



EMPLOYMENT TRIBUNALS

Claimant: Ms S Smith

Respondents: AS & S Limited (in Creditors Voluntary Liquidation) (R1)
Secretary of State for Business and Trade (R2)

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 23 November 2023

Before: Employment Judge Brewer

Representation

Claimant: In person

Respondents: R1 no attendance
R2, Ms S Wade, Lay representative

JUDGMENT

1. The claimant's claims for breach of contract and unauthorised deductions from wages were submitted out of time and the Tribunal does not have jurisdiction to hear them. Those claims are accordingly dismissed.
2. The claimant's claim for a statutory redundancy payment fails because the claimant was not an employee of the first respondent.

REASONS

Introduction

1. This case was listed for a final hearing to determine the claimant's claims for unpaid wages, unpaid holiday pay, unpaid notice pay, and unpaid statutory redundancy pay.
2. The first respondent is in the process of being wound up and has not participated in these proceedings.

3. The second respondent is a party having rejected the claimant's claims for payments from the Secretary of State on the basis that she was not an employee.
4. At the hearing the claimant represented herself and the second respondent was represented by Ms Wade.
5. I had a bundle of documents running to 235 pages, a bundle of authorities from the second respondent and a witness statement from the claimant.
6. One of the issues which had not been considered prior to this hearing was whether the claimant's claims categorised as breach of contract and unauthorised deductions from wages were presented in time. I am not sure why this had not been picked up prior to the papers coming to me. There has already been a preliminary case management hearing in this matter where all of the relevant dates are set out and I cannot say why the matter of time limits was not addressed.
7. At the outset of the hearing I explained that time limits were a jurisdictional issue that I was bound to deal with first and I set out for the claimant the relevant time limits and the law.

Issues

8. The issues I potentially had to decide were:
 - 8.1. were the claims for breach of contract and unauthorised deductions from wages brought within the time limits respectively set out in article 7 of the Employment Tribunals Extension of Jurisdiction Order 1994 and section 23 Employment Rights Act 1996 (ERA),
 - 8.2. if not, should time be extended to allow those claims to proceed,
 - 8.3. was the claimant an employee or worker,
 - 8.4. if so, did she suffer any unauthorised deductions from wages,
 - 8.5. if the claimant was an employee,
 - 8.5.1. was she dismissed,
 - 8.5.2. if so, was the reason for dismissal redundancy,
 - 8.5.3. if so, is she entitled to a redundancy payment,
 - 8.5.4. if so, how much
 - 8.5.5. was she dismissed in breach of contract,
 - 8.5.6. if so, what damages is she entitled to

Law

9. Turning first to the question of time limits, it is uncontroversial that in respect of the claims for breach of contract and unauthorised deductions from wages, a claimant has three months from the deduction, or the last in a series of deductions, to present the claim to the Tribunal, and three months from the termination of employment to bring the breach of contract claim. This of course is subject to any extension of time for early conciliation.

10. Time to present either of these claims can be extended if there is a finding that it was not reasonably practicable for the claim to have been presented in time and the extra time taken to present the claim was reasonable.

11. The right to claim a redundancy payment is confined to employees. For the purpose of this right, s.230(1) ERA defines 'employee' as:

'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. S.230(2) provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

12. The test for employment status is the so-called multiple test. The most common judicial starting point for the multiple test is a passage from the judgment of Mr Justice MacKenna in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433, QBD. He stated:

'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.'

13. The continuing relevance of this passage was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors** 2011 ICR 1157, SC, where Lord Clarke called it *'the classic description of a contract of employment'*. In essence, the **Ready Mixed** formulation of the multiple test can be boiled down to three questions:

13.1. did the worker agree to provide his or her own work and skill in return for remuneration,

13.2. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee,

13.3. were the other provisions of the contract consistent with its being a contract of service?

