



EMPLOYMENT TRIBUNALS

Claimant

Miss O Hutchinson

v

Respondent

Rebecca Squires

Heard at: Bury St Edmunds

On: 12 November 2021

Before: Employment Judge K J Palmer (sitting alone)

Appearances

For the Claimant: Miss A Beech, Counsel

For the Respondent: Mr A Williams, Solicitor

RESERVED JUDGMENT on a Preliminary Issue

1. It is the Judgment of this Tribunal that the Claimant was an employee of the Respondent. The Claimant's claims for unfair dismissal, wrongful dismissal and unlawful deduction of wages including claims for holiday pay and sick pay, all survive.
2. There will be a further Preliminary Hearing by Cloud Video Platform to deal with case management issues, including the Claimant's application for costs and listing the matter for a Full Merits Hearing. This will take place on **11 March 2022** at 10 am.

RESERVED REASONS

1. This matter came before me pursuant to an ET1 presented by the Claimant to this Tribunal on 18 December 2020. In it the Claimant, who argues that she was employed by the Respondent, pursues claims for unfair dismissal, wrongful dismissal or notice pay and claims for holiday pay and sick pay.
2. The Respondents filed an ET3 filed on 18 January 2021 and argue ostensibly that the Claimant was a self employed individual and therefore is not entitled to pursue any of her stated claims.

3. They argue the Tribunal has no jurisdiction to hear them in light of her self employed status.
4. The matter was listed for a Preliminary Hearing to determine the Claimant's status and was originally due to take place on 21 September 2021. Three hours were allowed. That Hearing was postponed and relisted and took place over the course of one day on 12 November 2021. There was insufficient time, having heard all the evidence together with there being a Bundle running to over 450 pages, for a Judgment to be given and Judgment was reserved. This is that Reserved Judgment.
5. I had a Bundle, sent to me electronically, before me, running to in excess of 450 pages. That Bundle had been amended and further documents added, more particularly the Consultancy Agreement entered into by the Claimant and relied upon by the Respondent. I also had witness statements from those from whom I heard live evidence, including the Claimant, the Respondent and two further witnesses produced by the Respondent: a Ms Tracey Jordan and a Ms Claire Ablitt.
6. The Hearing took place by Cloud Video Platform (CVP).

Findings of Fact

7. The Claimant was engaged as a Beauty Therapist by the Respondent who runs a business operating from premises in the Respondent's back garden. The Claimant entered into a Consultancy Agreement, a copy of which I had before me. That Agreement was clearly signed, albeit that the photocopy in my electronic Bundle was very difficult to read. The date at the top of the Agreement was 5 March 2015.
8. The Respondent relies upon that Agreement as a reflection of the arrangement between the parties. It is the Claimant's case that the Agreement does not reflect the true arrangement between the parties and is in effect a sham.
9. The Agreement envisages, as often is the case with such Consultancy Agreements, that the individual providing the working services can provide a substitute. This appears at 3.3 of the Agreement. However, it is common between the parties that it was never the case that such a substitute in the terms indicated by 3.3 was ever provided, nor was it ever practicable, or the intention of the parties, that a substitute be so provided. The Respondent, under cross examination, freely and readily admitted that when there were circumstances which meant that a particular client could not receive a treatment from the Claimant due to perhaps the Claimant's illness, then that client would be referred to another Therapist working with the Respondent. In cross examination, the Respondent admitted that it was her expectation that it was the Claimant who would perform personally the services to the client.

