



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs V Rickord

**Respondent:** The Dove Inn (Corton) Ltd

**Heard at:** Bristol **On:** 29 March 2018

**Before:** Employment Judge Christensen sitting alone

**Representation**

**Claimant:** Mr Kinally - friend

**Respondent:** Mr Smith - consultant

## JUDGMENT

1. The claims of unfair dismissal and wrongful dismissal (breach of contract) may proceed; the claimant was an employee of the respondent and is entitled to bring such claims.
2. A Telephone Case Management Hearing will now be listed to give directions to list this matter for a Final Hearing.

# REASONS

## Background matters

1. This matter has been listed before me to determine a preliminary issue – namely whether the complaints of unfair dismissal and wrongful dismissal should be dismissed because the claimant is not entitled to bring it if they were not an employee of the **respondent as defined in S230 (1) & (2) Employment Rights Act.**
2. Some issues arose at the outset of the hearing in relation to the bundle. The respondent wished to insert two new documents into the bundle – to be numbered page 51 & 52. The claimant objected. Document 51 is a photocopy of what appears to be a post-it note with handwriting on it. The note is addressed to 'Vera' and states 'pls raise 0 hour contract to start 24<sup>th</sup> June £8 ph'. The respondent wished to admit this on the basis that it was in the claimant's personnel file. The claimant objected on the basis that it wasn't dated, it doesn't say who it related to and that anybody could have written it. She also objected on the basis that she had already requested all documents on her personnel file and were told that there were none.
3. I confirmed that the document should be placed in the bundle as it may assist me in determining the events that had led to the creation of the claimant's contract. I confirmed to the claimant that all her objections were noted and that she was free to make submissions on the significance of this document in due course.
4. Document 52 is a list of all the weeks that the claimant worked from April 2015 to March 2016. The respondent wished to admit this on the basis that it indicated that the claimant had taken a period of leave for a period in excess of 1 month which is inconsistent with the terms of her written contract. The claimant confirmed in discussion that the period related to sickness and not a period of holiday. This was accepted by the respondent. The claimant had indicated that she had already asked the respondent to disclose similar lists for all her years of employment, but they had not been disclosed. The respondent provided no explanation for this failure. I confirmed that the document should be placed in the bundle on the basis that it was likely to assist in understanding the claimant's work pattern.
5. The respondent's position is that they have two standard forms of contract. One is a contract of employment and the other is a casual zero hours contract given to casual staff who are not employees. I have not been provided with a copy of the standard zero hours contract.
6. The claimant gave evidence. For the respondent I heard evidence from Mr Harvey Clark who is not an employee of the respondent but is instead an employee of another company operated by the Chairman of the respondent. The Chairman of the respondent is Mr Harrison-Allen and he operates a number of companies in the financial services and insurance sector. Mr Clark is an employee of one of those companies and performs accounting and

payroll services for the respondent on the instruction of Mr Harrison-Allen. Mr Clark had no involvement in the claimant's recruitment nor in the issuing of her contract of employment. He had no direct involvement her management during the 4 years of her employment.

7. The respondent's position is that the claimant was never an employee and was instead a casual worker who had no expectation of being given work and was under no obligation to accept work when offered. The respondent's position is that the claimant should have been given a standard zero hours casual contract when she started work and that she was instead given the wrong contract that was intended for employees, in error. The respondent's position is that the contract she was given did not reflect the reality of her working relationship and should therefore not be relied upon. The claimant's position is that she was an employee, that is consistent with the contract that she was given, the discussion and agreement reached at her interview, the reality of her working relationship and that she was not given the contract in error. The claimant argues that that contract is consistent with her clear expectation that she was a part time employee, would be offered regular work upon the understanding that she was expected to accept that work when offered and that she considered herself to be an employee of the respondent with attendant mutuality of obligation. The claimant's position is that this is consistent with her working relationship over four years. The claimant's position is that she would not have accepted a casual zero hours contract and that such a possibility was never raised with her. Had it been she would not have accepted work at the Dove Inn. She already had a number of casual work commitments and was seeking 'employment' with its attendant certainties, securities and commitments. The claimant's position is that this is consistent with agreement reached at interview and her working pattern during her four years of employment.
8. I consider the claimant to be a clear, consistent and entirely believable witness. Where she had given me evidence of events that took place I have had no difficulty in accepting her version of events. Mr Clark on the other hand was of much less assistance as a witness – he had very little evidence to give of direct involvement of the relevant events in question and seemed instead to have appeared as a witness to give evidence of what he had been told had happened. Examples of this are the discovery of the post it note in the personnel file and the instruction that Ms Holm gave to Vera in June 2013. He also asserted that the respondent operated a staff handbook that would be relevant to employees but when questioned about this confirmed that he had never actually seen one but believed that Ms Holm would have put one together. He accepted that it was possible that one didn't exist.

