



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000287/2023**

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**Preliminary hearing  
Held in Edinburgh on 23 October 2023**

**Employment Judge A Jones**

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**Ms N Watson**

**Claimant  
In person**

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**The Midlothian Council**

**Respondent  
Represented by:  
Mr A Thomas  
solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claimant was neither an employee of the respondent in terms of section 230(1) of the Employment Rights Act 1996, nor a worker within the terms of section 230(3) of that Act.

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The Tribunal having no jurisdiction to consider her claim, her claim is dismissed.

### **REASONS**

#### **Introduction**

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1. The claimant raised a number of claims against the respondent. By the time of this hearing, the claimant's claim of harassment because of a disability had been dismissed. In addition, the claimant confirmed at the commencement of the hearing that her claims of direct discrimination, discrimination arising from

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disability and a failure to make reasonable adjustments were all withdrawn by her, on the basis that she accepted that these were out of time. These claims are therefore dismissed.

2. The remaining claims before the Tribunal are:

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- a. Unfair dismissal
  - b. Redundancy payment
  - c. Notice pay
  - d. Holiday pay
  - e. Arrears of pay

10 **Issues to be determined**

3. These claims having been withdrawn, there was no requirement to address any issue of time bar. The purpose of this preliminary hearing was therefore solely to make a determination as to the claimant's employment status and in particular to determine whether the claimant was an employee or a worker for the purposes of section 230 Employment Rights Act 1996.

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4. The Tribunal heard evidence from the claimant who was cross examined and who answered questions from the Tribunal. A joint bundle of documents was produced. The respondent did not lead any evidence.

20 **Findings in fact**

5. Having heard evidence and considered the documentation to which reference was made, the Tribunal found the following facts to have been established on the balance of probabilities.

6. The claimant incorporated a business called Evolution 10 Limited in August 2010. The claimant was the sole director of the company.

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7. The claimant operated a hairdressing business from a salon called Evolution 10 at Cameron Toll in Edinburgh for a number of years and when she closed

the salon, the equipment she had was put in storage. The claimant had been in the hairdressing industry for 20 years.

8. The claimant became aware that the respondent was looking for assistance in running a hairdressing program at Dalkeith High School around May 2017.  
5 The school offered qualifications at national 4 and 5 levels in the subject of hairdressing which would allow students to obtain apprenticeships in the hairdressing industry.
9. The claimant attended 2 separate interviews with members of the respondent's staff to discuss whether she could assist them in the provision  
10 of these courses.
10. It was a requirement of the Scottish Qualifications Authority that in the provision of these courses, students should be working in a hairdressing salon environment.
11. It was agreed that the claimant would assist in the provision of these courses.  
15 The claimant does not have a formal teaching qualification and was not registered with the General Teaching Council of Scotland.
12. It was also agreed that the claimant would supply the equipment from her salon which had been in storage for free to the respondent while she was performing duties there. This included branded mats with 'Evolution 10' and  
20 other equipment one would expect to see in a hairdressing salon.
13. The claimant started working around 6 June 2017 with students who were based at Dalkeith High School and subsequently also carried out work with students from St David's High School which shared some facilities with Dalkeith High School.
- 25 14. The claimant was not issued with any contractual documentation initially. She became ill around 12 December 2017 and spent a few days in hospital. The claimant had not received any payment in respect of her services by this point.
15. The claimant was authorised as a supplier to the respondent on 15 December 2017. Ms Paxton who had applied for the claimant to be registered was

reminded in an email of 15 December that the respondent operated set guidelines on purchasing goods or services and it was normally expected that three quotes be obtained prior to appointing any provider. No such quotes had been provided in relation to the services offered by the claimant.

- 5 16. Ms Paxton emailed the claimant on 18 December to explain that she was trying to get her into the system so she could be paid. She went on to say “The procurement have authorised you as a new supplier so hopefully payment will not take too long, in the meantime they requested that I send you these terms and conditions.” Attached to the email was a document called
- 10 “Conditions of Contract for the Purchase of Services.” The email was sent to the claimant at an email address which used the ‘Evolution10’ name.
17. Ms Paxton prepared an invoice for the claimant to countersign, which would be submitted for payment. The invoice covered work carried out between June 6 2017 and 2 January 2018.
- 15 18. The claimant did not carry out any work during the school holiday periods and was not paid during that time.
19. The claimant was paid at her hourly rate for time spent training which was required by the respondent (such as health and safety training) and for her presence at parents’ evening. She was paid at a rate of £15 per hour. No tax or national insurance was deducted from the sums invoiced before payment
- 20 and the claimant was not paid holiday pay.
20. From 27 March 2008, the claimant submitted invoices once a term for the work carried out during that term. In those invoices she also claimed for products such as shampoo which she had purchased for the salon. The
- 25 invoices were headed with a logo ‘Evolution10 hair styling and beauty’ and gave the claimant’s address. They referred to her as Managing Director. Invoices continued to be submitted on this basis until November 2022.
21. The claimant provided a reference for students around December 2021. The reference stated “My name is Natalie Watson, I am the owner of Evolution 10
- 30 Hair & Beauty Salon, I have 25 years of Industry experience providing Royal

Patronage. The salon is based at the Dalkeith schools campus, within Dalkeith high school. I am an official partner with both Dalkeith High & St David's schools, where I provide Hair, Beauty and Employability skills for our students. I provide a fully functioning working salon.....All students must follow the Salon Code of Conduct...As a business owner, private stylist, SIA Licensed Security officer and First Aider, I incorporate a varied skill set within all of the course that I provide. ...Evolution 10 actively promote team work and help build each individuals self-confidence.....”

