



EMPLOYMENT TRIBUNALS

Claimant: S MARKEVICH

Respondent: THE CUDDLE CLUB GROUP LTD

Heard at: Watford Employment Tribunal (by video)

On: 18 July 2024

Before: Employment Judge Din (sitting alone)

Appearances

For the Claimant: R Wijewardena, Work Rights Centre

For the Respondent: A Acheampong, Peninsula Business Services Limited

RESERVED JUDGMENT

For the period 21 April 2023 to 16 June 2023, the Claimant:

- was a worker of the Respondent within section 230(3)(b) of the Employment Rights Act 1996; and
- met the extended definition of employment set out in section 82(2)(a) of the Equality Act 2020.

The Claimant's complaints of direct sex discrimination; unlawful deduction from wages; holiday pay; breach of the Working Time Regulations 1998; and failure to provide payslips and a written statement of employment particulars, proceed.

REASONS

Introduction

1. The Claimant states that she was employed by the Respondent, a pet grooming business, as a dog groomer, from 21 April 2023 until 16 June 2023.

2. Early conciliation started on 13 July 2023 and ended on 19 July 2023.
3. The claim form was received by the Tribunal on 21 July 2023. In that claim form, the Claimant states that she was discriminated against on the grounds of disability and pregnancy or maternity. She states that she is owed arrears of pay.
4. On 22 November 2023, the Claimant's representative wrote to the Tribunal with an application to amend the claim. This followed the Claimant taking legal advice.

Preliminary hearing – 24 April 2024

5. A preliminary hearing before Employment Judge Dick took place on 24 April 2024.
6. Employment Judge Dick allowed the Claimant's application to amend her claim. The amended claims consist of the following:
 - 6.1 Direct sex discrimination;
 - 6.2 Unlawful deduction from wages;
 - 6.3 Holiday pay;
 - 6.4 Breach of Working Time Regulations 1998 (rest breaks);
 - 6.5 Failure to provide payslips and a written statement of employment particulars.
7. The Claimant withdrew all other complaints, and Employment Judge Dick made a judgment in this regard on 24 April 2024.
8. At the 24 April 2024 preliminary hearing, the Respondent stated that the Respondent had not received the original claim form. The response had provided, albeit late. Employment Judge Dick granted leave to present the response out of time, and allowed further time for the Respondent to provide a response in light of the Claimant's reformulated claims.
9. Employment Judge Dick noted that a significant issue between the parties is whether the Claimant had the status of an employee, a worker, or, as the Respondent says, was self-employed. He agreed with the parties that it was appropriate to list a preliminary hearing to deal with that point.

Particulars of response

10. On 13 May 2024, the Respondent provided its particulars of response. In that response, the Respondent states that the Claimant was not an employee or a worker for the purposes of section 230 or section 43 of the Employment Rights Act 1996 and, therefore, the Tribunal does not have jurisdiction to determine the Claimant's claim.
11. In the event that the Tribunal does have jurisdiction to determine the Claimant's claim, the Respondent:

- 11.1 Denies that the Claimant was discriminated against on the grounds of sex;
- 11.2 Denies that the Claimant is owed any unauthorised deduction of wages;
- 11.3 Denies that the Claimant is owed any holiday pay;
- 11.4 Denies that there has been a breach of contract, and that the Claimant was not provided with sufficient rest breaks under the Working Time Regulations 1998.

Today's hearing

- 12. The Tribunal is to decide whether the Claimant was employed, was a worker, or was self-employed during the relevant period.
- 13. The Tribunal may then fix a date for the final hearing, make further case management orders and settle a list of issues.

Evidence and other materials

- 14. There is a bundle setting out the relevant materials.
- 15. The Tribunal was provided with a witness statement from the Claimant and the Tribunal heard from her. The Tribunal was also provided with a witness statement from Aneka Johnson, the owner of the Respondent, and the Tribunal heard from her.
- 16. Both parties provided very helpful written summaries of their submissions. I am grateful to both representatives for their efforts.

