



EMPLOYMENT TRIBUNALS

Claimant: Ms L Thomas

Respondent: NewsTeam Group Ltd

Heard at: Cardiff **On: 17 July 2023**

Before: Employment Judge R Brace

Representation:

Claimant: In person

Respondent: Mr Kennett (Chief Operating Officer of the Respondent)

JUDGMENT having been sent to the parties on 18 July 2023 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:

WRITTEN REASONS

Preliminary Issues

1. This has been an remote final hearing by video (CVP). Neither party had any issue connecting and there were no issues during the continuance of the hearing.

The Claims and Early Conciliation

2. The Claimant entered into early conciliation with the respondent on 8 February 2023 which ended on 10 February 2023 [25]. On 10 February 2023, the Claimant's ET1 claim was filed at the Tribunal [5] bringing a claim in respect of unpaid wages. The Claimant asserts that she was an employee. The ET3 Response filed on 5 June 2023 contests the claim on the basis was engaged as a self-employed contractor and not an employee or a worker.

The Evidence

3. The Tribunal heard evidence from the Claimant and from Mr Jon Kennett, Chief Operating Officer for the Respondent. Both witnesses relied upon witness

statements, which were taken as read, and both were subject to cross-examination, the Tribunal's questions and re-examination.

Bundle

4. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle"). References to the hearing Bundle (pages 1-123) appear in square brackets [] below. These are references to the hard copy bundle and not electronic PDF automated numbering.

List of Issues

5. How an employment tribunal hearing proceeds was explained to the Claimant, although she confirmed that she had represented others previously and she was familiar with how a case proceeds. The main elements of the claim were discussed and the guidance given to tribunals and parties on status cases were also discussed.
6. The issues to be determined in this case were discussed at the outset and agreed as set out below. A copy of the list of issues was emailed to the Claimant and she printed off a copy and had that copy before her during the hearing.

1. *Employment status*

- 1.1 Was the Claimant an employee or worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

2. *Unauthorised deductions*

- 2.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?
- 2.2 Were the wages paid to the Claimant less than the wages she should have been paid?
- 2.3 Was any deduction required or authorised by statute?
- 2.4 Was any deduction required or authorised by a written term of the contract?
- 2.5 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 2.6 Did the Claimant agree in writing to the deduction before it was made?
- 2.7 How much is the Claimant owed?

3. *Breach of Contract*

- 3.1 Did this claim arise or was it outstanding when the Claimant's employment ended?
- 3.2 Did the Respondent do the following:
 - 3.2.1 Did the Respondent fail to pay wages due to the Claimant that were due and owing?
- 3.3 Was that a breach of contract?
- 3.4 How much should the Claimant be awarded as damages?

Facts

7. The Claimant worked as a delivery driver for the Respondent from 19 October 2022 until 16 January 2023, delivering papers and magazines to customers of the Respondent.
8. The Respondent operates a UK wide newspaper and employs deliverers, employees who deliver to customers and are provided with vehicles, mileage allowances and employment rights and benefits.
9. The Respondent also engages delivery drivers on a different form of contract to the employed deliverers, a copy of which was contained in the Bundle at [27]. That agreement included provision that the agreement reflected a contract to provide services as a self-employed contractor and not an employee or worker. The contract terms further provided that the contractor had the '*full and unfettered right and/or obligation to hire assistants/substitutes/sub-contractors to provide the services required*'
10. A copy of such an agreement signed by the Claimant was included in the Bundle [26]. The agreement referred to the Claimant as an independent contractor and included the provisions relating to substitution.
11. Whilst the Claimant accepted that the electronic signature at [28] was a copy of her signature, having provided that signature in a box that had been sent to her by the Respondent, and that her personal details, including address, email address and bank details were her correct details, the Claimant disputed having been sent a copy of the contract.
12. Mr Kennett gave evidence, evidence that I accepted, that a copy of the contract was sent to the Claimant as reflected by the DocuSign Envelope ID, a signed copy was provided in the Bundle and I was satisfied on balance of probabilities that the Claimant had received and signed a copy of that agreement despite the Claimant disputing this in her own evidence.
13. In any event, the unchallenged evidence of Mr Kennett was that the Respondent:
 - a. Did not provide any equipment to the Claimant, that she used her own vehicle and mobile phone and paid for her own expenses including fuel and insurance;

- b. That the Claimant carried out deliveries which she had agreed to undertake with orders recorded on a PaperRound application (the "Paper Round App"), software which drivers used to mark deliveries that they had completed which recorded the drivers' GPS location and time each delivery was completed;
- c. That the Claimant was free to undertake work for other organisations; and
- d. That the Respondent did not supervise or control the Claimant when she carried out the delivery round.