10. It is the Claimant's evidence that she was required to be available for work during set hours, rather than a total of 30 hours to be worked whenever she wished. The Respondent's position is that the Claimant could essentially come and go as she wished. There was evidence in the Bundle that the Claimant's hours varied and in fact invoices over a period of time did show a variation from month to month, albeit that variation seemed more pronounced towards the end of the Claimant's engagement prior to the termination of the Agreement by the Respondents.
11. However, the Claimant was not paid on an hourly basis, but was paid 40% of each treatment fee, the rate of which was fixed by the Respondent. And 50% for intimate waxing. The treatments varied in price and therefore there is not an accurate record of hours worked for us to view. The Claimant, in cross examination, gave evidence that she worked fairly regular hours save for an alternative Saturday. I agree with Ms Beech's follow up written submission that there was insufficient put to the Claimant in cross examination for us to be able to draw an inference other than accept the evidence put by the Claimant.
12. During the giving of her evidence, the Respondent asserted that the Claimant was essentially running her own business and was not exclusively working for the Respondent. It is the Respondent's case that the Claimant was operating another business on her own out with the work that she was doing for the Respondents business "And So Beautiful".
13. This evidence was to some extent supported by Tracey Jordan and Claire Ablitt, although their evidence was very vague and concentrated mainly on the fact that in their discussions with the Claimant as clients of the Respondents, the Claimant had always expressed herself to be very happy working at the Respondents.
14. I found that the evidence given by the Claimant was unshakeable in this respect, that there was nothing else to persuade me that the position was anything other than the Claimant had indicated which was that she worked exclusively for the Respondent. It is possible that she harboured ambitions for the future of setting up on her own, but there is insufficient evidence to convince me that she had already done so during the period of time she was engaged by the Respondent.
15. I am bound to say that I found the Claimant's evidence to have been given in a straightforward and unshakeable manner, whereas the Respondent was less certain in many of her answers and was persuaded to depart from aspects of her written statement which admittedly was extremely brief. I therefore remain unconvinced by the Respondent's evidence with respect to the issue of control, that is the control which she as the Respondent exerted over the Claimant when the Claimant was working. I am persuaded that there in fact was a significant level of control over the Claimant and others at the salon. The salon engages individuals who the Respondent considers to be both self employed and there are some

there which, more latterly, are considered to be employees or workers by the Respondent.

16. It is clear that the Claimant was expected to carry out tasks out with the provision of specific beauty treatments to clients, including cleaning and sending out marketing flyers. There was an expectation of personal service by the Claimant. The Respondent's marketing material was drafted in such a way as to include the Claimant as part of the Respondent's business. The Claimant carried a business card designed by the Respondent, carrying the Respondent's branding. The Claimant had an email address at the Respondent. The Claimant paid the Respondent no rental fee. Customers paid the Respondent. All tools and training were provided for the Claimant by the Respondent. I accept that much of the training might have been paid for by the manufacturers of products who wished their products to be bought by the Respondent, but nonetheless, that training was managed and organised by the Respondent. The Claimant was obliged to wear a uniform. All Covid-19 measures were managed and operated by the Respondent. The Claimant was expected to fall in line with those. The evidence is that the Claimant was required to be available for work during set hours and that did not change from week to week save for the alternative Saturdays.
17. The plethora of exchanges and messages in the Bundle clearly illustrated a considerable level of control which the Respondent had over those working in the salon. She operated a process concerning time off for holiday which required those working at the salon to give appropriate notice. I accept the Claimant's Representative's submissions that the exchanges in the Bundle to which I was referred, give the tenor that the Respondent was very much in charge of the taking of holiday and it is very much that there were negative repercussions for staff if they took time off simply when it suited them.
18. All of these factors suggest that there was a significant level of control exercised by the Respondent. In evidence, the Respondent confirmed that in circumstances where the Claimant did not attend that she would contact clients and customers to rearrange for another Therapist to look after them.
19. It was the Respondent who determined the split of fees between the Respondent and the Therapist and it was also the Respondent who determined the prices charged to clients. The Respondent managed a "Cancellation Club" and controlled and managed this. The Respondent admitted in cross examination that she maintained sufficient awareness of the Claimant's diary to know if she could send a Cancellation Club text or not.
20. The Respondent admitted and accepted that there was direction from her as to how tasks were done. She also admitted that she directed how staff managed their diary in order to maximise the number of appointments that they undertook to increase profitability for the business.
21. The Consultancy Agreement entered into contains a clause specifying that the Claimant devote at least 30 hours each working week to the carrying out

of the services. It also includes at paragraph 6, a clause specifying that the consultant can be engaged in other businesses but goes on to specify that such business cannot be in any way similar to or competitive with the business of the Respondent. This is akin to an engagement that goes beyond that of self employed contractor.