Law

Legislation

- 17. Section 230 of the Employment Rights Act 1996 (**ERA 1996**) states:
 - “230. – 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.
 - (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)-
 - (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...".

- 18. The definitions at section 83 of the Equality Act 2010 (**EqA 2010**) include:

“(2) “Employment” means-

- (a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

- 19. *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, is authority that, for practical purposes, section 82(2)(a) EqA 2010 has the same meaning as section 230(3)(b) ERA 1996.

Employee

- 20. There is no single test for determining if an individual is an “employee” under section 230(1) of the ERA 1996 and various factors must be considered. See, in particular, the Supreme Court cases of *Autoclenz v Belcher* [2011] ICR 934 SC and *Uber BV v Aslam* [2021] UKSC 5.

- 21. As a minimum, the following must be present:

- 21.1 A contract between the employer and the employee;
- 21.2 Control by the employer over the employee;
- 21.3 Mutuality of obligation, for the employer to provide work, and for the employee to accept and perform work; and
- 21.4 An obligation on the employee to provide personal service.

- 22. In addition, some key questions will be:

- 22.1 What does the contract say? It is to be noted that this may not be determinative, as the Tribunal will need to consider whether this reflects the true agreement between the parties;
- 22.2 To what extent is the individual incorporated into the business? The more they are incorporated (as opposed to being in business on their own), the more likely they are to be an employee;
- 22.3 What was the amount of remuneration and how was it paid? A regular wage or salary may suggest employment, submission of invoices or a share of profits may suggest that the individual is an independent contractor;
- 22.4 What are the arrangements for paying income tax and national insurance? If the individual does it themselves on a self-employed basis, this may be an indication that they are an independent contractor;
- 22.5 How much of a financial risk is the individual taking? If they are taking risk, the more likely they are to be an individual contractor;

- 22.6 Who provided tools and equipment? If the individual provides their own tools and equipment, this may be an indication that they are an individual contractor;
- 22.7 Was the individual tied to one employer, or could they work for others (particularly for or as a rival competitor)? If it is the former, it may be an indicator that they are an employee;
- 22.8 How could the arrangement end? The power of dismissal would suggest an employer / employee relationship;
- 22.9 What are the contractual benefits (e.g., sick pay, holiday pay or pension entitlements)? Contractual benefits would suggest an employer / employee relationship;
- 22.10 What is the relative bargaining power of the parties involved?

Worker

- 23. As stated above, there is a consistency of approach between whether an individual is a worker under section 230(3)(b) of the ERA 1996 and the definition of employment in section 83(2)(a) of the EqA 2010.

The statutory test

- 24. In accordance with section 230(3)(b) of the ERA 1996, in order for an individual to be a worker, there needs to be:
 - 24.1 A contract (whether express or implied),
 - 24.2 Under which the individual has agreed to personally perform any work or service,
 - 24.3 Where the work or service is for the benefit of another, who is not a client or customer of the individual's profession or business undertaking.
- 25. The concept of a "worker" in the legal sense is a statutory construct. It is a deliberately wider term than "employee" and falls between being an employee and self-employment. Further, its interpretation should give effect to the legislative purpose. Following the *Uber* case (see above), this includes protecting vulnerable individuals who are subordinate to and depend on another party in relation to the work done.
- 26. Each of the three elements to the test in section 230(3)(b) of the ERA 1996 are dealt with below.

Contract

- 27. As in the case of *Autoclenz* (see above), any written terms will be a relevant consideration. However, the Tribunal will need to consider whether these reflect the true agreement between the parties.

