



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss L Dakin

AND

Respondent
Mr A Evans

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton

ON

23 June 2023

EMPLOYMENT JUDGE GRAY

Appearances

For the Claimant: In person (assisted by her mother Ms Josey)

For the Respondent: In person

JUDGMENT ON APPLICATION TO RECONSIDER RULE 21 JUDGMENT

The judgment of the tribunal is that the Respondent's application for reconsideration is allowed, and the Judgment dated 30 December 2022 is revoked.

JUDGMENT

The judgment of the tribunal is that the Claimant is a worker within the meaning of section 230(3) of the Employment Rights Act 1996 and the Claimant's claim for unauthorised deductions from wages succeeds and the Respondent is ordered to pay the Claimant the gross sum of £1,536.47.

REASONS

1. After oral judgment was delivered the Respondent requested written reasons which are also now provided.
2. It is understood the request for written reasons relates to the part of the Judgment determining the unauthorised deduction of wage complaint.
3. Written reasons for the reconsideration judgment are therefore not provided, reasons having been given orally at the hearing. They will be provided for that Judgment if a written request is presented by either party within 14 days of the sending of this written record of the decision.

Background

4. By a claim form submitted on the 22 September 2022 (supported by an ACAS certificate dated 25 July 2022 to 5 September 2022) the Claimant sought arrears of pay for the period April to June 2022 totalling, as stated in the claim form, £1,544.04.
5. Following a response not being entered Judgment was made by Employment Judge Roper in favour of the Claimant for that amount.
6. Following reconsideration of that Judgment, which was then revoked, the hearing proceeded to determine the Claimant's complaint.
7. Evidence was heard from the Claimant (through a submitted written witness statement and orally) and the Respondent (just orally as he had not prepared or submitted a written witness statement despite being directed to do so in the notice of hearing).
8. Each party also presented their own set of documents for consideration.

The facts

9. I found the following facts proven on the balance of probabilities after considering the whole of the presented evidence, both oral and documentary, and after considering and listening to the oral submissions made by and on behalf of the respective parties.

10. It is not in dispute that the Claimant undertook work for the Claimant from the 21 March 2022 to the 24 June 2022. The Claimant describes her role as a groom / yard worker.
11. The dispute between the parties is the terms upon which the Claimant worked for the Respondent.
12. It is accepted in this case that no written agreement was in place between the parties.
13. It is common ground that the Claimant had worked for the Respondent previously at a different location. The Claimant accepted in cross examination that she was let go from that role due to being not up to standard. The Claimant stated in cross examination, when asked if in March 2022 she approached the Respondent to become a contractor, that it was as a worker. The Claimant agreed that on or around 18 March 2022 she asked the Respondent if she could do some work at Firgrove. The Claimant then starts work there on the 21 March 2022.
14. The Respondent asserts that the Claimant was engaged as a genuinely self-employed person working to a rate of £2.50 per stable. He says these terms were agreed with the Claimant on the 22 March 2022 (the day after she started). The Claimant denies this.
15. The Claimant denies that she was genuinely pursuing a business activity on her own account.
16. There is no suggestion the Claimant was not personally undertaking the work for the Respondent, albeit the Respondent complains as to her lack of effectiveness, which the Claimant denied.
17. The Claimant asserts she was at least a worker who was personally working hours for the Respondent at an hourly rate.
18. As to the hourly rate, the Claimant confirmed that this was not agreed expressly but she understood it to be the national minimum wage rate after she received her first pay from the Respondent on 12 April 2022.
19. The Claimant says this is because she sent the Respondent a WhatsApp message (copies of which formed part of her documents bundle) on the 2 April 2022 that detailed she had worked 31 hours and 45 minutes in March 2022, and it broke down what those hours were.

