



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000522/2023

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Held in Glasgow via Cloud Video Platform (CVP) on 20 February 2024

Employment Judge L Doherty

10 **Mrs Kirsty Errington**

**Claimant
Represented by:
Mr F Marshall -
CAB**

15 **Amanda Gray**

**First Respondent
Represented by:
Mr J Steel - Lay
Representative**

20 **Daisy Steel**

**Second Respondent
Represented by
Mr J Steel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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- (1) The claimant was an employee and;
 - (2) The claimant was employed by Amanda Gray trading as Spedlins Castle Air B&B and;
 - (3) The second respondent is dismissed from the proceedings.

REASONS

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1. This was an Open Preliminary Hearing (OPH) to determine two issues. Firstly, the identity of the claimant's employer. It was the claimant's position that she was employed by Amanda Gray and Daisy Steel, trading as Spedlins Castle Air B&B (Spedlins Castle). It is the respondent's position that the claimant was employed by Amanda Gray trading as Spedlins Castle.

2. The second issue is whether the claimant was an employee. It is accepted that the claimant is a worker. Determination of this point is relevant to consideration of the claimant's complaints of breach of contract (failure to pay notice pay); failure to provide terms and conditions of employment; and automatically unfair dismissal under Section 100 of Employment Rights 1996 (the ERA).
3. The claimant was represented by Ms Marshall of the CAB and the respondents were represented by Mr Jack Steele, a lay representative.

Application for Strike out of the claim

4. There was a preliminary matter in that the respondents made an application for strike out of the claim, which was considered at the outset of the PH.
5. In support of respondent's position was that the claim should be struck out, Mr Steel submitted that there was considerable common ground on the facts. The claimant was dismissed with less than two years' service, and received an email which provided her with the reasons for her dismissal.
6. There had been no request for a contract; payment in lieu of notice had been made; attempts had been made to resolve the issue of non-payment of holiday pay to which no response has been received; there was no particularisation of the claims of discrimination or unfair dismissal in ET1, albeit these were referenced in the in the PH agenda. Furthermore, Mr Steel submitted such complaints as there were in the agenda were trivial and very thin. Account should be taken of this, particularly in circumstances where the respondent is elderly and frail.
7. Mr Steel also submitted that there was a significant issue with the claimant failing to disclose information in relation to detail and documents which went to the meris of the claim and remedy. The claimant was under a general obligation of disclosure which she had failed to comply with. It was not possible to determine the case fairly and justly. Further, the claimant had made an onerous application for disclosure.

8. Mr Steel submitted the second respondent should be dismissed. She had no proprietary interest in the business, or the building which is owned by the first respondent and her husband.
9. Mr Marshall opposed the application on the grounds that there had been no failure to comply with an order issued by the tribunal. Nor was there any basis upon which to conclude that there was no reasonable prospect of the claimant succeeding; these were discrimination claims which should be heard. In connection with the automatically unfair dismissal claim it had been agreed specification of this will be provided after employment status was determined.

10 **Consideration of strike out application**

10. The tribunal has power to strike out a claim under Rule 37 the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules).
11. From Mr Steel's submission, the tribunal understood the application to be made under Rule 37(1) (a) on the grounds that the claim had no reasonable prospects of success; Rule 37 (1) (b) on the grounds that the manner in which it has been pursued is unreasonable; and Rule 37 (1) (c) noncompliance with an Order of the tribunal.
12. In respect of the application under Rule 37 (1)(a) the tribunal had regard to the fact that at the PH which took place in December 2023, the respondents were represented by their then solicitor, Mr Holms. The tribunal identified what was said to amount to complaints of discrimination from consideration of the ET1 and the PH Agenda. That was recorded in the PH Note which was issued on 18 December 2023. There no objection taken to the inclusion of any of the claims so identified by the respondents either at the PH or subsequent to it, until Mr Steels application for strike out. Given the exercise which had taken place in which Mr Holms, acting for the respondents, was involved and what is recorded in the PH note of 18 December 2023, the Tribunal was satisfied that the respondents had fair notice of the discrimination claims which are sought to be made.

13. Albeit Mr Steel submitted there was common ground between the parties, the tribunal does not understand it to be conceded by the respondents that all treatment complained of by the claimant occurred.
14. There remains a live issue between the parties as to whether the treatment
5 complained of amounted to discriminatory conduct on the basis alleged. The determination of that may require evidence as to what occurred as a matter of fact, and even if there is no significant factual dispute, evidence as to context; and it will also require legal argument. The respondents may consider that the claimant's allegations are trivial or thin, but those are issues in a
10 discrimination case which are properly dealt with after there has been evidence and argument as to their merits. In the event that the due to Mrs Gray's infirmity she requires some adjustments to the arrangements for giving evidence, then these can be requested. There is a long line of authority from the appellate courts highlighting the importance of not striking out
15 discrimination claims except in the most obvious cases. The discrimination claims have been identified in a manner which allows the respondents to respond to them. It cannot be said from consideration of the material presented by the claimant in the ET1 the PH agenda, and in the course of the case management PH that all aspects of the claim have no reasonable
20 prospects of success. The application for strike out on that basis therefore fails.
15. In relation to the application under Rule 37 (1)(b) and (c), the tribunal understood Mr Steel to rely upon the claimant's failure to disclose information essential to the fairness of the hearing; failure to comply with a Tribunal order;
25 and to have made an oppressive application for disclosure in support of the position that claim should be struck out the grounds of unreasonable conduct/ failure to comply with on order.
16. The claimant has not failed to comply with any formal order issued by the tribunal to date. There is no general duty to disclose information contained
30 within the Rules. That is not to say disclosure is not important; the claimant will have to provide disclosure of matters which go to the fairness of the hearing, including remedy. Case management can be put in place before any