Personal service and substitution

- 28. A central requirement for worker status is personal service. However, a limited right of substitution is not inconsistent with a worker's personal service obligation (see *Pimlico Plumbers* (see above)). In the Court of Appeal, *Etherton MR* set

out some applicable principles in this regard. They can be summarised as follows:

- 28.1 An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally;
 - 28.2 A conditional right to substitute another person may or may not be inconsistent with persona performance depending on the conditionality;
 - 28.3 A right of substitution only when the individual is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance;
 - 28.4 A right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to exceptional facts, be inconsistent with personal performance;
 - 28.5 A right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.
29. A right of substitution may still be considered unfettered even where there is a requirement to give notice that a substitute will be sent or that the person is suitably qualified (see *UK Mail v Creasey* [2012] 9 UKEAT / 0195 / 12 / ZT). However, where the right to send a substitute was limited to persons selected by and known to the alleged employer, or the right could be exercised only in cases of unavailability due to illness and the like, this would be the sort of limited right which would not exclude employee or worker status (see *MacFarlane v Glasgow City Council* [2001] IRLR 7).

Client / customer of the profession or business undertaking

30. A number of the questions referred to above in relation to whether or not an individual is an employee will be relevant to this element of the overall test.
31. For example, the level of control that other party has over the individual's work or services will be key, not least as it is so connected to the concepts of subordination and dependence referred to in the *Uber* case.
32. The answer remains a matter of fact and degree.

Mutual obligations

33. It is accepted that while a level of mutuality of obligations is required for there to be an employee relationship, this is not required for a worker relationship (see *Nursing and Midwifery Council v Sommerville* [2022] EWCA Civ 229). As such, the lack of an obligation to work does not stop a finding that an individual is a worker when they are working.

Relevant findings of fact

34. In the period prior to 11 April 2023, the Respondent advertised for dog groomers. The advertisement said that the job types were "Subcontract, full-

time and part-time". The Respondent was flexible on the employment status of the groomer.

35. The Claimant responded to the advertisement and undertook a trial shift on 11 April 2023.

Offer

36. It is the Respondent's position that the Claimant initially applied for a self-employed role. However, after her trial interview, she asked if she could be employed instead as she was looking for some stability. The Claimant disputes this.
37. Either way, on 14 April 2023, the Respondent sent the Claimant a document (**Offer Letter**) to be signed by Ms Johnson on behalf of the Respondent.
38. The Offer Letter stated the Respondent, "...is delighted to offer you the full-time position as a pet groomer with an anticipated start date of Friday 21st April 2023". It set out the Claimant's responsibilities and said that she would report directly to Ms Johnson. It further said that the Claimant's working hours are "8 hours per day / 40 hours per week, Tuesday to Saturday. (Subject to change)". The starting salary was said to be £13 per hour with payment on a monthly basis. The Offer Letter said "Your employment is on a full-time basis".
39. The Offer Letter went onto say: "This letter is not a contract indicating employment terms or duration". The Claimant was asked to confirm her acceptance of the offer by signing and returning the Offer Letter by 14 April 2023. The Claimant did so.
40. The Respondent states that it verbally agreed to employ the Claimant on the condition that that she meet all her pre-employment checks, which included a satisfactory reference. The Respondent says that the Claimant confirmed she would meet these requirements and was, as a result, issued with the Offer Letter referenced above. The Claimant disputes this, saying that there was no mention of references in her discussions with the Respondent. They are not referred to in the Offer Letter. Further, there is no mention of references in the considerable WhatsApp and other correspondence between the Claimant and the Respondent.
41. On 20 April 2023, Ms Johnson requested (by WhatsApp) that the Claimant provide her "...full name, national insurance number and D.O.B. to set up payroll". As part of the same interaction, Ms Johnson asked "Also do you have a P45 or P46 ?".
42. The parties agree that the Claimant submitted her details to be placed on the Respondent's payroll. However, the Respondent states that the Claimant was unable to provide references and a P45 or P60 in order to complete the employment and payroll process.
43. I find that there was no requirement for references. However, it is clear that the Respondent asked for the Claimant's P45 or P60 and neither document was provided.

