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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107193/2023

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Hearing held by CVP on 16 February 2024

Employment Judge R Mackay

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Mr J Headon

**Claimant
In Person**

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ZCO Ltd

**First Respondent
Represented by:
Mr Turpin, Litigation
Consultant**

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Potent Solutions Ltd

**Second Respondent
Represented by:
Mr Turpin, Litigation
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is as follows:

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1. On the application of the first respondent, the second respondent is joined as a party to the proceedings.
2. The claimant's claim for a redundancy payment is dismissed, having been withdrawn by the claimant.

3. The claimant at all material times held the status of “worker” of the second respondent as the term is defined in Section 230(3)(b) of the Employment Rights Act 1996 (“**ERA**”).
4. The claimant’s claim for holiday pay succeeds; he is awarded the sum of **THREE THOUSAND AND TWENTY FOUR POUNDS (£3,024)**. This is the gross amount. The second respondent shall be liable to make the payment to the claimant and either the second respondent or the claimant shall account to HMRC for income tax or national insurance contributions (if any) which may be due in respect of the payment.

REASONS

Background

1. In his claim form, the claimant sought payment in respect of accrued holidays and a redundancy payment. In the response submitted on behalf of the first respondent, liability was denied. It was disputed that the claimant had the status of either “employee” or “worker” as those terms are defined in ERA.
2. At the outset of the hearing, the claimant made clear that he did not consider himself as having been an employee, simply a worker. On that basis, by agreement, his claim for a redundancy payment was withdrawn (entitlement to such a payment requiring employee status).
3. On behalf of the first respondent, Mr Turpin made an application for the second respondent to be joined to the proceedings. The second respondent was, he submitted, the correct entity engaging the claimant. The claimant was uncertain as to the correct party, having seen references to both entities. Mr Turpin made clear that the second respondent adopted the response submitted by the first respondent and agreed to accept liability for any award made.
4. The Tribunal heard evidence from the claimant himself. On behalf of the respondents, evidence was led from Mr Yunus Bobat, a contracts manager

for the second respondent. The Tribunal found the claimant to be an entirely credible and reliable witness. He was clear in his account and answered questions to the best of his ability.

5. Mr Bobat was largely a credible and reliable witness. In some respects, however, his evidence of relevant matters was limited as he did not have direct knowledge. Any material areas of conflicts in the evidence are identified and resolved in the Findings in Fact section which follows.

Findings in Fact

6. The first and second respondents are part of a group of companies based in Bolton. The group is involved in the provision of services to the Post Office. The first respondent operates as a franchisee running local post offices on behalf of the Post Office. The second respondent also runs post offices but does so on an interim basis where the Post Office struggles to identify a permanent provider. These interim services can be very short in duration or can last for many years.
7. The claimant was initially engaged by the second respondent in 2012. After a gap of approximately one year, he resumed his engagement in 2015 and remained in post until his engagement was terminated in 2023.
8. The claimant's role was that of post office assistant. He had a base at Alness post office. His function was to provide a mobile service to three neighbouring communities which did not have a fixed post office. His engagement came to an end when a permanent provider took over from the second respondent at Alness post office. The mobile service was discontinued at that time.
9. The claimant was not provided with a contract or any other written documentation at any time during the engagement. He was classified by the second respondent as self-employed and he was taxed on a self-employed basis. He was paid an hourly rate which (at least at some times) was less than the National Minimum Wage. At all times, he provided invoices for his services, stipulating the hours worked.

10. The second respondent typically engages post office assistants like the claimant on either an employed or self-employed basis. The choice as to which applies is left to the individual concerned. The second respondent does not distinguish in terms of the work required between post office assistants who are employed and those who are self-employed. Their duties and day-to-day activities are the same. The only practical difference generally relates to the time commitments which apply. Those who are employed work fixed hours. Those who are self-employed generally provide availability on a regular basis and are offered shifts depending on their availability.
11. In order to operate as a post office assistant, the individual concerned must go through an approval process operated by the Post Office. Having been through that vetting process, the individual is given access to the Post Office's computerised system (known as Horizon). Post office assistants, whether employed or self-employed, are given a unique access code which they require in order to access the system. Access to the system is an essential part of performing the role.
12. The second respondent engaged employees at Alness post office. Whilst the arrangements varied over the course of the claimant's engagement, there was generally a manager in place. Although the claimant did not report directly to those employees, he liaised with them in performing his functions.
13. His day-to-day activities involved driving to the three neighbouring communities. He used his own vehicle to do so. In each community, he had access to a local facility where he would set up a mobile post office. This would include the Horizon computer terminal as well as cash, stamps, a secure box and other items provided by the staff at Alness in order for him to perform his functions.
14. Contrary to the normal position for self-employed post office assistants, who offer availability on a regular basis, the claimant's hours were fixed. He

initially worked five days a week, his hours coinciding with the opening hours of the mobile post offices in the three communities.

