



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104316/2023

Hearing held by CVP on 2 November 2023

Employment Judge McFatridge

Miss Ruth Gotts

**Claimant
In person**

Peter Oag

**Respondent
Represented by:
Ms Matheson,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal has no jurisdiction to hear the matter since

1. the claimant's claim of breach of contract was submitted out of time;
2. the claimant was not a worker and the Tribunal has no jurisdiction to hear the claim of unlawful deduction of wages under section 23 of the Employment Rights Act 1996,

The claims are dismissed.

E.T. Z4 (WR)

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had carried out work for the respondent for a period up until around June 2022 and that she was due the balance of an invoice which she had subsequently sent to the respondent. The claim was taken to be either a claim for breach of contract or a claim for unlawful deduction of wages. The respondent submitted a response in which they denied the claims. It was their position that whether the claim was categorised as a claim for breach of contract or a claim for unlawful deduction of wages the claim was time barred. On the claimant's own admission the claimant had ceased to carry out work for the respondent by 30 June 2022. The claim had not been submitted until 16 August 2023 and ACAS conciliation had not started until 10 August 2023. It was also their position that the Tribunal had no jurisdiction to hear the claim on the basis that the claimant fell within neither strand of section 230 of the Employment Rights Act 1996 and was neither an employee nor a limb (b) worker. Finally, the respondent's position was that they had paid the claimant a sum of money in June 2023 which was tendered in full and final settlement of all sums that may be due to her and that the claimant had accepted this sum by in cashing the cheque. It was their position that in any event she had been paid all sums legally due to her. At the hearing the claimant gave evidence on her own behalf. The respondent Mr Oag gave evidence on his own behalf as did his wife Laura Oag. A joint bundle of productions was lodged. The respondent also lodged a draft chronology which was accepted by the claimant as being accurate so far as dates were concerned. It should be noted that at the outset of the hearing the claimant experienced difficulty in connecting by video to the hearing. Both parties were keen to proceed albeit that the claimant could only hear what was going on and that neither the parties nor the Judge would be able to observe the claimant visually while she was giving evidence. In the circumstances and given that both parties were happy to proceed on this basis I agreed to it. On the basis of the evidence, the productions and the jointly agreed timeline I found the following facts relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent is a farmer who farms several farms in Caithness including Brims Farm. Up until February 2020 the claimant worked for Charles Angus a firm of agricultural engineers active in Caithness. As
5 such she became acquainted with the respondent and various other farmers in the area. Following the termination of her employment with Charles Angus Agricultural Machinery she started working for farmers on a contract basis. This included work for the Highland Egg Company and work for the local farmers' mart. The claimant is able to do various pieces
10 of farm work including feeding and moving animals.
3. In 2021 the claimant was carrying on work for a Donald McDonald who farmed at a farm just above Brims Farm and who was also acquainted with Mr Oag.
4. The respondent Mr Oag personally worked on the farm as did his son and
15 occasionally his wife. If additional work was required he would hire contractors to do this. Where he was hiring a contractor to provide labour only he would usually do so on the basis that they would provide him with a note of their hours every fortnight on a Sunday evening and he would then pay the money to them the following Monday, He would either do
20 this by giving them a cheque or going in to the bank and paying them by direct bank transfer. Other contractors would submit their bills once the piece of work they had done was complete. In late 2021 Mr Oag was engaged in fattening cattle at Brims Farm. He began to suffer ill health and was advised by his doctors that he could not carry anything. He then
25 arranged that when the cattle needed fed he and his wife would go up to Brims Farm themselves and his wife would do whatever lifting was involved. Mr Oag indicated to a number of people that he could do with some help. Mr McDonald for whom the claimant was doing work at the time told the claimant that Mr Oag was looking for someone and the
30 claimant and Mr Oag both met together at Brims Farm at some point in early November 2021.
5. Mr Oag and the claimant reached an agreement that the claimant would feed the cattle. Mr Oag explained to the claimant what was required. The

5 cattle required to be fed barley and silage. He did not specify to the claimant precisely how the work was to be done. He told the claimant that he estimated that it would take her around two hours in the morning and two hours in the evening to feed the cattle and said he would pay her for this at the rate of £10 per hour. The claimant would be expected to ensure that the cattle were fed seven days per week. Both parties believed that the nature of the contract between them was that if the claimant needed to take time off then it would be up to her to arrange for the animals to be fed and she would be free to send a substitute to do this. All tools and equipment were provided by Mr Oag apart from a wheelbarrow which the claimant provided herself.

