



# EMPLOYMENT TRIBUNALS

**Claimant:** Maria Day

**Respondent:** FOXY Drivers Limited

**Heard at:** Southampton                      **On: Wednesday, 25<sup>th</sup> July 2018**  
Employment Tribunal

**Before:** Employment Judge Mr. M. Salter

**Representation:**

Claimant: In person

Respondent: Mr. Cunningham, legal representative.

## JUDGMENT

It is the judgment of the tribunal that the Claimant:

- a) was an employee of the Respondent within the meaning of s230(1) of the Employment Rights Act 1996;
- b) is entitled to an agreed redundancy payment from the Respondent of £1,260.00;
- c) is entitled to payment of 80 days accrued, but unpaid, holiday from the Respondent.

## REASONS FOR RESERVED JUDGMENT

*References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.*

*References in round brackets are to the paragraph of these reasons or to provide definitions.*

## INTRODUCTION

1. These are my reasons for the judgment given above.

## BACKGROUND

### The Claimant's case as formulated in her ET1

2. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 17<sup>th</sup> January 2018 is in, short, she was an employee of the Respondent, or alternatively a worker, and so was entitled to various employment rights during the period of her employment with them namely holiday pay and that when her employment ended she was entitled to a redundancy payment.

### The Respondent's Response

3. In its Form ET3, received by the tribunal on 5<sup>th</sup> March 2018, the Respondent denied the claimant was either an employee or worker but alleged that she was self-employed.

## THE FINAL HEARING

### General

4. The matter came before me for Final Hearing. The hearing had a one-day time estimate. The Claimant represented herself and the Respondent was represented by Mr. Cunningham a legal representative.

### List of Issues

5. Neither party had produced a list of issues so at the outset of the hearing I sought to identify what the issues were in this matter.

#### *Employment Status*

- a. Was the Claimant an employee of the Respondent?
- b. If not, was she a worker within the meaning of s203 of the Employment Rights Act 1996 ("ERA")?

#### *Redundancy*

- c. The Respondent accepts that *if she was an employee* then, owing to her continuity of service, she would be entitled to a redundancy payment as the reason or if more than one reason the principal reason for her dismissal would be redundancy.
- d. The agreed level of her redundancy payment would be £1,260.00.

#### *Holiday Pay*

- e. The claimant claims payment for two years accrued but untaken holiday. The Respondent denies the Claimant is entitled to payment for this length of holiday as there was no carry over in her contract of employment (r13(3))

and in accordance with r13(9) of the Working Time Regulations 1999 she is only entitled to holiday in the relevant year.

*National Minimum Wage*

- f. The claim under the national minimum wage act was withdrawn and so I dismiss it upon withdrawal.

Particular Points that were Discussed

*Without Prejudice Material*

6. Within the bundle was an amount of without prejudice material. I explained to the Claimant I was not permitted to see this type of material unless she and the Respondent both consented to me seeing it. Ultimately both parties agreed to me reading this material.

*Litigant in person*

7. I explained to the Claimant that, as a litigant in person, I would do my best to ensure she was on an equal footing with the Respondent, however, that did not mean I would run her case for her and it was for her to present the evidence she wished me to consider in making my decision. I would also not conduct cross-examination for her.

DOCUMENTS AND EVIDENCE

Witness Evidence

8. I heard evidence from the Claimant and, on behalf of the Respondent, Stephanie Savill the director of the Respondent. Both witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. Both witnesses were cross-examined

Bundle

9. To assist me in determining the application I have before me today an agreed bundle consisting of some 61 pages prepared by the Respondent. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing and before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Claimant

10. The Claimant, in brief submissions reiterated the Respondent did set her hours, rate of pay, sales targets set, and that she believed she was treated as an employee but without the rights with it and that the Respondent provided all the equipment to bring in sales to her company and she do actually think she was taken advantage of for gains, did not have to pay out work place pension I believe either a worker or an employee.

Respondent

11. The Respondent denied the Claimant's employment status focussing on her signing the correspondence stating she was self-employed.

**MATERIAL FACTS**

General Points

12. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, considering relevant documents where they exist, the accounts given by the Claimant and Ms. Savill in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities considering my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
13. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

14. Is effectively a brand which, the Respondent hopes, connotes to female customers garages that they can trust to treat them fairly. If the garage is interested, and meets the standards required of the Respondent, then the garage pays to be

promoted by the Respondent and receives material they (the garage) can use to promote themselves under the Respondent's brand.

15. The Respondent's business model is not to directly employ staff but instead to have outsourced contracted providers of services. Until 2008 it had a team of people who provided it with such services. When the recession hit the motor trade in 2008 the Respondent however disbanded the team it had.

