



EMPLOYMENT TRIBUNALS

Claimant
S Kalupahana
Mehestrige

Respondent
Immigration and Nationality
Services Limited

v

Heard at: Watford by CVP
Before: Employment Judge Anderson

On: 11 December 2023

Appearances

For the Claimant: A Perera (lay representative)

For the Respondent: S McIntosh (consultant)

JUDGMENT

1. The claimant was not an employee or a worker of the respondent. The claimant's claim of unpaid wages and holiday pay is dismissed as the tribunal has no jurisdiction to hear the claim.

REASONS

Background

1. The claimant brings a claim of unpaid wages and holiday pay against the respondent. The claimant says he was employed by the respondent from 13 July 2022 until 23 March 2023 when he was dismissed. The respondent says that the claimant was self-employed and was offered no work after 22 December 2022. Early conciliation was from 11 to 26 May 2023 and the claim was filed on 29 May 2023.

The hearing

2. Unfortunately, in this hearing the claimant who is domiciled in Sri Lanka and is unable to return to the UK, was unable to give oral evidence at the hearing. He was represented by Mr Perera, a relative, in a lay capacity. The respondent was unable to cross examine the claimant. The tribunal received a written witness statement from the claimant. The claimant filed a bundle of documents in support of his case. The respondent made no disclosure and merely commented on the claimant's bundle. The respondent filed a witness statement from Mercy Matthew

at the weekend. Mr Perera confirmed that he had received the document on Saturday (9 December 2023). Ms Mathew attended and gave evidence on oath.

The Issues

3. There was no list of issues set out by the parties, but I determined them to be as follows:
 - a. Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?
 - b. Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?
 - c. If he was an employee or a worker, is he owed:
 - i. Wages for December 2022, January 2023, February 2023 and March 2023.
 - ii. Holiday pay for the period 13 July 2022 to 23 March 2023.
 - iii. Interest on delayed payments.
 - iv. An increase in his hourly rate for 7 September 2022.
4. I explained to the parties that I would hear evidence on, and consider the matter of, employment status first. Then, if I found that the claimant was a worker or an employee, I would go on to hear evidence on whether wages were unpaid.

Submissions

5. Mr Perera, for the claimant, said he believed he was employed by the respondent, and he worked Monday to Friday and sometimes in the beginning he worked six days from Monday to Sunday. He worked hard for the company and Mr Perera could not believe when he was sacked, and the claimant took part in a lot of meetings.
6. For the respondent, Ms McIntosh said that with this case there was no contract of employment as alleged by claimant and the email of 13 July 2022 is simply stating an hourly rate and that the claimant would be paid for the work done as a back end developer. Ms Mathew has quite clearly explained that the work log is a document written by the claimant and where he writes 'completed' that is not evidence that the respondent agrees that it is completed. There was no supervision of the claimant or performance related meetings. The claimant was engaged by the respondent on a freelance basis. He had a particular job to do and was paid by bank transfer. The claimant had only signed an NDA. As the respondent's witness had pointed out there would have been an offer letter and a clear contract of employment if he was an employee, and nothing like that was given to the claimant. The agreement that spurred on the end is displayed in the bundle. If any monies were owed on 23 March 2023 the claimant would have raised this. He failed to do so as knew no monies were owed at that time. The website made reference to by the claimant was not created by the claimant and was only now being worked upon. The claimant was not sacked. There was a mutual agreement for the work to be undertaken by the claimant to come to a mutually agreed ending. This is an engagement with a freelancer.

Comment on the respondent's evidence

7. The respondent is a company. The respondent had legal representation from Croner. Despite this, the respondent made no disclosure. The directors of the company did not attend as witnesses. The only witness provided was someone who was employed after the claimant stopped working for the company and had no direct knowledge of him. The respondent said it had no disclosure to make. The witness, Ms Mathew said that she had spoken to people within the respondent about what had happened when the claimant was working with the respondent and searched for documents but could not find any. She said Mr Chouhan had now left. She asserted that if there had been an employment relationship there would have been an offer letter and employment contract etc. and offered her view that as there was not, there could not have been an employment relationship. No evidence was provided that it is the respondent's usual practice to offer a written contract following an offer letter. The tribunal was told by Ms Mayhew that payments to the claimant were made by bank transfer. No evidence of this was provided by the respondent. No invoices were provided. No confirmation of invoices paid were provided. No documents were provided showing how the company treated these payments in its end of year accounts. Ms McIntosh said that she had explained the disclosure obligation to the respondent and had been advised there was no disclosure. It is nonsense that there was no relevant disclosure and in my view the respondent has treated this process with contempt.

Findings of fact

8. On 13 July 2022 at 18:25, by email, the respondent's Parakh Chouhan, head of marketing and content productions, offered the claimant a contract as follows:

As discussed earlier we are happy to offer you a trial project to work with IANS as a back end developer. You will be involved in the development of app and website work for INAS. During this period we will offer you £10.10 hourly rate. You need to sign the NDA before I can share the scope document. Please sign and revert with your confirmation to accept this offer before 9:00 PM BST tonight.

9. The claimant signed the NDA the same day.
10. This exchange followed an email conversation of the previous days about setting up an interview, which included two emails that had a heading 'Looking for a Tier 2 sponsorship'.
11. The respondent made the following payments to the claimant, as evidenced by the claimant's bank statements: 11.8.22 £1252.40, 7.9.22 £2454.30, 14.11.22 £1666.50 and £949.40, 3.1.23.
12. The claimant disclosed a work log covering the period 14 July 2022 to 30 January 2023. According to that log he was working long hours on work provided by the respondent. The respondent did not dispute this, and I find

that during this period the claimant effectively worked full time on work supplied by the respondent. The respondent disputed that where the claimant had logged work as completed, it was completed, as this, it said was his own document. I find that there is no evidence that the respondent agreed at the time that any particular piece of work had been completed.