final hearing to deal with this. If the respondents considered that that particular information is required, it is open to them to make an application for recovery of this.

- 5 17. In any event in order to consider whether the claim should be struck out under Rule 37 (1) (b) or (c) the tribunal has to consider whether as a result of the conduct or the default in question a fair hearing is no longer possible.
- 10 18. The tribunal could not reach the conclusion that that was the case. Matters have only reached stage in a preliminary hearing to consider employment status and identity of employer. Notice the discrimination claims is given. Specification of the claim under Section 100 of the ERA is only necessary if the claimant satisfies the tribunal she was an employee, which is the subject of this hearing. Such deficiencies are there might be in the specification of the claimant's position can be dealt with by way case management of tribunal orders and
- 15 19. The respondent's application for strike out was refused and the Tribunal proceeded with the hearing.

The Hearing

20. Evidence was given by the claimant; her evidence in chief was given by way of a witness statements which was taken as read.
- 20 21. A witness statement was produced by Amanda Grey, but she did not attend to give evidence. Mr Steel's position was that he did not intend to call Mrs Gray due to her advanced age and state of health. Mr Marshall submitted that the hearing could not proceed fairly in the absence of Mrs Gray, as the claimant would not have the opportunity to cross examine her.
- 25 22. The tribunal was not satisfied that it was prevented from having a fair hearing due to Mrs Gray's absence. It is a matter for the respondent to decide what evidence they wish to lead, and if they do not wish to lead evidence. In the event they choose to rely on witness statement only, where the witnesses do not attend to speak to this or be not cross examined, then that is a matter for

them. It was explained that the Tribunal will attach little or no weight to a witness statement which is not spoken to in evidence.

23. Both sides lodged a bundle of documents.

Findings in Fact

5 24. On 24 November 2021 the claimant applied for the role of housekeeper in Spedlins Castle. She was interviewed for the post by Daisy Steel. It was explained to her by Ms Steel during the interview that Spedlins Castle was owned and had been refurbished by Mrs Gray, but that it was her (Ms Steel's) 'baby'. The claimant was told during her interview that she would have to work
10 on a Friday.

25. Ms Steel offered the claimant the job.

26. The claimant was not provided with a written contract of employment or written terms and conditions of employment.

15 27. The claimant worked at Spedlins Castle from 15 December 2021, until she was dismissed on 11 September 2023.

28. The claimant's rate of pay was £12 per hour, increasing to £15 per hour.

29. The claimant's tasks comprised in the main of housekeeping tasks and meeting guests. Guests had the claimant's telephone number as an emergency contact. The claimant did not work the same hours every week.
20 Her hours varied according to the work required by the business. Ms Steel provided her with a spreadsheet at the beginning of the year which outlined when guests were scheduled to stay, which could be altered depending on new bookings.

30. The claimant initially provided the hours she worked to Daisy Steel.

25 31. The claimant worked for approximately two months before she became aware of Mrs Gray's involvement in the business. The initially claimant believed that Ms Steel was her employer, however Mrs Gray told the claimant that she was her employer. The claimant then provided Mrs Gray with her hours of work.

32. Mrs Gray and Daisy Steel, in approximately equal measure, provided the claimant with direction on the conduct of her day to day work.

33. Midway through her employment the claimant asked Ms Steel about payslips. She told the claimant to speak to Mrs Gray, who in turn told her to speak to Ms Steel. Mrs Gray then provided the claimant with a handwritten letter of her earnings.

34. The claimant knew that Spedlins Castle building was owned by Mrs Gray.

35. It was Mrs Gray who paid the claimant throughout.

36. It was Mrs Gray who dismissed the claimant.

Note on Evidence

37. There was no significant dispute on the claimant's the evidence, much of which was not challenged.

38. There was a dispute as to the hours she worked, however that did it was not necessary for the tribunal to resolve this to determine the issue before it, as there was no dispute that her work was contingent on the business needs.

Submissions

39. Both parties made oral submissions. The thrust of Mr Marshall's submission was that the claimant was an employee and was employed by Amanda Gary and Daisy Steel T/A Spedlins Castle This was refused by Mr Steel. Where relevant the submissions are dealt with below.

Consideration

Employment Status

40. It is accepted by the respondents that the claimant was a worker. The issue is whether she was an employee.

41. The relevant statutory provision is section 230 of the ERA which provides:

Employees, workers etc.