44. I find that there was then a verbal agreement for the Claimant to continue working with the Respondent for a trial period of four weeks from 21 April 2024. This arrangement then continued until the Claimant stopped working with the Respondent on 16 June 2023.
45. Further evidence for this are comments by the Claimant on 27 April 2023 to her Universal Credit work coach. She said: "Hi! I started 21.04 but they decided for the next 4 weeks I'm still gonna be self employed, some sort of trial. So no contract till 21.05 I think. Also it's 40 h a week as the breaks are not paid.. so technically I'm 9 hours at work but paid for 8". This discussion is referenced in undated WhatsApp messages between the Claimant and the Respondent referring to the four week period.
46. On 13 June 2023, the Claimant said to her Universal Credit work coach that she was moving out of London. She said that when she told the Respondent, the owners tried to make her feel guilty. The Claimant repeated that she did not have a contract. She said "They directly asked me if I am pregnant or planning to have kids, and that's why for the first month I won't get a contract". The Claimant went onto say "I decided to stay self employed, but was ran like a horse with no breaks at all sometimes with bookings back to back".
47. The Claimant has said that the change in approach by the Respondent was due to the Claimant mentioning her possible pregnancy in or around 25 April 2023. This is referenced in her message to her Universal Credit work coach on 13 June 2023. The Claimant states that it was following this that the Respondent requested an insurance certificate, asked the Claimant to invoice payments, required the Claimant to find a substitute for her holiday and denied that the Claimant was entitled to a sick note. I make no factual findings in this regard.
48. The essential point for today's purposes is that the parties understood that their arrangement had changed from one pointing to an employer / employee relationship, to one that was different for, at least, a trial period of four weeks. The Respondent states that this was with a view to a review of employment status at three months. Whether or not this was the case, this arrangement ran until the point at which the Claimant stopped working for the Respondent.
49. Although it appears that the terms of the Offer Letter were not formalised, many of the elements of the Offer Letter remained in operation following this change.

Terms of the arrangement

50. There was no written contract throughout the period that the Claimant worked with the Claimant. Based on the Offer Letter and the other evidence, the terms of the arrangement included the following.
51. The Claimant's responsibilities remained, broadly, the same as those set out in the Offer Letter. Further, she would report directly to Ms Johnson.
52. The Claimant was required to work for the period set out in the offer document – namely, eight hours per day for 40 hours per week, Tuesday to Saturday.

53. There is some dispute as to whether the Claimant had to work hours beyond those set out. I find that, generally, those were the Claimant's set hours with some possible variation.
54. The Claimant's pay remained at £13 per hour with payment on a monthly basis.
55. Neither the offer letter nor subsequent correspondence suggests that the Claimant was subject to any disciplinary or grievance procedure operated by the Respondent. Further, there is no reference to sick pay, holiday pay or other benefits.

Bookings

56. When it came to bookings, the Respondent's clients chose which appointment slot they wanted on the Respondent's booking app and the Respondent would check the Claimant's availability before confirming or rejecting the appointment.
57. The Claimant was also provided with log in details for the app to confirm her availability for slots which were provisionally booked by clients.

Breaks

58. There is some dispute about the ability of the Claimant to take breaks and whether she had sufficient time to do so.
59. The Claimant states that the Respondent consistently demanded hours from the Claimant, including without breaks. The correspondence between the Claimant and the Respondent shows the Claimant complaining on a number of occasions about her lack of breaks.
60. I find that the Claimant was often subject to a busy day. There is evidence that the Claimant was scheduled to work overlapping shifts and she was often required to work through back to back appointments. It may be that she could have insisted on breaks, but the Claimant felt obligated not to take breaks where she did not have time for them and time had not been created for them in the Respondent's booking app.
61. Although the Claimant states that she was not allowed to use them, I find that, if the Claimant was to take breaks, there was a secure play area with crates for dogs when groomers are having a break.

Absence

62. The Respondent states that the Claimant was verbally informed by the Respondent that she could engage other people to complete the tasks required. I have not seen any evidence of this, other than with respect to a possible absence on 17 June 2023.
63. The Claimant and the Respondent discussed the Claimant taking leave on 17 June 2023 and on 12 May 2023, the Respondent indicated that the Claimant would need to provide a substitute.

