



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Pachwicewicz
Respondent: Wilsons Solicitors (UK) Limited
Heard at: East London Employment Tribunal
On: 7 July 2021
Before: Employment Judge Russell
Representation:
Claimant: In Person
Respondent: Mr R Boateng (Solicitor Advocate)

JUDGMENT

1. **The Claimant was neither an employee nor a worker.**
2. **All claims are dismissed as the Tribunal does not have jurisdiction to hear them.**

REASONS

1. By a claim form presented to the Employment Tribunal on 5 April 2020 the Claimant brought claims of unfair dismissal, discrimination because of religion or belief, arrears of pay and for other payments. The Respondent resisted all claims.

2. At a Preliminary Hearing before Employment Judge Housego on 21 December 2020, the Claimant confirmed that there was no claim for discrimination because of religion or belief and that claim was dismissed upon withdrawal. The unfair dismissal claim was struck out as the Claimant did not have two years' continuous service and the Tribunal therefore had no jurisdiction to hear it. The remaining claims, failure to pay minimum wage and/or provide payslips, were brought under Section 13 and Section 8 of the Employment Rights Act 1996.

3. The case was listed for a final hearing today with a time estimate of 1 day. It was subsequently converted to a Preliminary Hearing to determine employment/worker status. Unless the Claimant was an employee or a worker, the Tribunal does not have jurisdiction to hear complaints of failure to pay minimum wage or provide payslips. The Claimant has

not provided a Schedule of Loss as ordered by Judge Housego but I decided that it was appropriate to deal with the preliminary issue on its merits first. If the claims were not dismissed, I would then consider whether the Claimant should be limited to the remedy set out in the Preliminary Hearing Case Management Summary (20 hours a week at minimum wage for the period 9 September and 4 April 2020 being some £4,926) or make further Orders as necessary.

4. I had regard to the contents of a bundle provided to me by the Respondent, a witness statement provided by the Claimant and a statement provided by Dr Diriwari on behalf of the Respondent. I was assisted by the submissions of the Claimant and the Respondent in reaching my decision.

Law

5. Section 230(3) of the Employment Rights Act 1996 has two limbs. Limb (a) defines as an employee a person who works under a contract of service. The contract of service may be express or implied and, if express, either oral or in writing. The classic description of a contract of employment may be found in **Ready Mixed Concrete South East Limited v Minister of Pensions and National Insurance** [1968] 2 QB 497 which sets out three conditions.

- 5.1 Firstly, the servant agrees that in consideration of a wage or other remuneration he/she will provide their own work and skill in the performance of some service for the master.
- 5.2 He/she agrees expressly or impliedly that in the performance of that service they would be subject to the others control in a sufficient degree to make that other master.
- 5.3 The other provisions of the contract are consistent with it being one of service.

6. It is also well established that there can be no contract of service without there being an irreducible minimum of obligation on both sides. Mutual obligations are necessary for there to be a contract at all. If there is a contract, the Tribunal must then determine what type of contract it is having regard to the nature of the obligations. Control alone cannot determine employment status.

7. Limb (b) defines as a worker an individual who has entered into or works under any other contract whereby the individual undertakes to perform personally any work or services for another party to the contract and whose status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual.

8. When considering limb (b) worker status, there must first be an obligation to perform work personally and the existence, or otherwise, of a right of substitution will be relevant. In considering whether they are providing service other than as a client or customer, the focus is upon whether the purported worker actively markets their services as an independent person to the world in general on the one hand or whether they are recruited by a principal to work for that principal as an integral part of the principal's operations, as confirmed in the recent case of **Pimlico Plumbers Limited & another v**

Smith [2018] UKSC 29.

9. Applying the law to the facts of this case, it is therefore necessary to decide firstly whether or not there was a contract at all. If there was a contract, to identify the terms of that contract, whether express or implied oral or in writing and then to analyse the same to decide whether or not employment or worker status is made out.

Findings of Fact and Conclusions

10. The Respondent is a firm of solicitors which undertakes family law work funded by the legal aid scheme. The Claimant is a student of international law at Birkbeck University of London. The Claimant and Dr Diriwari, the principal of the Respondent, met in London in or around June 2019.

11. The Claimant says that they agreed that they would collaborate to provide legal services in public law care proceedings within the jurisdiction of England and Wales involving foreign nationals. She says that she introduced a number of clients to the Respondent and then provided her services, working on the files. By contrast, the Respondent's case is that the Claimant offered to provide interpreting services for any Polish clients that he may have and that he agreed to do so on a self-employed basis. The Claimant asserts that on 6 September 2019, she and Dr Diriwari concluded an express verbal agreement, in the presence of his driver, where she would be employed for 20 hours a week for a salary of £9 per hour. Dr Diriwari denies that there was any such conversation far less any such agreement.