22. It is accepted that the Claimant was responsible for her own Tax and National Insurance, but the invoices she raised were homemade and often handwritten, illustrating that in no way the Claimant appeared to be operating a separate business with the Respondent as a client of that business.

The Law

23. In recent years there has been a plethora of new authority on the question of status. For the purposes of this Hearing, it is important to consider that there are essentially three different types of status for someone engaged in the work place. That is: employee, worker or self employed contractor.
24. The significance of these is paramount. If the Claimant was an employee then she can pursue all of the claims she seeks to pursue in her claim. If she is a worker then she can pursue all save for her unfair dismissal claim. If she was in reality a genuine self employed contractor, she can pursue none of them as the Tribunal does not have jurisdiction to hear them.
25. Section 230 of the Employment Rights Act 1996 (“ERA 1996”) defines employees as follows:

230 Employees, workers etc.

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

26. Section 230(3) ERA 1996 goes on to say:

230 (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally

any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

27. I am grateful to those representing the Claimant for setting out the legal position. Recent Authorities such as Autoclenz Limited v Belcher and Ors [2011] ICR1157, and more recently Uber BV and Ors v Aslam and Ors [2021] ICR657, tell us that it is for a Tribunal to determine the true agreement between the parties and this will often have to be gleaned from all of the circumstances of the case of which any written agreement is only a part.
28. The Tribunal's task is to determine whether the statutory definition of "worker" and "employee" is met. The rights are created by legislation. The task is one of statutory interpretation not contractual interpretation.
29. It is therefore for the Tribunal to assess the true position between the parties irrespective of whether any written agreement was entered into.

EMPLOYEE STATUS

30. With respect to employee status, the leading case remains Readymix Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497. That specifies that there must be firstly, personal service and secondly, a sufficient degree of control to make a servant and master arrangement exist. There must be wage or other remuneration.
31. There must also be an irreducible minimum of obligation on each side to create a contract of service. The employer must be obliged to provide work and the employee to accept what is provided.

WORKER STATUS

32. In terms of a worker, a Claimant is a worker where they are engaged under a contract and they perform the work personally and the Respondent is not a client or customer of the Claimant's business.
33. I am referred to other Authorities by those representing the Claimant and I have considered those Authorities.

Conclusions

34. Applying the Findings of Fact to the Law, I conclude that there is absolutely no question that the Claimant was not operating as a self employed individual providing services as part of a business or profession.

35. There is no question that even on the Respondent's own evidence, the Claimant was engaged under a contract to perform work personally and despite some indications to the contrary in the written Agreement, it is clear that the Respondent is not a client or customer of the Claimant's business.
36. To reach this conclusion I have considered matters in the round and all the evidence before me. The Respondent relies on the wording in the Consultancy Agreement suggesting that the Claimant is engaged on a self employed basis. They rely on the fact that the Claimant raises invoices and deals with her own Tax and National Insurance. However, the evidence to counter the Respondent's assertions is overwhelming. Clause 12 of the Agreement asserts that the status of the Claimant is that of independent contractor. It is my judgement that that simply does not reflect the true arrangement between the parties. The fact that the Claimant deals with her own Tax and National Insurance does not preclude her from being a worker, or indeed an employee.
37. Even the Respondent, in evidence, agreed that the understanding was that the Claimant would provide the services personally. The Respondent accepted that no substitution by the Claimant had never been effected under the terms of the written Agreement and it was never intended that this would happen. In circumstances where the Claimant could not service a particular client, another Therapist would be selected by the Respondent.
38. It is therefore my conclusion that it is clear from the terms of the arrangement between the parties that the Claimant was certainly within the definition of "worker" under s.230(3) ERA 1996.
39. The question then is whether the Claimant also satisfied the definition under s.230 ERA 1996 of being an "employee". I am persuaded that she was an employee. Particularly persuasive in this respect was the fact that the Consultancy Agreement is not reflective of the parties' actual relationship. I have already dealt with above the question of substitution. But the Claimant was expected to carry out tasks such as cleaning and sending out the Respondent's vouchers, this is not commensurate with her being an independent individual. She was also required to be available for work during set hours rather than being able to work when she wished. However, it is the level of control illustrated both in the documentation before me and in the evidence put before me which persuades me that the Claimant was an employee. The Respondent controlled virtually every aspect of the relationship between the parties. She provided the premises, all the equipment, the tools, the uniform and the method of operation. She determined the split of fees and the prices paid by customers. She managed any process of absence, be it sickness or holiday and dealt with the whole process of substitution by referring clients to other Therapists if the Claimant could not service a particular client. The Respondent advertised the Claimant as being part of the Respondent's business. She appeared on the Respondent's website and in social media and had a business card designed by the Respondent carrying the Respondent's