64. The Claimant was asked to set up a call between a friend and the Respondent so they could discuss the friend covering the Claimant's shift. The Respondent contacted the Claimant's friend regarding this and provided the Respondent's address for the friend to attend a trial session. The Claimant later informed the Respondent that due to a lack of childcare, the friend was unable to cover the shift.
65. I find that, although the Respondent did initiate contact with the Claimant's friend, this was because the Respondent and (understandably) had to verify that the Claimant's substitute was up to the task.

Other work

66. The Respondent was aware that the Claimant was still working from home with some clients she originally had before joining the Respondent.
67. There is no indication that this work would be anything other than outside of the times that the Claimant would work for the Respondent.

Payment

68. The Claimant issued invoices for her work.
69. The invoices were for the same amount – namely, on the basis of 40 hour weeks at a pay rate of £13 per hour. The Respondent confirmed that pay would be in a four week cycle (see WhatsApp messages on 28 May 2023).

Insurance

70. On 27 April 2023, the Claimant provided her pet business insurance certificate for the period 6 December 2022 to 5 December 2023.

Equipment

71. The Claimant had some of her own equipment in her grooming activities. This was, according to the Claimant, normal for the industry.
72. The parties agreed that the Claimant had access to the Respondent's equipment and supplies when needed.

Uniform

73. There is a dispute as to whether there was a requirement on the part of the Claimant to wear the Respondent's uniform.
74. The Respondent's uniforms were available in the backroom and were available to the Claimant.
75. The Claimant sometimes wore a t-shirt with her name printed on it. She also sometimes wore the Respondent's t-shirt and apron, which the Claimant is seen wearing in pictures put into evidence.

76. I do not consider that there was a requirement for the Claimant to wear the Respondent's uniform. However, she did, on occasion, wear that uniform.

Social media

77. The Claimant was involved in publicising the Respondent and her grooming work on Instagram.

CCTV

78. It is agreed that there were CCTV cameras on their premises, and that the Claimant was notified when a camera was not working or some support was required.
79. The CCTV is a requirement for all business leasing at Wembley Park and was installed prior to the Claimant working for the Respondent. Further, as most dog groomers worked alone, the CCTV was for health and safety purposes.
80. On occasion, Ms Johnson contacted the Claimant following something that she had seen on the CCTV link.

Resignation

81. The Claimant resigned on 16 June 2023 and her work with the Respondent ended at that point.

Discussions and conclusions

82. The Claimant states that she satisfied the test for an employee or a worker. The Respondent's position is that the Claimant was a self-employed freelance contractor and, as a result, the Tribunal does not have jurisdiction to hear the Claimant's complaints.
83. There was a contract between the Claimant and the Respondent. It was verbal and there was no written contract. Much of the basis of the contract was the Offer Letter. The terms included the following:
- 83.1 The Claimant's responsibilities remained broadly the same as those set out in the Offer Letter;
 - 83.2 The Claimant would report directly to Ms Johnson;
 - 83.3 The Claimant was required to work for the period set out in the offer document – namely, eight hours per day for 40 hours per week, Tuesday to Saturday;
 - 83.4 The Claimant's pay was £13 per hour with payment on a monthly basis.
84. I find that the Respondent exercised a high degree of control over the Claimant and that the Claimant was subordinate to the Respondent.
85. Although the Claimant had access to the booking app, this was the Respondent's booking app and the Claimant's schedule would be driven by the Respondent's clients' requests for appointments. As such, it is difficult to see

how the Claimant had actual control of the bookings via the app. I did not see evidence of the Claimant refusing to work or refusing to accept appointments that were put in via the app. Accordingly, I do not consider that she had much, if any, discretion over what work she could take on. She had fixed hours and was paid on the basis of those fixed hours. It is hard to see how she could refuse to work during those fixed hours.