15. During the engagement, in direct consultation with representatives of the Post Office itself, he agreed to a different working pattern whereby he worked fixed hours on Tuesday, Wednesday and Thursday each week. His total hours remained broadly the same. The second respondent approved the revised working pattern although, as Mr Bobat stated in evidence, it was highly unusual for someone in the claimant's position to liaise directly with a Post Office representative on a matter such as this.
16. For a period of approximately one year starting in July 2017, the claimant's role changed. Instead of his normal function, he was asked by the second respondent to act as a trainer for other of its staff in the use of new technology. This involved travel across large parts of Scotland. During the time he performed this role, his post office assistant role was carried out by his father or his father-in-law.
17. Aside from that period, when he was permanently assigned to the alternative duties, he performed the services personally at all times. He did not at any time provide a substitute. He was not able to do so. The evidence of Mr Bobat on this was particularly clear. In order to perform the role, any individual must have been through the Post Office vetting process and must have been given an access code to the Horizon system. Self-employed post office assistants are not able or expected to provide a substitute if they are unavailable. In the normal course, the second respondent would allocate another of its self-employed assistants to the role. Given the unusual nature of the claimant's role, and the geographical remoteness, that was not an option. If the claimant was unavailable, the mobile post offices would not open. He was, however, careful to ensure that that did not happen often (including, for example, by taking only short holiday breaks). He did not receive any holiday pay for those holidays which he took.

18. Mr Bobat sought to lead evidence that on one occasion he understood the claimant to be abroad on holiday at the same time as invoicing for services. He took this as pointing to either the claimant having provided a substitute (of which he was unaware) or being fraudulent in claiming the sums. These points were not put to the claimant in cross-examination; nor was there any proper foundation in the evidence before the Tribunal for the allegations to be made. The Tribunal was satisfied that there had been no such occurrence.
19. During his time with the second respondent, the claimant performed other unrelated functions. Initially, he worked as a cleaner using his own cleaning business. Latterly, he had an employed position at a supermarket. At no time did he provide services similar to those he provided to the second respondent to any other party.
20. In the performance of his role, the claimant had extremely limited interaction with representatives of the second respondent (other than those who worked at the Alness post office). He was left to his own devices. He was trusted to perform the role and was not supervised or appraised. This absence of interaction is in marked contrast to the position Mr Bobat described in respect of regular self-employed post office assistants with whom he said there was almost daily contact scheduling shifts etc.
21. The second respondent did not have any direct control over how the claimant provided the service. The service requires to be carried out in accordance with Post Office protocols and the claimant was subject to those. That is consistent with the approach taken to employed post office assistants as well. The second respondent has no ability to deviate from the procedures of the Post Office itself.
22. The claimant was not provided with any disciplinary or grievance procedures and was never the subject of either of those. On occasion, if there was a customer complaint, this would go directly to the Post Office and they would liaise directly with the claimant.

23. The claimant was rarely absent from work due to sickness. On those occasions when he was, he did not receive sick pay. The claimant referred to having had a period of sickness due to Covid in 2020. During that period of sickness, the mobile postal service was not operated.
- 5 24. Contrary to the respondent's position as set out in the ET3, the claimant did not have an ability to change the days on which he worked. The times he worked required to coincide with the opening times of the remote post offices as listed on the Post Office website.
- 10 25. The claimant was not provided with any uniform or branded material referencing the respondents.
26. He was liable to make up for shortfalls in cash identified by the Horizon system. That applied equally to employees.
- 15 27. In mid-June 2023, the claimant heard through a local representative of the Post Office that a permanent service provider had been identified in Alness. He contacted Mr Bobat to enquire about this. The claimant also enquired about redundancy and holiday pay.
28. Mr Bobat initially led the claimant to believe that he would transfer to the new provider under the Transfer of Undertakings (Protection of Employment) Regulations (suggestive of at least worker status).
- 20 29. The claimant was subsequently advised that he would not transfer and would not receive a redundancy payment or holiday pay on the basis that he was neither an employee nor a worker.
30. Ultimately, the incoming provider did not continue with the outreach service. The relationship between the claimant and the second respondent therefore
25 ended with effect from August 2023.

Relevant Law and Submissions

31. Section 230(3) of ERA defines a worker as:

“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.”

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32. In considering whether an individual qualifies as a worker under Section 230(3)(b), it is necessary to consider the statutory wording (**Uber & Others v Aslam & Others** [2021] UKSC5. This involves a three-stage test:

(1) is there a contract between the worker and putative employer?

