe themselves (unless this is not reflective of the reality of the situation) (*Young & Woods Ltd v West* [1980] IRLR 201).

5 46. In considering the question of worker status, the primary focus should be on the relevant statutory wording (*Uber & Others v Aslam & Others* [2021] UKSC 5).

10 47. Mr Bathgate produced a skeleton argument and given that the claimant was unrepresented, he agreed to make his submissions first. Applying the facts to the relevant statutory tests, he invited the tribunal to find that there was no mutuality of obligation and insufficient control to amount to employee status. He referred also to the parties' clear understanding and the clear intention as evidenced from the documentation before the tribunal.

15 48. In relation to worker status, Mr Bathgate's alternative position in the skeleton argument was that the claimant was a "casual worker" albeit still on independent contractor basis.

20 49. The claimant made submissions on her own behalf and referred to the tests in *Ready Mixed Concrete*. She invited the tribunal to find that the irreducible minimum was satisfied and that other factors such as the degree of integration and the provision of equipment pointed to an employment relationship. She did not bear any financial risk and was not offering services as part of a business undertaking carried out by her. She did not do any work for any other parties.

50. If not an employee, the claimant submitted she was a worker.

Decision

25 51. The tribunal first considered whether a contract existed between the parties. There was nothing in writing between them. It was nonetheless satisfied that a contract was agreed verbally between the claimant and Mrs Maguire. In particular, at the meeting on 21 June 2021, a role for the claimant was agreed

as well as an agreed rate of remuneration for an anticipated number of hours per month. By commencing with the respondent, the claimant demonstrated acceptance of those terms.

52. The subsequent actings of the parties demonstrated that the contract was flexible in that it permitted the respondent to cease to offer work or services where it wished to do so. Equally, the claimant was able to remove herself from providing work or services when she did not feel able to do so or had other matters to attend to.

53. The parties also, by their conduct, demonstrated that the contract was one where the level of hours (and thus remuneration) might vary.

54. The tribunal went on to consider whether the contract was one of employment. Considering first of all the question of personal service, it is clear that the contract required the personal service of the claimant. Only she was able to provide the service. There was no question of any substitution rights or delegation. The first element of the test is, therefore, established.

55. So far as control is concerned, the tribunal considered who had the power of deciding the things to be done, the way in which they should be done and the means to be employed in doing them, as well as the time and the place where they should be done.

56. In this context, the tribunal was not satisfied that the respondent exercised control sufficient to satisfy the legal test.

57. As set out above, having been given key tasks to perform (and these revolved principally around funding applications), the claimant was left largely to her own devices in order to progress them. Other than an odd occasion where she was asked to meet with Mrs Maguire, she decided how she did the work and the means to be employed in doing it. She determined where and when to do the work.

58. The tribunal recognises that senior employees will often work without direct supervision in this way. It was mindful, however, that this was a relatively junior position in a very small organisation with no other employees. There was not the capacity, even if there had been the intention, for the claimant to be operating under the level of control that might be anticipated of an employee at her level. Moreover, there was no contractual right of control over the claimant in the work that she performed. She was not subject to any rules or policies.
59. The tribunal also considered the question of mutuality of obligation. There must be an obligation on the respondent to provide work and pay a wage to the claimant, and the claimant must be obliged to accept and perform that work.
60. For the reasons outlined above, the tribunal was not satisfied that the necessary mutuality of obligation existed in the contract between the parties. As is evident, both parties operated the arrangement on the basis that the respondent could cease to offer work and the claimant could cease to accept work if either wished to do so. It is noteworthy that during the period of the claimant's engagement, she was only actively engaged for approximately a quarter of the time.
61. The absence of mutuality can mean that there is no contract at all. The tribunal was, however, satisfied that a contract remained in place despite the pauses in work. On each occasion, the pause was intended to be temporary with a view to the claimant resuming at a later date. There was no deliberate separation between the different periods of work. The tribunal was, therefore, satisfied that a contract existed throughout albeit that it was as the claimant herself described "*akin to freelance work*" or as Mr Bathgate submitted "*casual work*".
62. With two of the essential elements missing in assessing employment status, the tribunal concluded that the claimant was not an employee for the

5 purposes of ERA. It was not, therefore, strictly necessary to look at other factors. One particularly pertinent factor, however, is the description applied by the parties themselves and their intentions. As set out in the Findings in Fact, it was very clear that there was no intention that the claimant be an employee. The respondent was not in a position to engage an employee without funding and funding was not in place. The whole purpose of the claimant's engagement was to obtain funding such that an employee could be engaged. It is illogical, therefore, to suggest that it was intended that the claimant be an employee from the outset of the engagement. That is reinforced by the various descriptions applied by the parties in the documentation. It is illogical to suggest that the claimant was already an employee when producing documentation seeking approval for the respondent to engage its "first" employee.

15 63. The tribunal then considered whether the claimant had the requisite worker status. For the reasons outlined above, she operated under an unwritten contract and she undertook to perform work personally.

64. The key question, therefore, applying the statutory language was whether the relationship between the parties was one of client of a profession or business undertaking carried on by the claimant.

20 65. The tribunal had no hesitation in finding that the relationship between the parties was not one of a client of a business undertaking. The claimant did not operate any business. She did not work for anyone else. She did not seek to provide services to any other parties. The claimant was provided with equipment and an office space within the respondent's premises. She did not assume any level of risk in undertaking the work. She was given an email address and was held out as representing the organisation in funding applications. These factors do not point to a relationship of a true self-employed contractor operating independently in the running of a business or profession.

66. For those reasons, the tribunal was satisfied that the claimant had the status of worker under ERA.

Further Procedure

5 67. In light of these findings, the tribunal will list the case for a final hearing to determine those claims brought by the claimant which require only worker status.

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| Employment Judge: | R Mackay |
| Date of Judgment: | 02 June 2023 |
| Entered in register: | 06 June 2023 |
| and copied to parties | |