14. There is a wide range of 'other factors' that may be taken into account.

15. Thus, the key questions are:

- 15.1. *where are the terms of the contract to be found:* If there are written terms, the court or tribunal will need to consider whether it was the intention of the parties, objectively ascertained, that all the terms of the contract be contained in the documents. This is a question of fact — **Ministry of Defence HQ Defence Dental Service v Kettle** EAT 0308/06
- 15.2. *what are the terms of the contract:* If the court or tribunal is satisfied that the contractual documentation is a full record of the parties' agreement, then identifying the terms of the contract will be a simple matter. However, if the court or tribunal is satisfied that the written contract is not the start and end of the bargain struck by the parties, then it will look to the surrounding factual matrix, including such things as the conduct of the parties and any oral exchanges between them. This, too, is a question of fact (see **Carmichael and anor v National Power plc** 1999 ICR 1226, HL, as well as the comments of Mr Justice Elias, then President of the EAT, in **James v Greenwich London Borough Council** 2007 ICR 577, EAT),
- 15.3. *how to characterise the relationship that those terms give rise to:* If the terms are exclusively contained in written documents, then the legal relationship to which those terms give rise is a question of bare law (see **Clark v Oxfordshire Health Authority** [1998] IRLR 125, CA). However, such a case will only 'exceptionally' arise, according to Sir Christopher Slade in that case. Where an investigation and evaluation of the factual circumstances in which the work was done is required, the question becomes one of mixed fact and law. Or rather, the tribunal must find those facts and weigh their importance in such a way as the law directs (see **O'Kelly and ors v Trusthouse Forte plc** [1983] ICR 728).
- 15.4. For the reasons set out below I need say no more about redundancy and redundancy pay.

Findings of fact

16. I make the following findings of fact.
17. The first respondent is a hairdressing business which is in the process of being voluntarily wound up.
18. There are three shareholders in the first respondent being the claimant, who has around 20% of the shares, and her parents who hold the remaining shares equally.
19. The shareholders are also statutory directors of the first respondent.
20. The claimant worked for the respondent from 17 July 1995 until 18 February 2023. There was no dispute that the effective date of termination of the employment, if there was employment was 18 February 2023.
21. The claimant contacted ACAS for early conciliation on 18 May 2023 and she received her early conciliation certificate 1 June 2023. The same dates applied to early conciliation for both respondents.

22. The claimant initially worked as an apprentice hairdresser, but she appeared to fairly quickly abandon that and became essentially part of the management of the business although I accept her evidence that from time to time she undertook duties such as receptionist and even washing hair.
23. There is no written contract of employment.
24. The claimant said, and I accept that she worked part time, she estimated around 35 hours per week. As a director she had a directors' loan account and as a shareholder she received dividends. She said in evidence that she did not understand dividends and she thought it was simply part of her pay.
25. The claimant said that the directors took joint decisions about the running of the first respondent's business.
26. The claimant took responsibility for dealing with any performance or conduct issues in relation to the staff but, importantly, if there were complaints or concerns about the claimant then she was not subject either to the first respondent's disciplinary or grievance procedures and the directors would merely have a discussion and take a decision.
27. There is no suggestion anywhere in any of the evidence that the claimant was under the control of either the main shareholders or in a general sense, the business.
28. The claimant did not have a defined role in the first respondent.
29. The claimant was part of the decision-making process when it was decided to wind up the first respondent.
30. Although the claimant said she was paid sick pay and holiday pay, there was no evidence of that in the paperwork. I accept that the claimant was paid when she was on holiday, but the pay slips show that there is no differentiation between what she was paid and what she was paid for, that is to say holiday pay is not shown even though the claimant has said she was on holiday during periods covered by the pay slips which are contained in the bundle.
31. What the pay slips do show is not that the claimant was paid an hourly rate for working a given number of hours each week or month, rather that she was paid £462.50 each week clearly irrespective of the number of hours worked. In fact, each pay slip shows that each week the claimant was paid this sum for one hour's work which implies that this is not pay for the various personal services the claimant said she undertook, but rather a sum of money, as I have said, irrespective of how long she worked for and what she did during the working day. This seems to me to be much more likely to be pay for being a director given its consistency rather than pay for being an employee which would vary with the number of hours worked.