20. The Claimant's date of birth is the 22 July 2001. She was therefore aged 20 at that time.
21. This means the national minimum wage rate for her March 2022 pay was £6.56 an hour. The Respondent paid the Claimant £208.28 on the 12 April 2022 which is 31 hours and 45 minutes x £6.56.
22. The Respondent says that this is just a coincidence and that what he was actually paying her was £215 (equivalent to 86 stables) less a lunch drink he had bought her. The Respondent has not presented any documentary evidence to support what he says.
23. The Claimant denied under cross examination that anything else was agreed verbally or in writing with the Respondent and that is why she continued to submit the WhatsApp messages at the end of the month and claims the wages she does.
24. The Claimant submits further WhatsApp messages to the Respondent on the 1 May 2022 detailing 109 hours and 50 minutes work for April 2022, on the 1 June 2022 detailing 94 hours and 45 minutes work for May 2022, and on the 6 July 2022 detailing 93 hours and 35 minutes for June 2022.
25. In the Claimant's schedule of loss, she works out what these hours would be at national minimum wage (then £6.83 an hour) and gives credit for a £300 payment made by the Respondent on 20 May 2022 and a £200 payment made on the 15 June 2022 leaving £1,536.47 owed.
26. The Respondent asserted that he had told the Claimant verbally after receiving the WhatsApp messages from her, that she was being paid per stable not per hour. The Claimant denied this.
27. I have a conflict of fact here. I need to decide the matter on the balance of probability.
28. If I accept the Claimant's assertions and evidence, that she is at least a worker due unpaid wages, then her case as to the amount claimed it would appear is also proven, as I will have accepted the hours she claims (as set out in the contemporaneous WhatsApp messages) and the rate she claims (as she cannot be paid less than the National minimum wage).
29. If I accept what the Respondent says, finding that her status is as a genuinely self-employed person, pursuing a business activity on her own account, this will mean the Tribunal does not have jurisdiction to determine this complaint.

30. Although the Respondent can point to a text message with his former partner on the 21 March 2022 as showing how a £2.50 per stable rate may be arrived at, it does not support this being communicated to the Claimant.
31. It is in my view too much of a coincidence that the pay the Claimant receives on the 12 April 2022 matches exactly the hours she submitted on the 2 April 2022 and the relevant national minimum wage rate. I also note the other contemporaneous WhatsApp messages that support the hours the Claimant says she worked.
32. I therefore on the balance of probability accept the Claimant's evidence on this matter.

The Law

33. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("ERA").
34. 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.
35. Under section 230(3) of the ERA 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 subparagraph (b) is sometimes referred to as a "limb (b) worker").
36. Under section 13 (1) of the ERA the right not to suffer an unlawful deduction from wages applies to workers, and not just employees.
37. Whether the Claimant was an employee/worker or not is a question of mixed fact and law for the tribunal.
38. The definition of worker includes, but is not restricted to, employees.

39. The worker definition potentially covers a wide range of individuals who provide personal services under a contract, including many casual and freelance workers who are not paid by PAYE. However, it is not intended to cover self-employed people who are genuinely pursuing a business activity on their own account.
40. The starting point for cases like this is the judgment of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, [1968] 1 All ER 433**, where he said as follows ... "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 ..."
41. Also, considering **Autoclenz v Belcher [2011] UKSC 41, [2011] IRLR**, there are four questions to be asked:
- a. first, what are the terms of the contract between the individual and the other party?
 - b. Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)?
 - c. 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?
 - d. 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?
42. To determine whether an individual carried on business on his own account it is necessary to consider many different aspects of the person's work activity, and this is not to be done by way of a mechanical exercise of running through items on a check list to see whether they are present or absent from a given situation. Rather ... "The object of the exercise is to paint a picture from the accumulation of detail... it is a matter of evaluation of the overall effect of the detail which is not necessarily the same as the sum total of the individual details" (**Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171**, para 11)

43. About worker status when considering whether the Respondent is a 'client or customer' of the Claimant's 'profession or business', there is helpful guidance from Langstaff J in *Cotswold Developments Ltd v Williams [2006] IRLR 181*, at para 53 ... "a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or a customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls".

The Decision

44. The terms of the working arrangement between the Respondent and Claimant are in my view implied as being the Claimant will work hours for the Respondent, notify the Respondent what they are at the end of the month and then be paid those hours at the relevant national minimum wage level.
45. No evidence has been presented to this Tribunal to suggest that Claimant actively marketed her services as an independent person to the world in general (a person who will thus have a client or a customer). Instead, I accept the evidence of the Claimant and find that she worked for the Respondent personally as a part of his operations. I therefore find that she meets the definition of a worker pursuant to section 230(3) of the Employment Rights Act 1996 as she asserts.
46. I accept the Claimant's evidence as to the hours she says she worked. I therefore find that the wages paid to the Claimant for April to June 2022 were less than the wages she should have been paid.
47. Such a deduction was not required or authorised by statute or authorised by a written term of the contract (there being no written terms). No written notice of any contractual term relied upon was given to the Claimant before the deduction was made. The Claimant did not agree in writing to the deduction before it was made. The Claimant is therefore owed the claimed amount, being £1,536.47 gross.

Employment Judge Gray
Dated 23 June 2023

Judgment sent to Parties on
10 July 2023 By Mr J McCormick

For the Tribunal Office