branding. The Claimant had an email address at the Respondent. No rental fee was paid to the Respondent by the Claimant. The agreement was that the Claimant was expected to be available at fixed times of the week. The Respondent would intervene to ensure that the Claimant had appointments and therefore work to do. She managed the amount of work in the business that the Claimant and others did.

40. In my judgement there was a sufficient element of control to reflect an arrangement of servant and master, or employer and employee. There was an expectation of personal service, there was an intention on each side to create a contract of service in that the employer was obliged to provide work and the employee was obliged to accept it.
41. For all of the reasons set out and in light of the Authorities I have referred to, I conclude that the Claimant was an employee under Section 230(1) and (2) of the Employment Rights Act 1996.

THE CLAIMANT'S APPLICATION FOR COSTS

42. With respect to the postponement of the Hearing on 21 September 2021. In the written submissions Ordered pursuant to the Hearing on status which took place on 12 November 2021, the Claimant had also ventured an Application for Costs against the Respondent arising out of the fact that originally the Hearing on status was due to take place on 21 September 2021. That Hearing took place before me and it was postponed and relisted for 12 November 2021 allowing one full day. Originally the listing in September had allowed for only three hours.
43. The Claimant's costs application is based on the fact that they say the Hearing on 21 September 2021 could not go ahead due to the Respondent's behaviour and a timeline is set out.
44. It is only right and proper that those representing the Respondent be given the opportunity of replying to that Application and those arguments. In fact Rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1, dictate that no Costs Order may be made unless the putative paying party has had a reasonable opportunity to make representations in writing, or at a Hearing.
45. The submissions I Ordered at the end of the Hearing on 12 November 2021, were not specified to be submissions including such an Application. I have seen no Response to the Costs Application by those representing the Respondent. Accordingly it seems to make sense that that Costs Application be dealt with at a Hearing, the details of which I have set out below.

ORDERS

Pursuant to Rule 56 of the Employment Tribunal Rules of Procedure

1. Preliminary Hearing

- 1.1 A Preliminary Hearing is to take place by Cloud Video Platform, three hours will be allowed. The purpose of the Hearing will be to:
 - 1.1.1 deal with the Claimant's Application for Costs arising out of the postponed Hearing on 21 September 2021; and
 - 1.1.2 to make such other Orders as are necessary for the furtherance of the Claimant's claims including a List of Issues, directions and the listing of a Full Merits Hearing.
- 1.2 In that respect the Hearing will take the form of a Case Management Discussion.
- 1.3 The Hearing will take place by CVP on **11 March 2022** before an Employment Judge sitting alone.

Other Matters

1. Public access to Employment Tribunal decisions

All Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and the Respondent(s) in a case.

7 February 2022

Employment Judge K J Palmer

Sent to the parties on: 8 February 2022

For the Tribunal Office