



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Bantel

Respondent: Hoxleigh Limited (in liquidation)

Heard at: London Central Employment Tribunal (by CVP)

On: 3 June 2024

Before: Employment Judge Anthony

REPRESENTATION:

Claimant: In person

Respondent: No attendance

RESERVED JUDGMENT

The Tribunal's judgment is that:

Breach of Contract

1. The claim for breach of contract fails and is dismissed.

Unauthorised Deduction from Wages

2. The claim for unauthorised deduction from wages is not well founded and is dismissed.

REASONS

Introduction

1. The claimant claims a breach of contract in relation to wages and also makes a claim in relation to unauthorised deduction from wages.

The Evidence

2. The claimant gave evidence on her own behalf and no one attended on behalf of the respondent.

3. The Tribunal was provided with:
 - a) ET1 claim form;
 - b) employee information;
 - c) contract of employment (unsigned);
 - d) WhatsApp messages;
 - e) Bank statements for Coutts Bank for the month ending 1 April 2023; 1 June 2023; 1 July 2023; 1 August 2023; 1 September 2023; 1 October 2023; 1 December 2023 and 1 February 2024;
 - f) Two screenshots for a bank account;

The Issues

4. The issues before the Tribunal are as follows:
 - a) Was the claim presented in time?
 - b) In relation to the breach of contract claim, was the claimant an employee?
 - c) In relation to the unauthorised deduction from wages, was the claimant a worker?
 - d) Is the unauthorised deduction from wages claim in respect of wages?
 - e) In relation to the unauthorised deduction from wages, has the respondent paid the claimant an amount of wages less than the total amount of wages properly payable?
 - f) In relation to the breach of contract claim, did the respondent pay to the claimant wages which was less than the sum payable under her contract of employment?

Relevant Law

Time Limits

5. The provisions in relation to time limits for bringing a breach of contract claim are contained within Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The normal time limit is within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation).
6. The statutory provisions in relation to time limits for bringing an unauthorised deduction from wages claim is set out in section 23(2)(a) of the Employment Rights Act 1996. The time limit to bring a claim in the Employment Tribunal for a complaint of unauthorised deduction from wages is three months beginning with the date of payment of the wages from which the deduction was made.
7. An extension of time may be granted by the Tribunal to validate a late complaint if the Tribunal is satisfied that it was “not reasonably practicable for the complaint to be presented before the end” of the three-month period. The complaint must nevertheless have been presented “within such further period as the Tribunal considers reasonable” in order for an extension to be granted.

8. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time (see *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490 at paragraph 12, per Underhill LJ). However, in assessing whether the ignorance or mistake is reasonable, it is necessary to take into account any enquiries which the claimant or their adviser should have made. The test of reasonable practicability is one of fact.
9. If it is not reasonably practicable to present a claim in time, the Tribunal may allow an extension of time of such further period as it considers reasonable. There is no fixed limit, and each case must be considered on its facts in the light of the employee's explanation for the delay (see *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA and *Howlett Marine Services Ltd v Bowlam* [2001] IRLR 201).

Employee and Worker status

10. An “employee” is defined in section 230(1) of the Employment Rights Act 1996:

“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.”

11. A “contract of employment” is defined in section 230(2) of the Employment Rights Act 1996:

“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.”

12. A “worker” is defined in section 230(3) of the Employment Rights Act 1996:

“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

(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;

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

Contract of Employment

13. A contract of employment need not be in writing and can be an oral agreement. The Tribunal will generally begin its consideration of any written terms for an

indication of the intentions of the parties. Where the true intent of the parties is in dispute, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms truly reflect the agreement and to do so applying the broad approach which *Autoclenz Ltd v Belcher and Others* [2011] UKSC 41 describes, rather than the stricter approach that conventional contractual principles would allow.

Contract of Service

14. A contract of service exists if the following three conditions are fulfilled: (a) an obligation on a person to work personally and be paid for it; (b) sufficiency of control for there to be an employer and employee relationship; (c) other factors being consistent with the employer/employee relationship (see *Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433 per McKenna J).