### **Findings of Fact**

9. The claimant commenced working for the respondent on 26 June 2013. The claimant stopped working for the respondent on 28 July 2017. The respondent is a pub with a restaurant and rooms. It has no dedicated HR support and although Mr Clark told me that he thought an employee handbook would exist he could tell me nothing about what was in it and one was not produced by the respondent. He also could not assist me in

understanding the procedures to be followed by employees in relation to periods of sickness and the taking of holidays. The respondent has a number of staff members that it regards as employees and a number of staff members that it regards as zero hours casual workers. I have been told that there is a contract that is given to zero hours contract workers but have not been provided with a copy of such a contract and have no evidence before me of the terms of such a contract.

### **The interview**

10. The claimant attended a job interview with Ms Holm at the Dove Inn in June 2013 and started work on 26 June. The claimant had a number of other casual jobs and was keen to find some regular part time employment. The other casual jobs that she did were cooking for people and riding out race horses for a trainer. The claimant told Ms Holm in interview about these other jobs at her interview. During her interview there was no mention made of the term 'zero hours' nor of the employment being 'casual'. The claimant only wanted to find a commitment to regular part time employment and would not have accepted a job at the Dove Inn on a zero hours or casual basis.
11. Instead there was a discussion between her and Ms Holm about the fact that the claimant would ensure that her casual work would not interfere with her commitment to the Dove Inn, that she would fit her other commitments around her commitment to the Dove Inn and was told that she would be expected to work shifts every week. There was a discussion and agreement around the need for flexibility in the number and timings of shifts that the claimant would be asked to work but a clear understanding that the claimant would be expected to work shifts every week.
12. I place no evidential weight at all on the document produced on the morning of the hearing and that I am told is a photocopy of post it-note found in the claimant's personnel file indicating that she was to be issued with a zero hours contract. Mr Clark gave evidence that the note had been found either at the bottom of the claimant's personnel file or stuck to the back of the claimant's contract. I asked him to clarify which it was and he confirmed that he believed it was stuck to the back of the contract. This inconsistency coupled with a lack of any explanation for it did not make his evidence plausible. The claimant's evidence was that the handwriting did not even resemble Ms Holm's handwriting. Mr Clark gave evidence that this note establishes that Ms Holm had instructed Vera to prepare a zero hours contract but was unable to assist in explaining why, if that was so, the claimant had not been issued with what I am told is a standard form zero hours contract issued to casual workers. Instead I prefer the very clear, consistent and compelling oral evidence that the claimant gave me regarding her discussion and agreement reached with Ms Holm in interview. Page 52 in the bundle causes me to have doubts about the credibility of the evidence provided by Mr Clark but does nothing to persuade me that there was an intention, in June 2013, that the claimant was to be employed as a zero hours casual worker. Such a notion is entirely inconsistent with the discussion at interview and also inconsistent with the working pattern that then developed.