14. In relation to the issue of substitution, Mr Kennett had set out in some detail within his written witness statement how this worked in practice (§15-19 Kennett Witness Statement):

- a. explaining that the Respondent did not keep records of substitutes;
- b. providing screen shots of messages between other contractors which showed a practice of giving contractors a genuine right to send substitute without issue from the Respondent;
- c. explaining that other drivers, operating on the same basis as the Claimant, were able to use a substitute and that this right of substitution was not limited or controlled at all; and
- d. providing some detail of how the system, over the previous two years, had meant that the substitute could carry out deliveries via the Paper Round App without notification to the Respondent.

15. That evidence was not challenged and was evidence that I accepted.

16. Further and in particular, it was agreed by the Claimant in her live evidence and in response to both cross-examination and questions from the Tribunal, that she could and did use others to undertake the delivery service, giving examples of;

- a. when she believed she was about to have a driving ban, she sought to arrange for another person to deliver; and
- b. on another occasion, when she had a blown tyre, her mother's carer had undertaken the delivery instead of the Claimant, the carer taking the Claimant's mother with her on the delivery round.

17. The Claimant complained however that on the last occasion, when she had called to her contact at the Respondent organisation, a 'Chris', explaining that she might be subject to a driving ban, her engagement was terminated before the substitute driver could undertake the deliveries. However I accepted the evidence given by Mr Kennett, that the engagement was terminated as the Claimant had not been compliant with requirements of the contract with regards to delivery time and in any event was not relevant to the issue of substitution itself.

18. In relation to the double charges which the Claimant had asserted was an unauthorised deduction, Mr Kennett gave evidence, again which I accepted, that the Respondent imposed double charges when the driver failed to turn up or provide cover explaining that this was to pay for a further driver to cover the work quickly with the cost being capped at double the daily rate to take into account

that cost and the additional burden on the call centre in dealing with the failed delivery and potential loss of customers and revenue.

The Law

19. Employees are defined in section 230(1) 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.
20. 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 s.13 ERA 1996, an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract.
22. The Claimant will therefore need to demonstrate that she is either an employee or a worker in order to be able to bring a claim in respect of unlawful deduction from wages, and indeed and other financial loss sustained by him attributable
23. Only employees can bring a claim for breach of contract in an employment tribunal and article 3 of the legislative provisions that enable such claims to be brought specifically exclude any claims for personal injury.
24. The following cases are relevant in relation to the status of the Claimant:
 - a. **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497;
 - b. **Autoclenz Ltd v Belcher and Others** [2010] IRLR 70 CA and [2011] UKSC 41;
 - c. **Pimlico Plumbers Ltd & anor v Smith** [2017] EWCA Civ 51;
 - d. **Uber BV and Others v Aslam Farrar & Others** 2021 ICR 657 CA – not only is the written agreement not decisive of parties' relationship, it is not even the starting point for determining status (albeit case was on 'worker' status, it is still relevant to employee status);

- e. **Ter-berg v Simply Smile Manor House Ltd** and ors 2023 EAT 2 (EAT considered that the Supreme Court's decision in Uber did not displace or materially modify the Autoclenz approach. Where the true intent of the parties is in dispute, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms truly reflect the agreement).

25. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in **Autoclenz** in the Supreme Court: "...the classic description of a contract of employment 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*".

26. A further proposition was that:

- a. There must be an irreducible minimum of obligation on each side to create a contract of service" ;
- b. If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status:
- c. 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:

27. 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. The four questions to be asked are:

- a. what are the terms of the contract between the individual and the other party? ;
- b. Is the individual contractually obliged to carry out work or perform services himself (that is to say personally)?;
- c. 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. 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?

Conclusions

34. In seeking to identify what contractual terms were agreed between the parties, having accepted the evidence of Mr Kennett and the evidence of the Claimant

that the signature on the written agreement contained in the Bundle was in fact her signature, I was satisfied that the written agreement provided set out the written terms agreed between the parties and that document contained all the terms of the contract.

35. Being satisfied that the contractual documentation was a full record of the parties' agreement, that was effectively the start and end of the bargain struck by the parties, and I was satisfied that the terms agreed between the parties were exclusively contained in written documents.
36. Turning to the relationship between the parties, the Claimant did not dispute that she was entitled to a right of substitution, giving an example of how her mother's carer had stepped in, with the Claimant's mother as a passenger, to undertake one particular delivery when the Claimant had a blown tyre.
37. This was fatal in my mind to the Tribunal being satisfied that it has jurisdiction to consider the complaints being brought either as ones of unlawful deduction from wages (which can be brought by employees or workers) or breach of contract (which can only be brought by employees).
38. I concluded that this was a case whereby the Claimant had the absolute freedom to provide the delivery services, not just by her own hands but by another's. That right of substitution was included in the written terms agreed and formed part of the true terms of the agreement between the parties. This absolute right was inconsistent with the obligation of personal performance
39. The Claimant was neither an employee nor a worker and therefore the claims, whether brought as unlawful deduction from wages or breach of contract, are dismissed as the Tribunal does not have jurisdiction to hear them.

Employment Judge Brace
Dated: 18 September 2023

Written Reasons sent to the parties on 19 September 2023

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS
Mr N Roche