12. The parties agree the following facts. There was no written contract or offer letter. The Claimant did not work regular hours for the Respondent or have a desk at the office. The Claimant introduced at least 5 clients to the Respondent and worked only with those clients. The Claimant submitted invoices for her interpreting services before and after court hearings. There were six invoices in the bundle in respect of work done between 25 September 2019 and 4 November 2019. Each invoice ended with **"THANK YOU FOR YOUR BUSINESS!"**.

13. There are also contemporaneous WhatsApp between the Claimant and Dr Diriwari to which I had regard. During June and July, they engaged in general discussion about public law care cases involving overseas clients. On 7 July 2019, Dr Diriwari said that he had a lot of experience in family law and the Claimant replied that she was sure that a lot of Polish people would approach him with such work, going on to say: **"it is why I want to learn with you"**. Dr Diriwari replied: **"yes, that is good and no worries, I am ready to work with you"**. As well as messages about making contact with potential Polish clients, the Claimant also sought Dr Diriwari's assistance in a legal dispute about a car.

14. The Claimant and Dr Diriwari exchanged a lot of messages about work on cases for Polish clients introduced by the Claimant and other, non-work related matters which suggest a personal relationship between them. In a WhatsApp message on 28 August 2019 the Claimant said that she would make Dr Diriwari a big career as a Polish children saver. Clearly this is something she feels very strongly about. It appears from the messages that Dr Diriwari found the issues raised in some of the cases time consuming and perhaps overwhelming; when he expressed this on 5 September 2019, the Claimant replied in terms suggesting that their "collaboration" would end with the current three cases.

15. On 6 September 2019, the Claimant and Dr Diriwari met in a restaurant. The Claimant says that this is where the agreement for a 20 hour a week at £9 per hour was reached. Dr Diriwari says that work was not discussed at all far less any employment or working relationship.

16. On 8 September 2019 at 16:17:09, following a very large number of messages relating to non-work related matters, the Claimant sent a message which read **“what time I have to come tomorrow to the office? I am starting tomorrow, or it was just more empty words?”** Dr Diriwari did not reply. The message is consistent with there being some discussion about the Claimant starting to work for the Respondent, although her reference to empty words are not consistent with her believing that they had entered into a binding agreement.

17. The Claimant attended the office on 9 September 2019. Dr Diriwari was not there to meet her and his secretary told her to book an appointment, suggesting that she had not been expecting the Claimant to attend. The Claimant sent Dr Diriwari to ask what was going on and asked: **“can you tell me what it’s supposed I have to do, because as far as I remember on Friday was agreed to sent letter of authority to Poland and you yourself told me to come in the morning apart from previously agreed 20h start since today”**.

18. The Claimant and Dr Diriwari did meet in his office on 9 September 2019. After the meeting, the Claimant sent the following message: **“I understand 20h of part-time was one more joke? The letter about my car ... is still real to have it sent or I should find another solicitor to do it after three months lost”**. When that afternoon the Claimant sent her National Insurance number to Dr Diriwari she stated: **“I need to know asap if you can “employ” me 20 hours per week”**. Dr Diriwari did not respond of these, or the many other, messages which the Claimant sent.

19. On 12 September 2019, Dr Diriwari sent the Claimant a WhatsApp message asking her to amend the Roca letter which he had sent. Roca was not a Polish childcare client but was the car company with which Dr Diriwari had agreed to assist the Claimant. I accept that the references to the Claimant’s amendments and work on this letter are not related to clients of the Respondent’s firm but to her own legal dispute with which Dr Diriwari was helping.

20. On 13 September 2019, the Claimant contacted Dr Diriwari to say that she had very important information about one of the Polish cases, that he would know how to deal with and that they needed to talk. I find that the Claimant continued to potential clients to the Respondent even though there had been no confirmation that she was working for him.

21. On 26 September 2019, the Claimant asked whether or not Dr Diriwari had prepared an invoice, she gave her bank details but stated that she would prefer to receive the money in cash. Dr Diriwari replied that he could give it to her tomorrow. This message is consistent with the interpreting services provided by the Claimant for a Polish which form the basis for the first invoice. I find that the agreement to pay for was interpreting and not legal work. The Claimant went on to message Dr Diriwari to say that she was speaking with another solicitor with regard to introducing potential Polish clients.

22. In WhatsApp messages throughout October 2019, the Claimant made several references to the agreement she says was made on 6 September 2019. It is clear from the messages that the Claimant was passionate about trying to help Polish people whose children she believed had been wrongly removed from them. The Claimant expected and

understood that Dr Diriwari would help her support those clients when she referred them to the Respondent. It appears that she was dissatisfied with his efforts and his conduct towards her in non-work related matters. Dr Diriwari did not reply to confirm or deny the alleged agreement. I consider it significant that in none of the messages did the Claimant assert that she was owed money for legal work done on the files between 9 September 2019 to date and for which she had not been paid.