### The work, the hours and the contract

13. The claimant commenced work at the Dove Inn and was given a document recording the 'terms and conditions of employment agreed' between the claimant and the respondent. These are compliant with the provisions of S 1 ERA and set out such matters as method of remuneration, hours of work, holiday, sickness, grievance, confidentiality etc.
14. In relation to hours of work the contract states this: '*Your working hours will be as required to perform your role. This will be composed of a number of shifts including weekends and Bank Holidays. Flexibility of working hours will be required by agreement.*'
15. The claimant was given a variety of shifts of up to three or four each week and often worked the evening shift in the pub. Her hours of work varied over the years. I have been provided with a list of her shifts for two whole years and these show a variance of between c6 hours and c33 hours.
16. For an evening shift and upon arrival at the pub at 4.00pm the claimant would work on her own to organise the restaurant for evening service, deal with anybody checking into the rooms, attend to anybody in the pub that needed serving drinks. Thereafter when the evening service started another member of staff arrived who worked under the claimant's supervision to run the restaurant and the bar for the evening. There were chefs that worked in the kitchen. The claimant cleared up the restaurant after service and then stayed in the bar area until the last customer had gone home. She cashed up and locked up the premises when the pub closed. The earliest that she left work was at 10.30pm and sometimes it was necessary for her to stay until the early hours of the morning if there had been a special event hosted. Any issues or problems that arose in the restaurant or bar had to be sorted out by the claimant, she was in charge. The claimant believed that Mr Harrison-Allen trusted her to be in charge.
17. The shifts were organised in the early days by Ms Holm and then more recently by Ms Cole. Mr Clark had some involvement in the organisation of the shifts from January 2016. Ms Cole would check in advance of each week's rota being drawn up with the claimant to find out what shifts she could or couldn't work. Following that, a draft would be drawn up and shared with staff and then sent to Mr Harrison-Allen for approval. On occasions he made adjustments to the rota. He removed the claimant from the rota on two weeks during her period of employment. The claimant recalls that this happened to her once during a summer but cannot recall exactly when and once in December 2015. The claimant regarded Mr Harrison-Allen to have a bullying manner and although she was not content to be removed from the rota in those two weeks, decided not take issue with Mr Harrison-Allen. Instead she focused on being as helpful as she could be to the Dove Inn as she valued her employment. With the exception of these two weeks, the claimant and the respondent always reached mutual agreement regarding the hours that she worked every week.

18. When the rota was finalised, the claimant would ensure that her other casual work fitted around her commitment to the Dove Inn. There are two text messages in the bundle from May and June 2016 that indicate that the claimant notified Mr Harrison-Allen at short notice that she was unable to cover her shifts. In May 2016 she confirmed that she has to go to the vet in Newbury and that alternative cover had been arranged. In June 2016 the claimant indicates that she cannot attend one of her shifts because of a memorial service. On that occasion she does not indicate that any steps have been taken to cover her shift.

### Holidays

19. The claimant's terms and conditions of employment state '*You must give due notice of your intention to take holidays*'. The claimant was asked to fill in a form notifying the respondent of the holidays that she intended to take twice a year – once in the spring and once in the autumn. The claimant complied with this requirement. The respondent has not disclosed any of these forms completed by the claimant, notwithstanding Mr Clark's evidence that all holiday forms were collected by the office.

20. The claimant accepted in evidence that she realises now that she was not paid during any period of holiday that she took but did not think of that at the time. She gave evidence that she could be described as silly or naive in this regard but did not properly understand her employment rights during her period of employment with the respondent and that, either as a worker or employee, she was entitled to be paid holiday pay. I make nothing of the fact of her naivety and accept that she was simply ignorant of her rights. Employment Tribunals are well used to encountering claimants who do not understand their employment rights at the time of their employment. It is worth noting that even had the claimant been a worker and not an employee she would still have been entitled to paid holiday. The respondent argues that her failure to press for holiday pay at the time she took holiday tends to indicate that she understood that she was not an employee. I do not regard the facts as tending to indicate that. The claimant makes the point in closing submissions that it is glib of the respondent to argue that the terms of the written contract should be disregarded as establishing a relationship of employee/employer because of the respondent's failure to have paid the claimant holiday pay when she took holiday. I accept the force of that submission.

### Sickness

21. The claimant had one period of sickness during her period of employment. This was a four-week period in September 2015 when she broke her eye socket. The claimant informed the respondent of her medical situation and that she was unable to work. She was not told of any procedure that she should follow, or any forms that she should fill out and left things at that. She informed them when she was better and returned to work and returned to the rota as normal when her eye socket had healed.

22. The claimant's terms and conditions document require a self-certification form to be completed for any period up to 7 days and thereafter for a medical certificate to be provided. It also provides that staff will be paid in full for two weeks and then half pay for two weeks. The claimant was not paid during her period of sickness. The same points arise here as are aired above in relation to holiday. The respondent argues that the failure by the claimant to have provided a self-certification form/medical certificate and to have asked to be paid her period of sickness is indicative of her acceptance of a variance in the contract she was given or that it was not indicative of a relationship of employer/employee. I do not regard that as a correct characterisation of the facts and accept instead the claimant's evidence that she was simply ignorant of her rights in this regard and did not think to check this provision.
23. I find that the claimant was ignorant of the terms in her contract. After having been given the contract in writing at the outset of her employment, she did not refer to or check the terms of her contract at any time during her period of employment.