Discussion and conclusions

32. I turn first to the question of time limits.

33. It is uncontroversial that where a statutory provision dealing with time limits refers to a thing being done 'within' a certain period, in this case, three months either from the effective date of termination and/or the date of any unauthorised deduction of wages.
34. In this case the claimant was last paid on 4 February 2023. The deduction would have been on the next expected pay date, around 12 February and therefore time ran from that point in relation to the claim for unauthorised deductions from wages. Three months from that date would have been 11 May 2023.
35. In relation to the claim for breach of contract, time starts to run on the effective date of termination. In this case therefore given that the effective date of termination was said to be 18 February 2023, the three-month time limit ran out on 17 May 2023. Given that the claimant did not contact ACAS until the following day, she does not get the benefit of any extension for the period of early conciliation.
36. The claimant said that she was aware that the Secretary of State was not going to make her any payments by 13 April 2023 which gave her just under one further month to commence early conciliation in order to benefit from any extension of time to bring her claims. In the rejection letter sent by the Secretary of State, there is an express reference to this and that appears on page 123 of the bundle. The letter from the secretary of state says:
- "you have the right to make a claim to an employment tribunal if you think you've been paid the wrong amount. There are time limits on when you can make a claim. Information about time limits and when and how to make a claim to an employment tribunal is available at..."*
37. There then follows a link to a website dealing with making claims to an employment tribunal. The claimant said that she did research about making a claim and she was aware of the need for early conciliation. I accept the claimant's evidence that she was confused and shocked that her claim to the Secretary of State had been rejected but she confirmed that she did speak to ACAS about a week after the rejection, so towards the end of April 2023, and she also said that she was, she thought, on holiday at the end of April 2023 however that is not a reasonable excuse for missing a crucial time limit.
38. If a claimant is to rely on ignorance of a time limit, then that ignorance must be reasonable. The claimant is an intelligent woman, a company director who had accessed help from an accountant and an insolvency practitioner and had been in discussions with ACAS prior to the expiry of any time limit. It seems clear to me, given the date that ACAS were contacted for early conciliation, that there was simply a miscalculation or a misunderstanding of what was meant by "within the period of three months" and the presumption was that three months after 12 or 18 February was 12 or 18 May.
39. From that I conclude that it was reasonably practicable for the claimant to have contacted ACAS within the primary time limit in both claims, to have therefore benefited from the extension of time for early conciliation and to therefore have brought her claims in time, but she failed to do so and therefore the Tribunal does

not have jurisdiction to hear her claims for breach of contract and for unauthorised deductions from wages and those claims fail.

40. I turn next to the question of whether the claimant is entitled to a redundancy payment which of course first requires me to determine whether she was an employee of the first respondent.

41. I remind myself that the key questions I have to answer are as follows:

41.1. did the claimant agree to provide her own work and skill in return for remuneration,

41.2. did the claimant agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee,

41.3. were the other provisions of the contract consistent with its being a contract of service?

42. As I have indicated, in my view the better understanding of the pay slips is that they show not payment in return for particular work and therefore not for particular skill or services and not for generally being an employee.

43. Given the regularity and consistency of the payments, and given the rate and number of hours described in each of the pay slips (essentially payment for 1 hour each week), it looks to me as though the claimant is being paid for being a director and not being paid for doing work as an employee as I would expect the pay to vary with the number of hours worked and for the hourly rate to be set out (unless of course the claimant was actually being paid just short of £500.00 per hour).

44. Crucially there is no evidence of any control being exercised over the claimant by either or both major shareholders or by the company itself. On the contrary it appears that the claimant is the one who was in control of what she did and when she did it to a very large degree. As she said in her evidence, she helped out with everything, and she had no defined job or role. The claimant said in her evidence "*no-one supervised me, we worked as a team*" (the "we" here being a reference to the Directors/shareholders)

45. The claimant took part in all of the key business decisions as a director, not as a manager or some other type of senior employee.

46. In terms of the other provisions of the contract, given the rather vague evidence of the claimant it is difficult to ascertain what they may have been, but I have referred above to the claimant's assertion that she was in receipt of holiday pay and my findings of fact on that are that she was not. I stress that I do not doubt that when she was on holiday she received pay, but that is not described in the pay slips as holiday pay, rather she continued to receive the same sum of money whether or not she worked in a particular week, how many hours she worked in a particular week, what work she did and whether or not she was on holiday.

47. For all of those reasons my conclusion is the claimant was not an employee within the meaning of the ERA and thus she cannot be entitled to a statutory redundancy payment. Therefore, the claimant's claim for a statutory redundancy payment fails.

Employment Judge Brewer

Date: 23 November 2023

JUDGMENT SENT TO THE PARTIES ON

....15 January 2024.....

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