22. During the period the claimant worked with the respondent she also continued to operate a hairdressing business and worked in the security industry. She submitted tax returns every year.

23. When the claimant was ill in December 2017, her classes were covered by teaching staff.

24. In December 2021, the claimant was informed that if she wished to attend the staff Christmas event, she would have to make her own arrangements to travel there as the transport was only being provided for staff.

25. The respondent did not ever provide the claimant with a laptop or tablet which was provided to staff and students.

26. The claimant's company Evolution 10 Limited was dissolved on 20 November 2018. The claimant incorporated a new company called Evolution10 Limited on 21 November 2018. The claimant's sister was appointed as a director in this company from 21 November 2018 until her resignation on 30 October 2020. The claimant became a director of the company on 30 October 2020.

27. The claimant set up another company called Team Act during the period she worked with the respondent, which was intended to be a partnership with the British Military and provide training and education to students. This plan did not come to fruition because of the pandemic and the company was dissolved in December 2022.

28. The claimant proposed at one point that the salon could run as a commercial venture out of hours where students would charge for the provision of hair and beauty services to members of the public, but this was not taken forward.

29. The claimant was required to attend a meeting with the Head Teacher of Dalkeith High School on 30 November 2022. She was informed that her contract was being terminated because the claimant had dissolved the company Evolution 10 and was in breach of clause 18.1 of the contract as she had not informed the respondent of this.

30. A letter was then issued to the claimant dated 1 December providing Notice of Termination of Contracted Services in terms of Condition 18.1 (a)/(b)/(c) of the contract and would occur in terms of Condition 18.2 of that contract.

31. The claimant responded by email of 6 December indicating that in her view she had not committed a material breach of the contract, and that in any event there was a 30 day period in which any breach could be remedied in terms of condition 18.2. She went on to say that she would forward all evidence of her companies' existence 'to provide absolute clarity'.

32. The claimant then sent an email to Ms Ormerod, the Head Teacher on 6 December reiterating that she had an active company and had business insurance and that there had been no lapse in cover.

### Submissions

33. Both parties made oral submissions.

### Relevant law

34. Section 230 Employment Rights Act 1996 ('ERA') provides:

(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

5 (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;

10 and any reference to a worker's contract shall be construed accordingly.

35. It is generally accepted that the multiple test of analysis whether an individual is an employee as set out **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 All ER 433 QBD** is a  
15 useful starting point of an analysis of an individual's employment status. This essentially requires a Tribunal to look at a number of factors when carrying out its assessment. The Supreme Court made reference to this test in **Autoclenz Ltd v Blecher and ors 2011 ICR1157 SC**. The effect of these  
20 authorities is that in order for a contract of service to exist, there must be control by the putative employer, the individual must be required to provide personal performance of the contract and there must be a mutuality of obligation between the parties. However, these requirements are not  
25 determinative of whether there is a contract of service, they are a minimum requirement. Consideration must be given to all the circumstances including the contractual arrangements between the parties.

36. In assessing the contractual arrangements between the parties, a Tribunal ought also to have regard to the reality of the arrangements between the parties, which may not be consistent with the terms of a contract (see for instance **Catamaran Cruisers Ltd v Williams and ors 1994 IRLR 386 EAT**).

30 37. A Tribunal is also required to consider the question of worker status separate from that of employee status. While some of the factors in relation to a determination as to whether an individual is an employee may be relevant to consider whether the individual is a worker, regard should be had to the

statutory provisions in relation to each definition. It is clear from the judgment in the case of **Plastic Omnium Automotive Ltd v Horton 2023 EAT 85** that it is important to consider each definition in the context of the findings in fact which have been made by the Tribunal. In particular, in assessing whether an individual is a worker, particular consideration should be given to whether a contract existed between the individual and the putative employer and if so whether the terms of that contract accorded with the reality of the relationship. While undue focus on the terms of any contract between the parties has been the subject of criticism by the courts, the Employment Appeal Tribunal has recently held in the case of **Ter-berg v Simply Smile Manor House Ltd and ors 2023 EAT 2** that where the true intent of the parties was an issue which was in dispute then a Tribunal should consider all the facts of particular case in order to determine whether the terms of the contract reflected the true agreement between the parties.

## 15 Discussion and decision

Was the claimant an employee of the respondent?

38. The claimant provided services to the respondent through a limited company. That limited company had been set up when the claimant operated a salon in a shopping centre. The respondent required the services of someone who could simulate the environment of a salon on the premises of a school for students to gain 'real life' experience. The claimant provided equipment from the salon she had previously operated in order to create that environment. Other than the first invoice, which was prepared by the respondent, the invoices presented by the claimant all made reference to the claimant's company and stated that she was the Managing Director of that company.