### **Termination**

24. During her last year of employment the claimant perceived that she was being given increasingly less shifts by Mr Harrison-Allen. She believed that this was because the respondent's business was not going well and therefore needed less people to work in the pub. The claimant was offered no further shifts from July 2017.

### **Submissions and the law**

25. The respondent prepared written submissions which were supplemented with oral submissions. The claimant made oral submissions.
26. The relevant statutory provision to determine the issue before me, whether the claimant is an employee, is found at S230(1) & (2) of the Employment Rights Act.
27. The respondent has also referred me to S230(3) of the ERA which contains the definition of a 'worker.' S230(3) confirms that a worker is someone who satisfies the definition of working under a contract of employment but could also be someone who works under a different type of contract in which the individual undertakes to do work personally.
28. I do not regard it to be of any assistance to focus on S230(3) as the issue before me does not require an examination of whether the claimant is a worker. The respondent has referred me to two cases (*Byrne Brothers-v-Baird [2002] IRLR 96* & *Windle-v-SOS for Justice [2016] EQCA Civ 459*) but I do not regard these cases to be of assistance as they both deal with worker status which is a different question to the one before me.
29. The respondent refers me to *Autoclenz-v-Belcher [2011] UKSC* as support for the proposition that I should disregard the terms of the written contract in so far as inconsistent with the true terms.

30. The claimant submits that this is an essentially simple case in that the contract under which the claimant worked meets all the requirements of a contract of employment. The degree of flexibility regarding 'Hours of Work' in the written contract is not inconsistent with a contract of employment – there was a clear expectation on both sides that 'a number of shifts' would be worked every week and that is what happened. The claimant submits that there was a clear expectation that shifts be both offered and accepted every week and there was therefore mutuality of obligation.
31. The claimant submits, that if it is necessary to do so, it would be proper to conclude that there was an umbrella contract in existence.
32. Both parties ask me to approach the issue before me by examining the usual criteria to determine whether a contract of employment existed. The respondent sets these out in written submissions.

### **Determination of issue**

#### **Mutuality of Obligation**

33. I am satisfied that there was an obligation on the employer to offer work and on the employee to accept that work. This was a two-sided obligation that was agreed at the claimant's interview and manifested itself throughout her period of employment. It was understood at the interview that the claimant would organise her other casual work commitments to ensure that she was able to take shifts every week offered by the respondent. I do not consider that the two weeks in which the claimant was unilaterally taken off the rota by Mr Harrison-Allen undermine this principle. By the time that Mr Harrison-Allen removed the claimant from the rota on the two occasions that this happened, the work had already been offered by the employer and accepted by the claimant in the sense that that offer and acceptance was reflected in the rota drawn up by Ms Holms.
34. It was agreed between the claimant and the respondent at interview that the nature of the commitment had some degree of flexibility within it in the sense that it was agreed that the number of shifts offered and accepted would vary from week to week; however, there was a clear expectation that shifts would be offered and accepted and this expectation is supported by the pattern of work thereafter and the wording of the contract itself. The work performed was at no time irregular or sporadic. I do not regard the nature of this flexibility over hours to undermine the mutuality of obligation that I am satisfied existed.
35. In accordance with *Autoclenz*, there are no facts that tend to establish that I should disregard the terms of the written contract. I am not satisfied that the claimant was issued her written Contract of Employment in error. The true nature of the relationship between the respondent and the employee on the facts is consistent with the written contract.
36. I do not regard it as necessary to examine whether an umbrella contract existed given the ongoing nature of the working relationship that existed between the parties.