6. Mr Oag suggested to the claimant that she submit an invoice fortnightly in the same way as the other labour only contractors he used. The claimant told him that she was not keen to do this. She was involved in other court proceedings and it was her understanding that her position in those proceedings would be prejudiced if it could be shown that she was receiving a regular fortnightly or monthly payment. She indicated that she would send in an invoice to Mr Oag in due course.

7. The claimant started feeding the cattle around the middle of November 2021. Up until that point the respondent's wife fed the cattle with the assistance of the respondent.

8. The claimant was generally not supervised. She had occasional contact with Mr Oag and with his son who would be carrying out other work about the farm. On occasions she would also encounter other contractors working on the farm.

9. On various occasions Mr Oag asked the claimant to send an invoice. The claimant did not do so.

10. On 1 and 2 January the claimant did not feed the cattle. She turned up to feed them but the respondent and his wife had not anticipated this because they thought it was customary for farmers not to feed the cattle at new year but instead to lay down enough feed to tide them over. Mr. and Mrs. Oag had themselves gone up to the farm to check on the cattle and had then given the cattle enough feed to see them through with only

being fed once a day. They met the claimant up there and told her that her services were not required as they had left out sufficient feed for the cattle to get through the period.

11. On one occasion in early 2022 the claimant attended in the morning to feed the cattle but was showing symptoms of covid and texted to say that she was unable to get there for the afternoon. As it happened she was able to come back the following day. There was another occasion when the claimant was assisting at the mart and was not able to do the evening feed. Once again she simply told the respondent this by text.
12. There was another occasion when the claimant was visiting her solicitor in Skye and was away for the day. She advised the respondent of this by text and arranged that his son would do the feeding.
13. The respondent noticed that the claimant's way of feeding the cattle was not the way that he would have done it. The claimant's view was that if one put the barley and the silage in together then the cattle would eat the barley and ignore the silage. It was her practice to wait until the cattle had eaten the barley before putting silage down. The respondent disagreed with this methodology but felt it was up to her to decide what way to do it and that it was not for him to interfere.
14. On occasions the claimant would be there whilst the respondent's son was dropping off bales of silage.
15. Around once every three weeks it was the respondent's custom to muck out the cow shed. This would be done either by the respondent's son or by one of the other contractors who brought his son along to help with gates. If the claimant was there she would sometimes help with gates although she was never asked to do this by the respondent. The respondent's understanding was that all that she was doing was what had been agreed namely feeding the cattle twice a day.
16. The respondent also kept sheep at Brims Farm. On one or two occasions they required to be brought in the shed and vaccinated. There were around 500 sheep. The respondent would come up and bring with him his wife, his son and various other contractors. The respondent's wife would

5 cook food for the people involved in this. The claimant was not engaged to do anything with the sheep. On one occasion she was still there when the sheep were being brought in and the respondent told her to go home. At some point in or around November 2021 the claimant advised the respondent that she needed a trailer. She agreed with Mr Oag that she would purchase a trailer on his account from GS Donn Limited and that the price of the trailer would be deducted from the money Mr Oag owed her for feeding the cattle. During the period from November to June the claimant also advised Mr Oag that she would be ordering various things on his account with Charles Angus Agricultural Machinery. During this period she ordered a box of gloves and a jockey wheel and jack. The invoice for the trailer was produced (J7). It shows the cost of the trailer as being £1350 plus VAT of £270 giving a total of £1620. No paperwork was provided in respect of other items ordered by the claimant from Charles Angus Machinery.