23. On 21 October 2019 the Claimant sent Dr Diriwari a WhatsApp message to inform him that she had told HMRC that she had been working for him for 20 hours a week, at the national minimum wage, since 9 September 2019; she again referred to an agreement made in front of the driver and asked that payslips be provided. This was one of over 30 messages sent by the Claimant that day. In the messages sent immediately before the reference to HMRC, the Claimant was clearly angry with Dr Diriwari accusing him of breaking promises and letting her down in relation to his handling of her car litigation and also in respect of personal matters. The Claimant stated that in light of their collaboration since July 2019 it was fair to consider that she was working 20 hours a week since 9 September 2019. Dr Diriwari did not reply to the HMRC message.

24. The Claimant again asserted on 31 October 2019 that she needed to be paid as agreed 20 hours per week since 9 September. It is clear from the messages that the relationship between the Claimant and Dr Diriwari was deteriorating significantly. Dr Diriwari did not reply to the Claimant's increasingly emotional messages.

25. On 9 November 2019 at 13:25:37 the Claimant sent a WhatsApp message in the following terms: **"I never wanted this kind of collaboration with you but I am supporting people who I take to you rather than you with more reason as I know you sold me and promised a lot and just denied this"**. Later that same afternoon she again referred to an agreement about 20 hours per week that she had mentioned several times, clearly in front of the Claimant's driver. As the Claimant's many messages over the course of the day became increasingly hostile, Dr Diriwari finally replied at 15:41:45: **"you call me stupid; I am out, I will reply you very well when I get home. ... Give me your invoice and I will pay you but will never give you a 20-hour payslip"**. This is the only message in which Dr Diriwari addressed the Claimant's repeated assertion of an agreement that she would work 20 hours a week for the Respondent.

26. After 9 November 2019, the Claimant sought to transfer the cases of her Polish contacts to other solicitors and any collaboration which may previously have existed came to a definitive end. From that date, and even during the course of these proceedings, the Claimant and Dr Diriwari have engaged in exchanges which do not reflect well on either of them.

27. In deciding whether or not there was a contract at all, I find that neither the Claimant nor Dr Diriwari was credible or reliable in their oral evidence. The Claimant clearly feels passionately that she has been deceived or betrayed by Dr Diriwari and her evidence was coloured throughout with rather extreme emotion. For his part, Dr Diriwari was so keen to deny that there had been any discussion about a working arrangement that his answers lacked credibility. Having regard to the WhatsApp messages sent by the Claimant around 9 September 2019, it is simply not plausible that Dr Diriwari would not have replied at the time if there had been no discussion on 6 September 2019 about the possibility of the Claimant working for 20 hours a week and if he had no knowledge of what the Claimant was referring to as he now claims.

28. On balance, I find that there was a discussion at the restaurant on 6 September 2019 about whether the Claimant could work for Dr Diriwari. I find that the Claimant wanted to work for him for 20 hours per week at a rate of £9 per hour to work on the Polish clients whom she had introduced and about his children she clearly cared passionately. The Claimant's collaboration with Dr Dirawari prior to 6 September 2019 was not limited to translation or interpreting work, she evidently acted as an intermediary between clients and the Respondent, passing on their instructions and helping with their cases. The Claimant believed that it was fair that she should be paid for her work and I find that this was the reason that there was a discussion on 6 September 2019.

29. However, I do not find that there was a contract agreed between the parties on 6 September 2019. On balance, I find that the Dr Diriwari allowed the Claimant to believe during the discussion that such an agreement was a possibility but that he did not agree that it would happen. This is consistent with the context of the subsequent messages and the fact that the relationship between them was not purely professional. Whatever the Claimant believed had been agreed was quickly shown on 9 September 2019 not to be a binding agreement. The Claimant herself refers to Dr Diriwari using empty words or it being one more joke. When the Claimant provided her National Insurance number, she sought confirmation of whether she was being employed. None of this is consistent with a concluded contract even one which was agreed verbally.

30. The Claimant's misunderstanding of what constitutes employment is evident in her claim that she continued to work for the Respondent until April 2020 because she went to the Respondent's office on one occasion with the client MS in that month. I conclude that the Claimant has decided that the effort that she making to help her Polish contacts *should* be regarded as work for which she *should* fairly be paid, rather than work for which it was agreed that she *would* be entitled to payment. I have no doubt that the Claimant did spend a large amount of time seeking to assist her Polish contacts and that she passionately wanted to help them. This is not however a contractual agreement that the Respondent would pay her for doing so, far less that she would work for a set number of 20 hours per week.

31. As Mr Boateng submitted, the Claimant bears the burden of proving a contract between the parties and I am not satisfied that she has done so. No matter how much she wanted there to be a paid working relationship, I find that none existed. As the Claimant has failed on balance to prove that there was a contract at all beyond her self-employed work as an interpreter outside of court. The claim fails and is dismissed. The Claimant was neither an employee nor a worker.

Employment Judge Russell
Date: 19 August 2021