## Control

37. The respondent submits that *'The claimant was not subject to any internal policies and procedures as employees are. The fact that the respondent did not exercise the same degree of control over the claimant as they do over employees is indicative of worker status'*. I do not regard this submission as helpful as there was no evidence before me of what level of control the respondent exercised over individuals that they considered to be employees.
38. It is also not correct to submit, as the respondent does, that the claimant was not subject to any internal policies as my findings indicate that she was subject to the requirement to report her holidays to the claimant twice a year by way of filling out a form. I have been unable to make any findings as to precisely what policies employees were subject to as Mr Clark was unable to assist with this.
39. Instead I prefer the claimant's submissions and am satisfied that the claimant was controlled in what she did at work as Front of House Manager in such a way that is consistent with her status as an employee. Notwithstanding that she was not under direct supervision when she performed her tasks at the Dove Inn, she did not decide what tasks she should perform, what menu should be served, what prices should be charged and instead was there to undertake the tasks as instructed by Mr Harrison-Allen. Namely the supervision of the pub, restaurant and room bookings, the cashing up and the locking up of the premises and the oversight of a member of staff who worked under her.

## Personal Service

40. The claimant was required to provide personal service – the rotas that she was assigned were assigned to her and there was no expectation that the claimant could send a substitute. There is one example in the bundle of the claimant texting Mr Harrison-Allen to let him know that with Ms Holm's knowledge, someone else was going to cover her shift because she had unexpectedly had to go to the vet. I do not regard that as inconsistent with the notion of the claimant needing to provide personal service. She did not unilaterally substitute someone of her choosing and instead spoke with Ms Holm to arrange a replacement for her when this was necessary at short notice.

## Exclusivity

41. The claimant's contract of employment contained an exclusivity clause which prohibited the claimant from carrying on any other employment with the written consent of a Director of the company. The respondent argues that this clause did not apply to the claimant in the sense that she was free to work elsewhere – in that sense the respondent says that this points against a contract of employment. However, the facts establish that the claimant disclosed to the respondent at her interview that she held some other casual jobs and reassured the respondent that they would not interfere with her commitment to the respondent.

### **Nature and length of engagement**

42. The respondent submits that it is relevant that the contract was not pre-determined in length nor for a specific task. I take judicial note of the fact that most contracts of employment are not for fixed periods or for the performance of a specific task and therefore glean no assistance from this submission. The lack of any fixed term or fixed task is entirely consistent with the existence of a contract of employment.

### **Pay and benefits**

43. The respondent submits it is relevant that the claimant was not paid a regular fixed amount in light of her hours varying. I do not regard this as having any significance to the issue before me. The claimant was paid for the work she did and was put through the respondent's pay roll in the normal way.

44. The respondent submits that it is relevant that the claimant did not receive a pension or other benefits. I do not regard this as pointing away from employee status. The contract is silent on pension benefits and bonuses and I have heard no evidence regarding what pension benefits the respondent made for its employees. The responsibility to set up a pension scheme rests with the employer.

### **Integration**

45. The respondent submits that the claimant was not integrated to the same standard as other employees. I do not consider this submission to be of any assistance as I received no evidence of the level of integration other employees may have experienced.

46. Instead I am satisfied that the claimant was integrated into the respondent's business in the sense that she was the face of the Dove Inn when she was at work. She dealt with all matters arising in the pub and restaurant, she cashed up and locked up for them as part of her duties, was subject to the requirement to notify them of her holidays twice a year and had weekly contact with Ms Holms regarding the setting of each week's rota.

### **Facilities and Equipment**

47. The respondent accepts that it provided the claimant with the facilities and equipment she needed to perform her role but also submits that it is relevant that the claimant had to provide her own clothing. I do not regard this point about clothing to have any relevance to the issue before me. There was no evidence before me about any clothing requirement or uniform and it is therefore to be expected that the claimant wore her own clothes to work.

### **Financial Risk**

48. The respondent submits that *'the claimant was not paid even if there was not sufficient work to keep her fully occupied. In the event that staffing levels were satisfied already, C would not be offered work'*. I do not regard this submission to be helpful in the sense that there is no evidence to support it. The claimant was always offered work, in every week that she worked for the respondent during her four years of employment. On two occasions that offer

was unilaterally withdrawn by Mr Harrison-Allen after the rota had been prepared. I am unable to make any findings as to what caused him to remove her from the rota. There is no proper basis to speculate about what might have happened and my findings instead focus on the evidence of what did happen.

49. Accordingly, I am satisfied that the claimant was an employee of the respondent. A Telephone Case Management Hearing will now be listed to give directions to prepare for a Final Hearing.

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Employment Judge Christensen

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Date 14 May 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON  
15 May 2018

FOR THE TRIBUNAL OFFICE