Recruitment

16. In 2013 however, it was looking to expand and placed an advert in the newspaper [2], it states:

THE IMPORTANT DETAIL

10 hours a week – precise days to be agreed.

After a trial period of 3 months this could become a permanent role for the right person.

We are offering a fair hourly rate based on experience plus a generous commission package after training. Self employed status would be the perfect arrangement for starters.

17. At this time, the Claimant had just returned from living overseas. She did not have her own home and so was living at a friend's.
18. The Claimant answered the advert above and attended an interview. I am told by Ms. Savill that it was a homebased role, but as the Claimant did not have her own home then the Respondent permitted her to work from their address in Goring Road, Steyning ("Goring Road"). Other members of staff also worked there including Ms. Midgely.
19. The Claimant's letter of appointment contains the following noticeable entries [4]

*I am delighted to offer you the role of Part Time Sales Administrator, working for FOXY Choice at 35 Goring Road in Steyning*

*We propose a probationary period of 3 months (July to September) allowing with side to opt out with a week's notice if need be.*

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*The role is for 10 hours a week (ideally spread over Tuesday, Wednesday and Thursdays) and you will provide Foxy drivers limited (Trading as a foxy choice) with self-employed services as discussed.*

*PAYMENT ARRANGEMENTS*

*We will pay you an hourly rate of 8 pounds and asked that you invoice us fortnightly during the trial three month period between July and September.*

*...*

*After the probationary period this will become a monthly arrangement to include your commission claim from the previous month sales.*

*Commission structure we will pay 30% on all new subscriptions and any sidebar advertisements based on the net invoiced value*

20. She then received a letter of appointment dated the 20<sup>th</sup> June 2013 [6] that stated she was to provide the Respondent with 10 hours of sales and administrative services a week at a rate of £8 per hour. The letter expressly states the Claimant is taking a “self employed role”. The role “is based at 35 Goring Road”. Again, the letter of appointment refers to a probationary period.
21. The Claimant’s was a telesales role; she would be expected to identify leads, enter any sales in a database and prepare packs of marketing materials for garages who purchased the product. The Respondent divided the country into North and South, with the “North” being anywhere above Birmingham. The Claimant’s area was the “South”. Ms. Midgely, covered the “North”. The Respondent largely left the Claimant to obtain the sales, however, on occasion would request the Claimant try and obtain a sale from a particular garage or chain.
22. When she began the Claimant undertook two weeks training to introduce her to the motor trade and the particulars of the Respondent’s processes.

Hours

23. The Claimant commenced work undertaking 10 hours a week. This was at the suggestion of the Respondent. The Claimant told me, and I accept that the days she was required to work were put forward by the Respondent [3]. The specific hours she was required to work were also suggested by the Respondent, the Claimant had the impression this was because it fitted in with Ms. Savill, which was important as the Claimant was working from Ms. Savill’s home.

24. Over the course of her time with the Respondent the Claimant was offered extra hours, and each time she accepted them. She did not work for anyone else as the hours she did for the Respondent increased. For instance, in December 2013 [11] her hours increased to 15 hours a week, but her pay reduced to £7 an hour at the suggestion of the Respondent. Again, this letter refers to the Claimant's being self-employed and based at Goring Road. By the end of her time with the Respondent the Claimant was contracted to undertake 30 hours a week.
25. If the Claimant left work early she was expected to make the time up. Equally, if the Claimant took time off work, which was unpaid, she would make the hours up before she went away in order to receive payment. Her normal days working were Tuesday to Friday, but she sought permission at times to work on Mondays to make up any lost hours for leave [12][21][34] or for appointments [24].

#### Replacements

26. I am told by the Respondent but see no documentary or other evidence to support this, that the Claimant was able to put forward a replacement if she did not want to attend work. The Claimant denies this was the case. Both parties accepted that over the four-years the Claimant had not asked to, or provided, a replacement.
27. Doing as best I can on the evidence I have, therefore, on balance I reject the Respondent's assertion: the Respondent has told me, understandably, not just for commercial reasons but also for data security, that it is very concerned over integrity and security of its information, requiring the Claimant to use a specifically set up laptop to ensure the integrity of its data, yet she was, on the respondent's case permitted to allow anyone else to attend work and have access to this material. This appears inconsistent with its account. Further, I have been provided with no evidence at all that anyone else provided a replacement. On balance, therefore I consider the Claimant has proven to me she was required to attend work personally.

#### Place of Work

28. The Claimant would attend the Respondent's address at Goring Road. This is where the Respondent is registered and is the home address of Mrs Savill. When

the Claimant commenced her time with the Respondent she was to work from Goring Road and she was still working from there four-years later when her role ended. When she did purchase her own home, the Respondent did not insist the Claimant worked from there: she remained working at Goring Road.