Findings of fact and Associated Conclusions

Was the Claim Presented In Time - Breach of Contract

15. The claimant states on the ET1 claim form that she was employed by the respondent from 27 March 2023. She states in her ET1 claim form that her employment ended on 6 October 2023. She states that she commenced new work on 7 October 2023. She states that the respondent did not pay her a salary for the work she carried out.
16. In response to directions from the Tribunal on 22 May 2024, the claimant provided the Tribunal with documents (b) above (employee information) and (c) which is the contract of employment (unsigned). The claimant clarified in oral evidence that the document described as the 'employee information' was drafted by herself. I sought clarification from the claimant as to why the end date for the employment on this document was different to that on the ET1. The end date on the 'employee information' was expressed as 25 March 2024. The claimant clarified that she was unsure of what date to put down and she utilised the date the company was placed in liquidation as the end date for the employment.
17. I place little weight on the 'employee information'. I find this was a document drafted by the claimant which contained inaccuracies and therefore cannot be relied upon. I do not accept the material date when the "contract of employment" was terminated was 25 March 2024. I find from the claimant's oral evidence and the ET1 claim form that the claimant was of the belief her "employment" terminated on 6 October 2023. This was because the claimant took the view that there was no realistic prospect she would be paid by the respondent.
18. I find from the claimant's ET1 claim form and her oral evidence that she acquired consultancy work in a self-employed capacity which commenced on 7 October 2023. I do not have the claimant's Coutts bank statement for the month ending 1 November 2023. In any event, I find the claimant's evidence is supported by her Coutts bank statements for the month ending 1 December 2023 which demonstrate she was paid by First Friday Limited on 30 November

2023. I find the claimant found alternative work to commence on 7 October 2023.

19. I accept the claimant's evidence that she did not provide notice of termination to the respondent. However, I find it is clear from the claimant's evidence that any contractual or "employment" relationship to work for the respondent, 9 a.m. to 5 p.m. Monday to Thursday, ended on 6 October 2023 because she was engaged to work for another company after this date. I find this is the material date when the "contract of employment" was terminated by the claimant, albeit with no notice to the respondent. I find the effective date of termination of the employment is therefore 6 October 2023.
20. The time limit to bring a claim in the Employment Tribunal for a breach of contract is three months from the effective date of termination of the employment. I find the claimant had until 5 January 2024 to bring a claim for a breach of contract. The claimant did not begin ACAS conciliation proceedings until 12 January 2024, which is after the end of the three-month period. The ACAS conciliation proceedings concluded on 9 February 2024. Given ACAS conciliation proceedings did not commence until after the expiry of the time limit in which to bring the claim, the ACAS conciliation proceedings do not extend time during the conciliation proceedings. The claimant's claim was presented to the Tribunal on 15 February 2024. I find the claim is therefore out of time by one month and 10 days.
21. I have considered whether it was reasonably practicable for the complaint to be presented before the end of the three-month period. I find from the claimant's oral evidence that she was told by her former colleague she could bring a claim in the Employment Tribunal and that she became aware of the possibility of bringing a claim at some point between October 2023 and January 2024.
22. However, the claimant did not present her claim until 15 February 2024. The claimant states she does not know why she did not bring a claim earlier. I find it is reasonable to expect the claimant to have undertaken some enquiries between October 2023 and January 2024 to ascertain any time limits in which to bring a claim and to act on those enquiries. The fact the claimant chose not to take action between October 2023 and January 2024, either to ascertain any time limits, or to bring a claim, does not assist her in demonstrating that her ignorance or mistake is reasonable.
23. Having regard to all of the circumstances, I conclude that it was "reasonably practicable for the complaint to be presented before the end" of the three-month period. I find the claimant has provided no good reason for why it was not reasonably practicable for her to present her claim before the end of the three month period. I therefore refuse to extend time. I find the Tribunal does not have jurisdiction to deal with the breach of contract complaint because it is out of time.

Was the Claim Presented In Time - Unauthorised Deduction from Wages

24. The unsigned contract of employment states that the claimant would be paid on the last Friday of the calendar month. Taking the claimant's claim at its highest, I find the claimant would have been last paid on Friday, 27 October 2023.
25. The time limit to bring a claim in the Employment Tribunal for a complaint of unauthorised deduction from wages is three months beginning with the date of payment of the wages from which the deduction was made. I find the claimant had until 26 January 2024 to bring a claim for unauthorised deduction from wages. The claimant began ACAS conciliation proceedings on 12 January 2024. The ACAS conciliation proceedings concluded on 9 February 2024. Given ACAS conciliation proceedings ended after the expiry of the three-month period, time limit is extended by one month from the conclusion of the ACAS conciliation proceedings. The claimant's claim was presented to the Tribunal on 15 February 2024. I find the claim for unauthorised deduction from wages is therefore in time. The Tribunal therefore has jurisdiction to consider the complaint in respect of unauthorised deduction from wages.