13. On 31 January 2023 the claimant emailed a Mr Refugio of the respondent to say that he had completed the project given last June and that he had not been paid for the last two months.
14. On 23 March 2023 in a WhatsApp exchange between the claimant and Parakh Chouhan the claimant, talking about a further project, says to Mr Chouhan that 'we' can complete the project within 7 to 8 weeks. It was not made clear who the 'we' referred to other than the claimant. Mr Chouhan responds as follows:

'Hello both. I think you can complete this work in 4 weeks. Here's my offer £1500 for each of you to complete the work in 4 weeks. I will pay on completion and will offer sponsorship if you complete the job. You can start tomorrow if you accept my offer.'

15. The claimant counter offers saying that the work would take 7 to 8 weeks. Mr Chouhan responds:

'I cannot accept your counter offer. This ends here.'

16. The claimant responds 'OK, thanks.'
17. No later documents were before me and there were no other documents in which the nature of the relationship between the parties is referenced.

Decision

18. I must consider whether, on the evidence provided by the claimant I can infer, on the balance of probabilities, that he was employed by the respondent during the period 14 July 2022 to 23 March 2023.
19. In making my decision I have had regard to the case of *Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497* which gave guidance on the matters to be considered when deciding whether any contract is an employment contract. Multiple factors should be considered. These include whether the contract was one of personal service and the degree of control exercised by the respondent over the claimant's work. In addition, many other factors could be relevant such as, for example, descriptions used by the parties of their relationship and how integrated into the employer's business the person claiming employee status was. Subsequent case law has focused on the irreducible minimum of factors to be considered, which are personal services, control and mutuality of obligation *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612* and *Carmichael v National Power Plc [1999] ICR 1226*. I also had regard to the case of *Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC)* in which the Supreme Court confirmed when looking

at the terms of a contract the question to be asked in every case is 'what was the true agreement between the parties?'.

20. In the case before me there was no formal contract between the parties. The claimant relies on the e-mail dated 13th of July 2022 as the contract. In my deliberations I have not found the lack of a written employment contract to be evidence that there was no employment contract, as suggested by the respondent, where it has failed to provide evidence that it issued written employment contracts to people it did consider to be employed during the relevant time.
21. Neither party raised with me any evidence, or made any submissions, on the matter of personal service. It is clear from the record of work produced by the claimant, and included in the bundle, that he was working full time on the project with the respondent but does not say that he had no option other than to perform the work personally, and from the wording of some of the messages in the bundle, including that of 23 March 2023, was clearly working with someone else. As noted above the claimant could not give oral evidence.
22. There was no evidence before me relating to the matter of control. It is not clear from the documents whether, for example, the claimant worked entirely at home or ever went to the respondent's premises or whether he had specified working hours.
23. The respondent's position is that the claimant was self-employed, and the wording of the messages of 23 March 2023 indicate that he was free to refuse an offer of work. The claimant acknowledges in his witness statement that he did not work on any apps for the company in February and March 2023. From that I can only assume that the respondent was not obliged to offer the claimant work. There was no evidence of complaint from the claimant during that time that he was not being given any work.
24. Of the WhatsApp exchange of 23 March 2023, Mr Perera, for the claimant, says this is a termination. Ms Mackintosh, for the respondent, said it is not and is indicative of the fact that there was no employment relationship, and this was work offered on a contractual basis. I agree that that is what the exchange of 23 March 2023 shows. On the evidence before me there is no mutuality of obligation beyond the respondent's undertaking to pay £10.10 per hour for work done.
25. I have considered the references throughout the documents to Tier 2 sponsorship. It is my understanding that with Tier 2 sponsorship the sponsor must be in an employment relationship with the claimant. No sponsorship was provided by the respondent to the claimant. It was clearly the case that the claimant was seeking sponsorship, as can be seen from his initial emails to the respondent before they entered into a contract, however as no sponsorship was given, it does not assist the claimant in showing that his contract with the respondent was an employment contract.

26. Additionally, I have considered that, where the claimant now claims unpaid holiday, there is no evidence that he requested this during the period 14 July 2022 to 23 March 2023 or after 23 March 2023 when it became clear the relationship was at an end.
27. The claimant makes a reference in his witness statement, where he sets out a list of payments he requests of the respondent: '*Give explanation for deductions from my pay (tax and National Insurance).*' The respondent said there were no pay slips as there was no employment relationship. The claimant has provided no evidence of deductions for tax and national insurance.
28. On the evidence before me I conclude that the email of 13 July 2022 is evidence of a contract for services between the claimant and the respondent, and not a contract of service (i.e. not an employment contract). The WhatsApp exchange of 23 March 2023 shows that a project had finished and another one was being offered at a fixed rate, which was declined by the claimant. There is no evidence of an employment relationship. Simply carrying out work on a project for remuneration, where there are no other indications of an employment relationship, is not enough from which to infer an employment relationship.
29. Having found that the claimant was not an employee I have considered whether the claimant could be considered a worker, though this was not an argument he raised. I find that I have not received sufficient evidence of the need to provide a personal service, or mutuality of obligation, to conclude that the claimant was a worker for the purposes of s230 of the Employment Rights Act 1996.
30. As the claimant was neither an employee nor a worker then the tribunal does not have jurisdiction to hear his claim of unpaid wages and the claim is dismissed.

Employment Judge Anderson

Date: 11 December 2023

Sent to the parties on: 14 January 2024

T Cadman
For the Tribunal Office