(2) does the contract require personal service? and

15 (3) does the nature of the arrangement fall within the business undertaking or profession exception set out in the statutory wording?

33. In order for there to be a contract, there must be mutuality of obligation (**Quashie v Stringfellow Restaurants Ltd** [2012] EWCA Civ 1735).

20 34. In considering whether personal service is required, the extent to which the individual may provide a substitute in the provision of the services is a key factor (**Pimlico Plumbers Ltd v Smith** [2018] UKSC 29).

25 35. In considering the business undertaking or profession exemption, an assessment of factors such as the degree of control, the exclusivity of the arrangement, the method of payment, which party supplied the equipment and the level of risk undertaken may be assessed as well as considering whether the putative worker is in a subordinate and dependent position or whether he is sufficiently at arms length and independent and able to look after himself (**Byrne Brothers (Formwork) Ltd v Baird** [2002] IRLR 96).

36. In a brief submission for the respondents, Mr Turpin invited the Tribunal to dismiss the claim on the basis that the claimant had at all times been self-employed and did not have the status of worker. He referred to aspects of the factual matrix including the claimant's position as self-employed for tax purposes, the lack of the control exercised by the second respondent over the method of delivery of the services, the lack of holiday pay and sick pay, and his ability to take on work outside of the relationship with the second respondent.

37. In reply, the claimant asked the Tribunal to find that he had been a worker during the engagement. He accepted that he was self-employed for tax purposes and considered that to be correct. He quite candidly admitted that until the end of this arrangement, at which point he looked into the matter, he had not been aware of the intermediate category of worker status and had not, therefore, considered the classification before.

15 **Decision**

38. The Tribunal first considered whether a contract was in place and had no hesitation in concluding that there was. Although there was nothing in writing, it was clear that mutuality of obligation existed between the parties. The second respondent had made an offer to the claimant to provide the mobile post office services in question and he had accepted that offer in return for agreed remuneration from time to time. In terms of the arrangement, the claimant was required to provide the services in a prescribed manner at prescribed times and the second respondent was under an obligation to remunerate him for those services in accordance with the agreed arrangements. The fact that the claimant agreed a variation in working pattern with the Post Office directly does not detract from that.

39. The Tribunal went on to consider whether the requirement for personal service was met. Again, it had no hesitation in concluding that it was. The claimant was required at all times to provide the service personally. The evidence of the second respondent's own witness on this was particularly

clear. In order to carry out the role, an individual must be approved by the Post Office and must be provided with a unique access code to the Post Office's computer system. It was simply not possible (and it was not permitted) for the claimant to choose a substitute and, in practice, he did not do so. The period when the claimant performed a different role was the subject of a bespoke arrangement at that time.

40. The Tribunal then considered whether the "business undertaking" exception should apply. It was not persuaded by Mr Turpin's argument that the claimant was in effect operating a business by working elsewhere. Latterly, he worked as an employee at a supermarket. That is not indicative of operating a business undertaking, it is indicative of an individual with two part-time positions. Equally, the cleaning company at one time operated by the claimant was entirely unconnected with his work for the second respondent. He did not at any time provide services as a post office assistant to anyone other than the second respondent. For completeness, considering other factors, it was clear that the second respondent had little or no control over the claimant and had very limited interaction with him. Whilst that might well be relevant in considering the question of employee status, that was no longer a live issue in this case. He was, in any event, subject to the wider controls of the Post Office itself (which are filtered through the second respondent to all of its staff, employed or otherwise).

41. Similarly, the claimant's classification as self-employed for tax purposes is not inconsistent with worker status (tax legislation recognising only self-employment and employment status). The claimant did not bear financial risk greater than those to which employees were exposed and he was clearly in a subordinate, dependent relationship.

42. For those reasons, the Tribunal was not satisfied that the status of worker was removed by virtue of the exception in the statutory language. It was clear to the Tribunal that the claimant held the status of worker.

43. It is apparent that the claimant was not typical of the individuals working for the second respondent (whether employed or self-employed). This was explained largely due to the unusual peripatetic nature of his role and the remote geographical location.

5 44. Having found that the claimant had worker status, he is entitled to payment in respect of accrued but unpaid holidays. The quantification prepared by the claimant having been accepted by Mr Turpin on behalf of the respondents, the Tribunal was content to make the award at that level. This is a gross sum. Either the second respondent or the claimant himself shall be liable to
10 account to HMRC for the income tax or national insurance contributions which may be due in respect of the payment.

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Employment Judge: R Mackay

Date of Judgment: 24 March 2024

Date Sent to Parties: 28 March 2024