(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.*

5 (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)—*

10 (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;*

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

(4) *In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*

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42. The Tribunal began by considering the question of employment status.

43. In order to determine that issue the tribunal considered the following questions:

25 (1) *did the clamant agree to provide her own work and skill in return for remuneration?*

(2) *did she agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?*

(3) *were the other provisions of the contract consistent with its being a contract of service?*

44. The tribunal was satisfied that the claimant had agreed to provide her own work in return for payment. There may have been a dispute as to the hours that she worked, but it was not in dispute that the claimant worked irregular hours which were contingent on the business needs on a week to week basis, and that she was paid for her work. The tribunal was satisfied that the claimant worked and provided personal service in return for pay. It was not suggested that she could, or in practice ever did, exercise the power of substitution by supplying another individual to the respondents to perform the duties which she undertook. The Tribunal was satisfied that there existed between the parties a mutuality of obligations. The claimant was obliged to provide personal service for the hours she was asked to work, and there was an obligation to pay for that work. The Tribunal was satisfied that the claimant was paid for the work which she did by Mrs Gray.

45. The Tribunal then considered whether the claimant was subject to a sufficient degree of control for the relationship to be one of employer and employee?

46. In considering this the Tribunal take into account that the claimant took direction about the conduct of her day to day work from both Ms Steel and Mrs Gary. She was told when she was required to work, which was contingent on the business needs, and she required to report the hours she worked, initially to Ms Steek and then to Mrs Gary. She was paid an agreed hourly rate of pay. She was dismissed by Mrs Gary.

47. All of these factors point to a degree of control being exercised over the claimant which is consistent with the existence of a contract of employment.

48. The tribunal considered whether there were any factors Inconsistent with the existence of a contract of employment. The fact that the claimant did not work regular hours each week and that the amount of work she did was contingent on the demands of the business, were matters which the Tribunal took into account. There was no information about the claimant's tax position before

the Tribunal. Such information would have been a factor, but not determinative of the claimant's employment status.

49. The exercise which tribunal has to conduct is to consider the overall picture, having regard to these factors. Balancing the claimant's obligation to provide personal service in return for payment, the degree of control she was subject to, and the factors which are inconsistent with the existence of a contract of employment, the tribunal was satisfied that the irreducible minimum necessary to a contract of employment was present in this case, and that the claimant was an employee for the purposes of Section 230 of the ERA.

10 ***Identity of employer***

50. The factors which supported the conclusion that Ms Steel was the claimant's employer were that Mrs Steel interviewed the claimant and offered her the job. She told the claimant that the business was 'her baby' in the course of the interview. The claimant believed Ms Steel was her employer for the first two months of her employment. Ms Steel provided her with a spreadsheet at the beginning of the year with details of guest booking. The claimant initially reported her hours to Ms Steel. Ms Steel was involved to approximately the same degree as Mrs Gary in providing the claimant with direction on the day-to-day conduct for work.

51. The factors which supported that Mrs Gray was the claimants employer were that she owned Spedlins Castle; she was involved in directing the conduct of the claimant's work; that after about two months of employment the claimant was told to report her hours of work to Mrs Gray, and she thereafter did so; that around two months into her employment the claimant was told that Mrs Gray was her employer; the claimant was paid by Mrs Gray throughout her employment; it was Mrs Gray who ultimately provided her with a written note of her earrings when this was requested; and that it was Mrs Gray who dismissed her.

52. Having regard to these factors, the Tribunal on balance concluded that it was Mrs Gray, as opposed to Ms Steel, or Mrs Gray and Ms Steel jointly, who was the claimant's employer. Even if Ms Steel told the claimant that the business

was 'her baby' and the claimant initially believed that Ms Steel was her employer, Ms Steel's role in directing the claimant in her duties and providing details of guest stays, were consistent with her managing the claimant, but did not support without more the conclusion that she was the claimant's employer. This was in contrast to Mrs Gary, who in addition to performing a similar type of management function to Ms Steel, paid the claimant and ultimately she dismissed her. These two elements go to the heart of the mutuality of obligations and control which are necessary to a contract of employment. The fact that it was Mrs Gray paid the claimant and dismissed her are entirely consistent with Mrs Gray being the claimant's employer. In addition, while not determinative of the point, Mrs Gray told the claimant she was her employer, and she owned Spedlins Castle. Both of these factors lend support the conclusion that it was Mrs Gray who was the employer.

53. The tribunal therefore concluded that the second respondent should be dismissed from these proceedings.

Further Procedure

54. The effect of the tribunal's conclusion as to employment status is that the claim under to section 100 ERA will proceed. The claimant should provide specification of the basis on which it said she was automatically unfairly dismissed Section 100 of the ERA with reference to which statutory provision relied upon. This should include specification of the circumstances connected with the claimant's work which she reasonably believed were harmful or potentially harmful to health or safety, which it is said was brought to the employer's attention by reasonable means, and why that is said to be the reason for dismissal.

55. This should be provided within 14 days of the date of this judgment.

L Doherty

Employment Judge

22 February 2024
Date

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Date sent to parties

22 February 2024

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