17. At some point in or about March 2022 Mr Oag noticed that there was a caravan and an old quad bike stored in the cattle shed. He asked the claimant about this. The claimant explained to the respondent's wife that she was not living in the caravan but that it was hers. The claimant at that time was assisting with lambing on an adjacent farm. On occasions it was not worth her while going home from the lambing and then going back out to Brims Farm and on those occasions she would in fact use the caravan to sleep for a few hours. The claimant did not ask the respondent for permission to put the caravan there. The quad bike belonged to the claimant but did not work.

18. From March 2023 onwards the respondent started selling off the cattle. Farmers are required to keep detailed movement records showing the movement of cattle from one place to another. The respondent's movement records for the period from February to June were lodged (document 8). I consider this to accurately show the number of cattle moved off the farm. By June 28 2022 the last of the cattle in the shed were moved off the farm and the claimant's engagement ceased.

19. By this point the claimant had not rendered any invoice to the claimant or sought payment in any way for the work which she had done.

20. In or about November or December 2022 the claimant prepared an invoice which was lodged (J9). She went up to the respondent's other farm and left it in the cab of a farm vehicle. She then texted the respondent to say that it was there. The invoice was in the sum of £7750. It simply stated

5 *"To General labour feeding cattle at Brims and assisting with bedding cattle and sheep work as required from 3rd Nov 2021 to 29th June 2022 £7750 775 hrs at £10/hr."*

21. On receipt of the invoice the respondent asked the claimant on several occasions to provide proof of her calculations. He also said that he
10 required to check with Charles Angus in relation to the number and cost of items which the claimant had ordered.

22. Following the respondent's request as to how she had calculated her figure the claimant produced a document which bore to be a calendar for the months January, February, March, April, May June 2023 on which
15 various entries had been made. These entries coincided with the number of hours the claimant was claiming for each day. It did not provide any entries for November or December but at the start of January it was noted "81 hours carried forward". The claimant's calendar is at document J10.

23. The claimant's position was that she had worked a total of 211 hours in
20 November and December which would mean she would be due £2110. From this she had deducted £1300 which she believed was the cost of the trailer leaving her due payment for 81 hours. She was then seeking payment for the additional hours. The hours she was claiming for amounted to much more than the four hours per day which had been
25 agreed. In addition to this it was the respondent's position that the number of hours she worked would have reduced from March onwards and that the claimant would have needed less than four hours each day to feed the number of cattle remaining.

24. Regrettably at this point relations between the parties appear to have
30 deteriorated with accusation and counter-accusation being made. The claimant's position was that the respondent was being difficult and delaying to pay her money she was due. The respondent's position was that the claimant had engineered a situation whereby she had not

submitted her invoice until many months after the work had been complete and had then grossly inflated the number of hours. It was the respondent's position that had the claimant done as she was supposed to have done and submitted her invoice regularly then he would have nipped in the bud any suggestion by her that she was due to be paid for additional work carried out over and above the four hours per day which had been agreed.

25. Matters culminated in an unfortunate incident which took place in early June 2023 when the claimant attended at the respondent's home. Both the claimant and the claimant's wife allege that each assaulted the other. The police were called. Following this incident the respondent asked his wife to produce a calculation as to what the claimant was due and to pay her this. She prepared this on the basis that the claimant was due to be paid for the 29 days worked in January at four hours per day. She did not include 1st and 2nd because the claimant had not fed the cattle on those two days. She calculated the claimant was due 27 days at four hours per day for the month of February. She excluded 1 February when she understood the claimant had been away at her lawyer in Skye. During March she considered the claimant was due to be paid 31 days at four hours per day. During April she noted that the number of cattle had reduced considerably from 1 April onwards. It had further reduced on 17 April. She considered the claimant was due 17 days at three hour per day and 13 days at two hours per day. For May she considered the claimant was due for 31 days at two hours per day. For June she considered the claimant was due 28 days at three hours per day. It was common ground between the parties that the claimant had ceased to attend to feed the cattle after 28 June. The document produced by the respondent's wife was lodged at J12.

26. On 2 June the respondent sent the claimant a cheque for £2773.20 along with a note which stated

"Find enclosed full and final payment for feeding cattle between January/June 2022."

Enclosed with this was a cheque for £2773.20. The claimant was aware that by in cashing the cheque she was endangering her legal position in

that it could be argued that she had accepted the sum in full and final settlement. Nevertheless, the claimant decided to then cash the cheque.