86. There is some argument over time worked by the Claimant beyond those fixed hours. It is the case that the Claimant did, on occasion, work beyond her fixed hours. However, the key point for the purpose of analysing employment or other status is that the Respondent had substantial control over the work that the Claimant did – particularly during the fixed hours that the Claimant was required to work – and that the Claimant was subordinate to the Respondent.
87. It is clear from the correspondence between the Claimant and the Respondent that the Claimant believed that she had insufficient time for breaks and cleaning. Whether or not the time was adequate for breaks and cleaning, I find that this is further evidence that the Respondent had control over the Claimant's working day and the Claimant was subordinate to the Respondent.
88. There was a mutuality of obligation, for the Respondent to provide work and for the Claimant to accept and perform work. Notwithstanding arguments as to whether the Claimant was required to work beyond her set hours, she did have a fixed pattern of work (eight hours per day for 40 hours per week, Tuesday to Saturday). She was required to attend on each of those days and to complete her hours. The Respondent was obliged to provide her with work and payment for the same at a fixed rate. There was no financial risk on the part of the Claimant here – it was agreed that she would be paid the same amount every month on a fixed basis.
89. The Claimant was obliged to provide a personal service. I do not consider that there was an unfettered right to substitute another person to perform the Claimant's services. The only occasion where the issue of substitution arose was when the Claimant proposed that she take the day off on 17 June 2023. Not only did this not happen in practice, it is clear from the correspondence between the Claimant and the Respondent that it was to be limited and only where the Respondent found the substitute acceptable. It is legitimate for the Respondent to check that the substitute is suitable. However, this type of one-off arrangement in order to provide suitable cover for the Claimant's absence cannot, on its own, preclude employment or worker status.
90. The Claimant was, in a number of material respects, integrated into the Respondent's business. She was present on the Respondent's premises and, as such, was the "face" of the business. She had access to the Respondent's booking system. She also involved in the Respondent's social media activities. She, on occasion, wore the Respondent's branded clothing.
91. However, there are a number of respects in which the Claimant's arrangement with the Respondent was inconsistent with employment.

92. Although there was a contract, there was no statement that there was a contract of employment. Although this is not determinative, it is relevant to the overall consideration of the situation.
93. The Claimant did use the label of self-employment, particularly when discussing her situation with her Universal Credit contact. The Claimant said that she did not have a choice but to regard herself as self-employed given that the Respondent did not provide her with a contract. She may have been of the view that this was a position that was forced upon her. Nonetheless, I consider it is accurate to say she was of the view that she was not an employee.
94. Again, although required to do this, the Claimant invoiced the Respondent for payment rather than being on the Respondent's payroll. Also, the Claimant provided evidence of her business insurance for the purposes of her work with the Respondent.
95. Further, the Respondent's arrangement with the Claimant was missing a number of elements that are often present in an employer / employee relationship. For example, the Claimant does not appear to have been subject to any explicit disciplinary or grievance procedure operated by the Respondent. In addition, there is no reference to sick pay, holiday pay or other benefits.
96. Other factors are more ambiguous.
97. The Claimant was entitled to carry out work for certain of her existing clients. This was outside of the work that she did for the Respondent and did not, it appears, happen during her working hours for the Respondent. Nonetheless, this does suggest a level of independence beyond that of an employee.
98. The Claimant – as was normal for the industry – had her own grooming equipment, but used certain of the Respondent's equipment where required. The Claimant, on occasion, wore the Respondent's uniform but was not required to do so.
99. Given the ambiguity, it is difficult to draw any firm conclusions from these latter factors.
100. Analysing all the relevant points in light of legislation and the caselaw, I do not consider that the Claimant was an employee of the Respondent in the relevant period. This is particularly due to the factors listed above that are inconsistent with an employee / employer relationship.
101. However, I am satisfied that at the material time, the Claimant was a worker within section 230(3)(b) ERA 1996. There was a contract, there was personal service and the service was for the benefit of the Respondent, who was not a client / customer of the Claimant's profession or business undertaking.
102. With respect to this last element, namely whether the Claimant was conducting business on her own account, the level of control that the Respondent had over the Claimant's work and the degree of subordination that the Claimant had to the Respondent, leads me to the conclusion that the Claimant meets the relevant statutory standard of worker.

Case Number: 3308891 / 2023

Employment Judge Din

Date: 30 July 2024

Reserved judgment and reasons
sent to the parties on:
6 August 2024

For the Employment Tribunals: