



EMPLOYMENT TRIBUNALS

Claimant: G B Townson

Respondent: Vincent Bentley

HEARD AT: Manchester, by video platform

On: 12 December 2023

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: In person

For the Respondent: In person

JUDGMENT having been sent to the parties on 14 December 2023 and written reasons having been requested as a result of a live appeal, the following reasons are provided:

REASONS

Introduction

1. By a claim form dated 29 December 2022, the claimant presented complaints of unauthorised deductions from wages and breach of contract. The response was received on 26 January 2023 and contended that the claimant was never employed by the respondent and so was not entitled to any monies claimed.

The issues

2. At a case management hearing on 17 August 2023, Employment Judge Parkin identified the issues to be determined as:
 - (1) Was the claimant employed by the respondent as an employee under a contract of employment/contract of service?
 - (2) If not, was the claimant employed by the respondent as a worker under a personal contract?

If the claimant was employed by the respondent as an employee or as a worker:

- (3) When did such employment commence and finish?
- (4) Did the respondent fail to pay the wages due to the claimant on a series of occasions (between May and the end of September 2022)?

If so:

- (5) What is the total amount of those deductions (after credit for payments made by the respondent to the claimant) which the Tribunal should award in her favour?
- (6) Is the claimant entitled to be reimbursed expenses of £79.79, as an implied term of her contract of employment, if an employee?

Evidence

- 3. The Tribunal was provided with a bundle from the claimant of 116 pages of documents, together with a witness statement from the claimant and a statement from Heather Heaton, the claimant's mother.
- 4. The respondent provided witness statements from himself and from Annette Chitty, a friend and business associate of the respondent.
- 5. The respondent told the Tribunal that he had sent documents to the Tribunal "months ago". A search was conducted of the Tribunal's electronic systems and postal records, but no trace of those documents could be found. The respondent was unable to say when he sent his documents, or how, or when they were received, although he was able to show when his 2 witness statements were received, and they were traced successfully. The Tribunal noted that the respondent's suggestion that he sent his documents in, months ago, is at odds with the case management orders of Employment Judge Parkin and the deadline set for disclosure and is also at odds with the report, at that time, of the respondent's non-compliance with case management orders.
- 6. In any event, after extensive searches resulted in no trace of the respondent's documents, the respondent did not accept an offer to stand the hearing down whilst he resent his documents to the Tribunal, and instead said he was happy to proceed without the documents that he wanted to rely on.
- 7. The Tribunal heard oral evidence from the claimant, Ms Heaton, the respondent and Ms Chitty (the respondent's friend and business associate).

Findings of fact

- 8. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those

concerned at the time. Where a conflict of evidence arose, the Tribunal resolved this on a balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The relevant findings of fact are as follows.

9. The claimant was engaged by the respondent to work in and for his business from 2 May 2022 and she did so until 30 September 2022. At the outset, the claimant was interviewed by the respondent and was offered work. The respondent took on the claimant because he was unable to give the business his full time and attention due to caring responsibilities for his elderly mother.
10. The claimant was engaged to develop the respondent's business and source new customers. In that sense, the claimant's personal service was important because the claimant knew people who could help the business. The claimant produced catalogues, posted for the business on social media, undertook network working, sourced venues and clients, and refurbished the respondent's studio to become a gallery.
11. Nominally, the claimant worked from 10.00am to 4.00pm daily and for 33 hours per week. However, in reality, she worked beyond those hours. The claimant did not always work at the gallery; some of her work was done from home but in her working time. In terms of pay, it was understood that the claimant would be paid at least the national minimum wage and 5% commission on sales.
12. From time to time, the claimant asked for a written contract of employment and the respondent first said he would produce one. Later he admitted that he had put it off because he "wanted to avoid HMRC".
13. The working relationship between the claimant and the respondent broke down because the respondent failed to pay the claimant. At the end of September 2022, the claimant refused to work for the respondent any longer unless or until she was paid. Her requests for payment had been ignored and the claimant had become nervous because she was being fobbed off with what she considered to be excuses from the respondent. In addition, the claimant began to hear rumours about the business which caused her to believe that the respondent might try to avoid paying her.
14. The respondent has failed to pay the claimant for the work that she has done or any commission.
15. The respondent has also failed to reimburse the claimant for a suitcase that she purchased out of her own money, for work purposes, in the sum of £79.79.

The applicable law

16. The law on what constitutes an employee, a contract of employment and a worker is found in the Employment Rights Act 1996 ("ERA").

Employee status

17. ERA, section 230(1) defines an employee as:
“an individual who has entered into or works under ... a contract of employment.”
18. Section 230(2) ERA provides that a ‘contract of employment’ means:
19. *“a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.”*

Worker status

20. ERA section 233(3) provides that:
“A worker is defined as an individual who has entered into or works under either a contract of employment or 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 a professional business undertaking carried out by the individual. “
21. The definition of a worker can therefore be broken down into 3 elements:
 - 21.1 there must be a contract;
 - 21.2 there must be a requirement to carry out personal services; and
 - 21.3 the work done must be for another party to the contract who is not a client or customer of the individual’s profession or business undertaking.
22. In *O’Kelly & others v Trusthouse Forte PLC* [1983] ICR 728 CA Sir John Donaldson confirmed that, in approaching the question of whether a claimant was an employee and also the question of whether a claimant is a worker in the alternative, a Tribunal must *“consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account”*.
23. The Tribunal must therefore consider all relevant factors in the relationship between the parties, including the degree of control exercised by the respondent over the claimant (for example: whether the claimant was under a duty to obey orders; who had control over working hours; supervision; the mode of working; and who provided any equipment). However, the Tribunal should take note of the fact that many employees, by virtue of their skill and expertise, may be subject to very little control. The Tribunal must also take account of organisational matters, such as the degree to which an individual is

integrated into the employer's organisation, whether there is an existing disciplinary procedure which is applicable to the individual and whether the individual is included in any schemes such as for occupational benefits. The Tribunal must also have regard to the economic reality of the relationship between the parties and whether the claimant can be said to be in business on her own account or whether she worked for another who takes the ultimate risk of loss or profit.

24. Other factors to be considered by the Tribunal include: whether there was a requirement for personal performance or whether the claimant could send a substitute or sub-contract the work; whether there was mutuality of obligation between the parties such as an obligation on the employer to provide work and on the employee to do it; and the Tribunal must also consider whether there were any other factors consistent with the existence of an employment relationship.
25. In Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] ICR 1157 the Supreme Court held that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in fact represent what was agreed. The true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

Conclusions

26. The Tribunal has applied the relevant law to the facts to reach the following conclusions.
27. In all the circumstances of the case, the Tribunal considered that the claimant was most certainly a worker for the respondent and also an employee.
28. The claimant was formally interviewed for a job, as a result of which she was offered a role and invited to 'join the team'. The Tribunal has seen texts between the parties which evidence that situation and the respondent has not denied or refuted them and has not challenged the claimant about them at this hearing.
29. The claimant was engaged to further the respondent's business, develop it, source its customers. She devoted her full time and attention to the business, because the respondent was unable to do so himself. The Tribunal found that the claimant was under the respondent's direction and control, engaged to further his business whilst the respondent had an elderly mother to care for which meant that he could not give the business his full time and attention. It was the logical and sensible thing to do to engage somebody who might have connections, to help the business along the way.
30. The respondent did not refute the claimant's suggestion that she worked beyond her notional working hours and at home. Personal service was also an important aspect of the relationship - the respondent engaged the claimant precisely because she knew people who could help the business.

31. When the claimant asked the respondent about a contract of employment, he did not tell her she was not an employee or not working under a contract of employment. Rather, he agreed that he would provide a contract of employment albeit that he then put this off, but he did not at any point deny that the essence of the relationship was one of employment. The Tribunal considered the respondent's comments at this hearing, and his suggestion that the claimant was self-employed, to be said in hindsight and self-serving. There was no evidence that the arrangement for payment of 5% commission amounted to some form of self-employment. In any event no such commission has been paid to the claimant.
32. The claimant's employment commenced on 2 May 2022 and ended on 30 September 2022 when the claimant and the respondent fell out. The claimant was therefore not paid for a period of just under 22 weeks' employment. The claimant has claimed for working 33 hours per week at the national minimum wage rate of £9.50 per hour. Her gross earnings are therefore £313.50 per week. The claimant told the Tribunal that she is owed **£6,261.50** gross, and the tribunal awards that amount (gross) to the claimant. The claimant did not seek payment of any commission.
33. The claimant also claimed £79.99 for expenses incurred on the respondent's behalf for the purchase of a suitcase. The claimant provided a TK Maxx receipt for a suitcase in the sum of £79.99. The respondent did not dispute the amount, or the purchase expense incurred by the claimant on his behalf and therefore the Tribunal awards the claimant **£79.79** as damages for breach of contract for non-payment of expenses.

Employment Judge Batten

Date: 8 July 2024

REASONS SENT TO THE PARTIES ON

9 July 2024

FOR THE TRIBUNAL OFFICE

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