27. The amount of £2773.20 was based on Mrs Gag's calculation that on the basis that the hours worked were as set out the claimant had worked a total of 510 hours. From this was deducted the sum of £2326.80. This sum was in respect of the cost of the trailer, the cost of other items which the respondent alleged had been ordered from Charles Angus Agricultural Machinery on the respondent's account for the claimant's own personal use and a sum in respect of the storage of her caravan and quad bike. The respondent decided to charge the claimant for this at the rate of £75 per week for a period of twelve weeks. They did not consult the claimant in any way regarding this and did not advise her of their intention to charge her this money. The sum of £75 was ascertained after contacting a local caravan site and a local aerodrome and asking them how much they charged to allow people to park a residential caravan there.
28. The claimant took advice from her solicitor. She had been in touch with a solicitor who was conducting other unrelated litigation on her behalf during the whole time she had been working for the respondent. She was advised by her solicitor that it was not worthwhile involving her solicitor in raising proceedings for payment but that she should deal with it herself. The claimant started early conciliation with ACAS on 10 August 2023 and received the ACAS certificate on 16 August 2023. She submitted her claim form on the same date.

Matters arising from the evidence

29. I considered that in this case all parties were to some extent tailoring their evidence to suit their case. All of the witnesses on occasions made frank admissions which did not suit their case but it was also clear that in some respects they sought to gloss over those things which they did not think would assist them. The claimant's reasons for not submitting her bill timeously were confused, contradictory and unclear. She suggested many times that the respondent had a poor reputation for paying people. The respondent had clearly tried to find as many reasons as they could for deducting sums from the amount they paid the claimant. As it happens I

do not have to adjudicate on the issue of how much the claimant's bill ought to have been and how much the respondent ought to have paid her based on the agreement made. The case does not get to that stage for the reasons given below. With regard to certain key pieces of evidence there was however agreement between the parties. The first was that both parties were in agreement that the arrangement between them was that if the claimant was unable to feed the cattle herself then she was free to send a substitute. The claimant herself stated that although it never arisen, if it had then she would have asked Donny McDonald to feed the cattle for her. She repeated the statement that she was free to send a substitute on several occasions. There was also agreement that the claimant had been free to do the work whatever way she wanted. With regard to the scope of the agreement the claimant accepted in cross examination that the only thing which had been talked about was cattle. She did not suggest that she had ever been asked to do the extra work by the respondent but she did not accept that on the occasion mentioned by Mr Oag she had been asked to go home rather than participate in the sheep vaccination. I decided that on balance I preferred Mr Oag's version rather than the claimant's.

30. With regard to the start date it was the claimant's position that she had started shortly after 3 November. She said it was either that day or the following day. The respondent's evidence was that she had not started until mid-November because he could recall that his wife had been paid for feeding the cattle up to the middle of the month. Mrs Oag also confirmed this in a way which made me believe that she was giving her own independent recollection rather than repeating an agreed line. In any event, it is not germane to the decision. With regard to the competing bills my view was that each party had overstated their position. Although the claimant's calendar was lodged I have to say that I would not have been persuaded that it was an accurate record of the hours she had worked. In particular there was one entry which on the basis of the evidence I heard could not be true. This related to 4 January when she states that Peter had met her at the farm. It was the evidence of both the respondent and his wife that they were away on a cruise from 3 January onwards. There were also instances where it was the respondents position that due to the

way agriculture works the entries were simply incredible i.e. they would not have been mucking out the shed two days running.

31. Equally I considered that by the time Mrs Oag was preparing the respondent's own calculation matters between the parties had soured to the extent that she was looking for any excuse to reduce the payment. It is noteworthy that although the respondent's own position was that the claimant had started work in mid-November there was no payment at all for the months of November or December. I also considered that their justification for charging the claimant for storage of her caravan and quad bike was somewhat lacking. There was absolutely no suggestion that this was a figure that had been agreed with the claimant or even that they had ever discussed the matter with the claimant. Mr Oag's sole evidence on the subject was that if the claimant had asked him to store the caravan there then he would have refused the request.