Was the Claimant an Employee?

26. Even though I have dismissed the claimant's claim for breach of contract for want of jurisdiction, for completeness, and if I am wrong in respect of the timeliness of the claim, I will deal substantively with the question of whether she was an employee.
27. As stated above, an "employee" is defined in section 230(1) of the Employment Rights Act 1996 as an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
28. A "contract of employment" is defined in section 230(2) of the Employment Rights Act 1996 as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

Written Contract

29. I begin by considering whether the claimant worked under a contract of employment. I have given careful consideration to the "contract of employment" I have been provided with, I find that the document is unsigned. The claimant states that she merely responded to an email from the respondent stating she agreed to the contract. However, the claimant has not provided any emails to demonstrate this was the method by which she had agreed to the terms of the "contract of employment". The burden is on the claimant to prove her case and it is reasonable to expect proof that this was a contract of employment that had been agreed. I find the claimant has failed to discharge the burden of proof that she had a written contract of employment to carry out work for the respondent.

Contract of Service

30. I have nonetheless considered whether the claimant had a contract of service which was either an oral agreement or implied contract of service.

31. The claimant states that she agreed to provide her own work and skill in exchange for a wage. The claimant states that she would sometimes attend an office but would often work from home. For a contract to exist at all, the parties must be under some obligation towards each other i.e. an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered. There must therefore be some personal performance of the contract by the employee.
32. The claimant states that she was employed as a Senior Merchandiser for the respondent. However, the claimant has provided no emails or documentary evidence of any work she carried out for the respondent. I find there is nothing to indicate from the evidence before me that the claimant carried out any work personally for the respondent or that any work that was carried out was an integral part of the business of the respondent.
33. If the respondent had provided work for the claimant, for example to follow up a specific client lead, then it would be reasonable to expect the claimant to provide evidence of such matters. However, there is no documentary evidence of any work the respondent has provided the claimant. The absence of such evidence strongly indicates there was no provision of work and no personal performance of it, the two key ingredients of a contract of service.
34. The claimant states that the respondent had an obligation to pay her a wage of £60,000 per annum. The claimant states she had not been paid any wages since the commencement of her contract of employment on 27 March 2023. The claimant states she worked without a wage until 6 October 2023. Although that is her evidence, the claimant has produced no correspondence between herself and the respondent detailing the dispute over unpaid wages. The claimant's oral evidence is that all discussions regarding unpaid wages were carried out over the phone and there is no record of this.
35. I do not accept the claimant's account as credible for the following reasons. Firstly, it is the claimant's claim that she worked for six months for no wage. Given the length of time, it is reasonable to expect the claimant to have corresponded formally with the respondent regarding non-payment of wages at some point during that six month period. I do not find it plausible that the claimant would have continued to work her claimed hours throughout that six month period without any wage, given her evidence that her employer did not pay her a wage from the outset. Secondly, it is also reasonable to expect correspondence chasing for payment of the wages after the employment was terminated. The fact that there is no correspondence regarding non-payment of wages at any point during the purported contract of employment and since leads me to conclude there was no contract of service to perform any work or services for the respondent.
36. The claimant has provided WhatsApp messages from a WhatsApp Group which she states was set up for 'employees' of the respondent. I have considered the WhatsApp messages provided by the claimant. The claimant states that all participants in the group had also not been paid a salary.

Curiously, I find that none of the messages on the WhatsApp group refer to non-payment of wages. If it is true that all of the participants had rendered personal service or carried out work which the respondent had provided and for which they had not been paid, it is remarkable that there is a complete absence of any discussion about unpaid wages.

37. I find that almost all of the discussions on the WhatsApp group relate to seeking further potential investment or funding in the business. I find there is only one reference to “monies owed” which was posted by another participant in the group (not the claimant), namely the message dated 12 October 2023. However, the reference to “monies owed” does not in my view indicate this was a reference to unpaid wages. I find this could equally refer to a loan to the respondent or the taking of a degree of financial risk such as providing an investment to the business. I find the tenor of the WhatsApp messages strongly indicate that these were a group of individuals (including the claimant) who had some form of an investment or financial stake in the respondent’s business and collectively, they were all waiting for other investors to invest in the business.
38. The claimant states that because she was not paid a salary, she had to use her overdraft and rely on financial support from her husband. I accept the Coutts bank statements do demonstrate multiple transfers of funds into her bank account. I find from the two screenshots provided that the claimant did utilise an overdraft. However, I find that none of this demonstrates that the claimant was owed wages by the respondent. I find at its highest, it simply demonstrates that the claimant had to rely on other sources of funds or income during this period of time.
39. I have considered whether the claimant was subject to a sufficient degree of control by the respondent. I find there is nothing to indicate that the respondent directed the claimant to carry out any specific work, tasks or projects. Although the claimant claims that her contract of employment was never terminated either by herself or the respondent, it is clear from the claimant’s evidence that from 7 October 2023, unbeknown to the respondent, she carried out work for another company in a self-employed capacity. If the respondent did exercise sufficient control over the claimant, it would be reasonable to expect the respondent to be aware that the claimant was working for another business during this period. I find there is nothing within the documentary and oral evidence to indicate that the respondent exerted a sufficient degree of control over the claimant to make the relationship one of employer and employee.
40. I conclude the claimant has failed to discharge the burden of proof that she had a contract of service, express or implied, in writing or otherwise, to carry out work for the respondent. I conclude the claimant cannot satisfy the definition of an “employee” as defined in section 230(1) of the Employment Rights Act 1996 because she was not an individual who had entered into or worked under a contract of employment. Therefore, even when I have substantively considered the claimant’s claim for a breach of contract, I find the claim fails for the reasons set out above.

Was the Claimant a Worker?

41. I have found the claim for unauthorised deduction from wages to be presented in time. I now deal with the question of whether the claimant was a worker.

42. A “worker” is defined in section 230(3) of the Employment Rights Act 1996:

“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

(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;

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

Limb (a) Worker

43. In my findings of fact on whether the claimant was an employee, I have already found the claimant did not work under a contract of employment and that she was not an employee. Accordingly, I conclude she is not a limb (a) worker.

Limb (b) Worker

44. Distilling the statutory definition into its constituent elements, the following factors are necessary for an individual to fall within the definition of a limb (b) worker: there must be a contract, whether express or implied, and, if express, whether written or oral; that contract must provide for the individual to carry out personal services and those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

45. I have already found there was no contract, express or implied, in writing or otherwise which provided for the claimant to carry out work personally for the respondent. Similarly, there was no contract in existence to demonstrate that the claimant was contracted to carry out personal services for the benefit of another party to the contract who must not be a client or customer of the claimant's profession or business undertaking.

46. In *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening)* [2014] UKSC 32 (per Lady Hale), it was held that there is a distinction between self-employed people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them (who are neither workers nor employees), and self-employed people who provide their services as part of a profession or business undertaking carried on by someone else (who are limb (b) workers).

- 47. That is consistent with the claimant’s claim that she did not provide her services for the respondent’s business as a self-employed person. I find there is nothing to indicate from the facts of this claim that there was any contractual provision on the claimant to carry out personal services for the benefit of another party to the contract who must not be a client or customer of her profession or business undertaking.
- 48. I have already found the facts of the claim strongly indicate the claimant had some form of an investment or financial stake in the respondent’s business and that the claimant, together with others were waiting for other investors to invest in the business. I conclude the essential characteristics of what constitutes a limb (b) worker are missing on the facts of this claim.
- 49. For all the reasons set out above, I find the claimant does not satisfy the definition of a “worker” as set out in section 230(3) of the Employment Rights Act 1996. In light of my findings of fact above, I do not need to consider whether the claim was in respect of wages and whether any deductions (authorised or otherwise) were made. The claim for unauthorised deduction from wages is not well founded and is dismissed.
- 50. I conclude the claim fails for all the reasons set out above.

**Employment Judge Anthony
27 June 2024**

Judgment sent to the parties on:

18 July 2024

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For the Tribunal:
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