39. No tax or national insurance was deducted from the invoices rendered prior to payment being made to the claimant. The Tribunal did not accept the claimant's evidence that it was not until she completed her tax return that she realised tax and national insurance had not been deducted. That was simply not a credible position to take for someone who had been in business on her



own account and must have been aware of the debits being made to her bank account. In any event, she would have been aware from the first time she submitted a tax return after carrying out work for the respondent that she was required to account for tax and national insurance in relation to payments made to her.

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40. During the period in which the claimant provided services to the respondent, she completed her own tax returns and continued to operate a hairdressing business in addition to pursuing other business interests. She was not a registered teacher and was only paid for the hours she worked. She did not receive holiday pay. She invoiced for products purchased by her for use in the salon. She provided a reference in relation to a student which made clear that the claimant saw herself as a business providing services to the respondent in a salon environment. While this was an unusual situation in that it was not a commercially operating salon, it is also notable that consideration had been given to make the salon a commercial operation.

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41. The claimant suggested that she had sent many emails to the respondent indicating that in her view she was an employee and that the contract issued did not reflect the reality of the situation. No such emails were produced to the Tribunal. The claimant indicated that this was because the respondent had not complied with a subject access request. However, it would have been open to the claimant, should she have been of the view that there was documentation available which would support her position, either to make an application to the Tribunal for an order for production of such documents or request a postponement of the hearing until the subject access request had been dealt with. The claimant did not take either course of action. In addition the terms of the emails between her and the respondent after she had been informed that the contract was terminated were not consistent with this position. The correspondence suggested that the claimant did see herself as bound by the contract, that she had not breached the contract as she had continued to have a limited company through which she was providing services and that therefore the respondent was not entitled to terminate the

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contract. The Tribunal did not therefore find the claimant's evidence that such emails existed to be credible.

42. The contract which had been issued to the claimant was consistent with the reality of the situation and the arrangements between the parties. The claimant provided services to the respondent. She provided invoices which were paid within 30 days. She maintained insurance in terms of clause 14 of the contract.
43. While the claimant disagreed with the termination of the contract she acted in a manner consistent with the contract by questioning it and referring to its terms.
44. While there was a degree of control over how the claimant carried out her duties, given that a curriculum had been set by the SQA which had to be followed, there was no evidence to suggest that the claimant was otherwise limited in how she carried out her duties. In addition, while there was no suggestion that anyone other than the claimant would carry out the duties, that was not sufficient when taken together with the other factors, to suggest that a requirement for personal service created an employment relationship. The claimant continued to carry out her profession outwith the work she carried out for the respondent. The Tribunal concluded that the reality of the situation was that the claimant was operating a salon in the respondent's premises albeit not on the usual commercial basis of a hairdressing salon which is open to the public. She was using the skills she had gained in operating her business but exercising them in a different manner.
45. For all these reasons, the Tribunal was satisfied that the claimant was not an employee for the purposes of section 230(1) Employment Rights Act 1996.

Was the claimant a worker?

46. The Tribunal then went on to consider whether the claimant was a worker for the purposes of section 230(3). For similar reasons that the Tribunal was satisfied that the claimant was not an employee, the Tribunal was also satisfied that the claimant was not a worker. There was a contract between

the respondent and Evolution 10, the claimant's company, and not the claimant directly. The supplier was said to be 'Natalie Watson (Evolution 10 Ltd) and that contract was for the provision of services. The dominant purpose of the contract was for the provision of training within a salon environment.

5 While the question as to personal service and whether the claimant could provide a substitute to carry out the duties did not arise in practice between the claimant and respondent, this is only one factor to take into account in an assessment of the overall relationship.

47. The Tribunal concluded that the relationship between the claimant and the respondent was somewhat unusual. The claimant was, through the company she set up, operating a salon environment in which students could be trained. It was therefore more than just her personal service which was required in providing that training, it was the provision of salon equipment and the creation of that environment which was required. This was provided through

10 the same company which had operated the salon previously and used the same branded equipment.

48. The Tribunal is required to consider all the relevant facts of the relationship, the way in which the services are carried out, the terms of the contract between the parties and also consider these factors within the context of the relative bargaining power of the parties. It appeared to the Tribunal that,

20 particularly given the terms of the reference which the claimant provided for a student, she saw herself as operating a business within the respondent's premises in which she was required to exercise her professional skills and experience of running that business elsewhere over a period of years.

25 49. In all these circumstances, the Tribunal concluded that the claimant was not a worker for the purposes of section 230(3) Employment Rights Act 1996.

50. Therefore, the claimant's claims fall to be dismissed.

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| <b>Employment Judge:</b>     | <b>AJones</b>          |
| <b>Date of Judgment:</b>     | <b>26 October 2023</b> |
| <b>Entered in register:</b>  | <b>26 October 2023</b> |
| <b>and copied to parties</b> |                        |