15 **Discussion and decision**

32. At the outset of the hearing the respondent's representative asked me to deal with the issue of time bar first. I agreed to do so and the claimant gave evidence which was fairly limited in scope regarding the time bar issue. She was cross examined by the respondent's representative regarding this. Both parties then made short submissions and I adjourned to make a decision. I advised the parties of my decision shortly thereafter which was that the claim based on breach of contract was time barred but that the claim based on unlawful deduction of wages was not. The hearing then proceeded to deal with the other aspects of the claim. The claimant resumed her evidence and evidence was then led from the respondent and the respondent's wife. By the end of that process it was somewhat late in the day. I discussed the matter with the parties and it was agreed that each would make a brief oral submission setting out their position but that they would be entitled to expand these in writing. The respondent's representative indicated that she already had a substantial written submission prepared and it was clear there would be insufficient time for this to be heard. Out of fairness I indicated that if the claimant wished to send in a written submission then she would be allowed to do so. I also advised both parties that whilst I had already given my view on the issue

of time bar I would be prepared to re-open the matter should the respondent's representative wish to bring additional authorities to my attention in her submissions. In the event neither party expanded on their oral submissions.

- 5 33. Rather than seek to repeat the submissions at length I will refer to them where appropriate in the discussion below.

Time bar

34. There are separate provisions relating to each claim. Although they are to some extent similar it is as well to deal with them separately.
- 10 35. With regard to the claim of breach of contract the Tribunal's jurisdiction is set out in paragraph 7 of the Employment Tribunals (extension of Jurisdiction) (Scotland) Order 1994. The claim must be submitted within three months of the effective date of termination. In this case the parties were agreed that that was 28 June 2022. The claim was not submitted
- 15 within that initial three month period. Paragraph 7(c) states that

"Where the Tribunal was satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods applicable, within such further period as the Tribunal considers reasonable."

- 20 36. It was clear to me that it was reasonably practicable for the claimant to have brought her claim at an earlier stage and certainly within the three month period. During her evidence the claimant tried to paint a picture whereby she considered that the respondent had financial issues and that she was simply being reasonable by delaying sending in her bill. I did not
- 25 accept this evidence. I considered that the respondent's explanation was probably more likely in that the claimant was aware that the hours she was claiming were going to be challenged and wished to delay matters to make it more difficult for the respondent to do this. It was clear that the claimant was in touch with a lawyer and had access to legal advice over this period.
- 30 The claimant's view appeared to be that in general terms when she sent out a bill to a farmer she would normally be prepared to wait some time for payment. She said that for example if she was sending out a bill to a

farmer for assisting with a lambing she would normally not expect it to be paid until after the lamb sales several months later. Whilst this may well be the case it was my view that this fell far short of amounting to any circumstance which made it not reasonably practicable for her to have made her claim in time. The authorities are clear that not reasonably practical means not reasonably feasible. It was entirely feasible for the claimant to have submitted her bill earlier and, if it was not paid, raised proceedings within three months of the effective date of termination. Accordingly, in my view the claim under the extension of jurisdiction order is time barred and the Tribunal therefore has no jurisdiction to hear it.

37. With regard to the claim of unlawful deduction of wages the Tribunal's jurisdiction is conferred by section 23. That provides at section 23(2) that

"Subject to subsection 4 an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with
(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made"

38. In this case the respondents representative referred me to the case of **Arora v Rockwell Automation Limited EAT0097/06**. This refers to an unreported case of **Group 4 Nightspeed Limited v Gilbert**. It was the respondents position that this was a case where there had been a complete non-payment by the respondent and that accordingly time would start to run from the date when the payment became legally due. It was the respondents position that this date was 28 June 2022.

39. The claimants position was that up until June 2023 she had expected to be paid her invoice in full and was unable to make her claim until this was done.

40. As I indicated to the parties on the day I considered that the respondents analysis of the position was incorrect. This was not a case of complete non-payment. As is made clear in her claim form the respondent had made a payment to the claimant which she had received on or about 7 June 2023. It was my view that a deduction had been made from the

wages she was due on this date and that time should run from then. It is therefore my view that the claim had been submitted within three months of this deduction. Accordingly, there was no question of the claimant requiring an extension of time on not reasonably practicable grounds. The claim had been submitted within three months of that date.

41. The respondent made reference to a number of cases involving a series of payments which I did not consider to be applicable in this case. There was no series of payments. The situation is that if the sum due were to be regarded as wages then there was no payment at all until 7 June 2023. If it had continued to be the case that there was no payment at all then although the claimant may have been able to raise a claim in the Sheriff Court the right to make a claim on the basis of an unlawful deduction of wages would have ceased on or about 27 September 2023 namely three months after the date on which, on any argument, the wages became due. There would of course have been a slight extension under the early conciliation proceedings. Any case based on complete non-payment would therefore have been time barred from around the beginning of October 2022 onwards unless the claimant was able to invoke the 'not reasonably practicable' extension. In my view matters changed however on 7 June when the respondent made a payment. If they made an unlawful deduction from that payment as was alleged by the claimant then the claimant had a period of three months (plus any time for early conciliation) after that date in which to bring her claim. I appreciate that that sounds somewhat anomalous but I note that in the case of **Arora** mentioned above the EAT accepted that such was the result of their conclusions. It is therefore my view that whilst the claim based on breach of contract was time barred the claim based on unlawful deduction of wages was not.

Was the claimant a worker?

42. The second preliminary issue raised by the respondent was that in any event the Tribunal had no jurisdiction to hear the matter because the claimant was neither a worker nor an employee.

43. The right not to suffer an unlawful deduction of wages is only granted to workers in terms of section 13 of the Employment Rights Act 1996. The term worker is defined by section 230 of the same Act. Section 230(3) states

5 *"In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker'¹) 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

10 *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*

15 *individual."*

44. There has been substantial jurisprudence relating to the definition of worker and many decisions handed down by the higher courts. The respondent's representative referred to a substantial number of these in her submissions including the cases of **Autoclenz v Belcher** and **Uber BV (and others) v Aslam and others UKSC 2019 0029**. Having

20 considered these authorities I believe it is abundantly clear that the claimant did not enjoy worker status. With regard to the issue of control it is clear that the agreement between the parties did not have the character of one of master and servant as it was put by the respondent. The

25 claimant was free to do the work as she wished. She was not told what times she had to feed the cattle, only that they needed feeding in the morning and evening. She was not penalised on the occasions when she did not do it. She was free to arrange an appointment with her lawyer in

30 Skye and go off and do that without prior arrangement with the respondent. With regard to when and how she was paid it was for the claimant to submit her invoice at a time and in a manner of her own choosing. It was clear from the evidence that it did not suit the respondent to work this way but the claimant had decided not to put her invoice in until some months after the work had been done. Crucially the claimant's own

evidence was that if she had been unable to do the work at any stage herself then she would have been free to send a substitute. In my view there was clearly no obligation of personal service here. The respondent contracted with the claimant to provide a service namely that of having the cattle fed twice a day. She was certainly not an employee and in my view she did not qualify as a limb (b) worker either. In my view she was an independent contractor and the respondent, like the other farmers and agricultural organisations for which she worked were to be regarded as customers of her business. Accordingly the Tribunal has no jurisdiction to hear her claim of unlawful deduction of wages either. The claims required to be dismissed. I am aware that given that the Tribunal has decided that *ab initio* it had no jurisdiction to hear the claim of breach of contract the claimant is potentially still free to bring any claim in this matter in the Sheriff Court. Whether the Sheriff Court still has jurisdiction or not will obviously be a matter for the Sheriff Court. Given that this is the case I feel it would be invidious for me to give any view (which would itself be obiter) in relation to what figure I would have awarded to the claimant had the Tribunal had jurisdiction. Matters are of course complicated by the fact that where the respondent has made deductions there was absolutely no suggestion in the evidence that such deductions were authorised in writing as is required by section 13. I therefore express no view other than can be gleaned from the observations on the evidence above.

**Employment Judge: I McFatrige
Date of Judgment: 23 November 2023
Entered in register: 24 November 2023
and copied to parties**