29. At this address was various items of office equipment. This was because Mrs Savill worked from home, it was equipment she provided. Later on in her employment, after the Claimant had obtained a home of her own, when Ms. Savill's children attended to stay the Claimant would be asked to not attend the address and to work from her own home [39]. The Respondents proposed the working schedule for the Claimant, but then accepted her return to Goring Road when her children left.
30. When she did work from her home the Claimant was provided with a laptop by the Respondent. As I have said, the Respondent tells me this is because of the IT set-up and the enhanced security they insisted on; and as they provided a laptop that was able to communicate with the Respondent's IT system.

#### Equipment

31. Closely linked to the place of work, is the provision of equipment. When the Claimant attended Goring Road there was, to all intents and purposes, an office set up. I do not find this surprising as Ms. Savill worked from home and so had obtained for herself desks, office chairs, office equipment (e.g. a printer).

#### Pay

32. The Claimant got paid every two weeks, this was despite the Respondent asking to pay her every month. The Claimant submitted invoices made out "For Services Provided to FOXY Drivers Ltd" [35, 36]. Her payments took the form of an hour rate as well as a percentage of the sales income she generated.
33. The Respondent set the Claimant sales targets. The cap on the sales percentage was 40%.



34. However, it became apparent to the Respondent that the Claimant was earning more than this and so it proposed a revised sales figure structure. And so they changed the Claimant's pay and bonus structure.
35. In March 2014 however, the Respondent changed this structure [15] as the Respondent received less than the 60% it was meant to receive. This was re-visited in April 2014 [18] in an attempt to "flex your current hourly and commission related package to bring this close to our budget requirements". This April letter maintained £8 an hour for the Claimant (assuming a maximum of 20 hours a week). The claimant was set a sales target, and was incentivised by a sales bonus if she achieved certain levels of sales [19, 28]

Ending of the Arrangement

36. In October 2017 owing to the ill health of Ms. Savill's husband, the Respondent decided to go fully online and the Claimant's role was terminated [40]

THE LAW

Statute

37. So far as is relevant, S230 ERA states:

- (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.
- (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.

38. Section 230(1) of the Employment Rights Act 1996 defines "employee" as an individual who entered into or works under a contract of employment. Sub-

section (2) defines “Contract of Employment” as a contract of service or apprenticeship, whether expressed or implied, and whether oral or in writing.

39. In order for a person to obtain payment from the Redundancy Payments Office under section 166, 167 and 182 of the Act, that person must be an employee.
40. There is extensive case law on the question of who is an employee. As early as 1968 the case of Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance constructed what has become known as the multiple test. This has been developed over the years and the concept of an “irreducible minimum” has been introduced. This approach was endorsed by the House of Lords in the case Carmichael v National Power plc [2000] IRLR 43.
41. In the case of Montgomery v Johnson Underwood Ltd [2001] IRLR 269 the Court of Appeal held that mutuality of obligation and control are the irreducible minimum legal requirements for the existence of a contract of employment. The Court of Appeal confirmed that the guidance in Ready- Mixed Concrete, as approved in Carmichael, was the best guide to be followed by Tribunals.
42. That guidance requires three conditions to be fulfilled. Firstly, that the individual agrees that, in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer; “mutuality of obligation”. Secondly, the individual agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree, “to make that other master”. Thirdly, the other provisions of the contract are to be consistent with its being a contract of service.
43. The Tribunal must consider the whole picture to see whether a contract of employment emerges, although mutuality of obligation and control must be identified to a sufficient extent in order for a contract of employment to exist.
44. In Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 Elias J said ‘The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.’

45. I have been referred to r13(9) of the Working Time Regulations 1998 but no case law under this regulation.

#### CONCLUSIONS ON THE ISSUES

##### General

46. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

##### Findings on the Issues

47. I have decided that the claimant was an employee of the respondent. My reasons are as follows.

48. Clearly there was a contract between the parties and neither side has suggested otherwise. The question for me is what the form of that contract is. I will look first at whether it is possible for the contract to be one of service i.e. an employer/employee contract. I have done this by looking at the details of the relationship between the Claimant and Respondent and then taking a step back and looking at the overall picture.

49. The contract being somewhat light on terms, I have had to look at how the parties conducted themselves over the four years. Whilst the various correspondence does state the Claimant is self-employed I must look behind the label at the reality of the situation, bearing in mind the Claimant did sign the contracts with this definition in and did pay tax as a self-employed person.

##### *Mutuality of obligation*

50. I consider that this requirement is made out: during the duration of the contract the Respondent was under an obligation to offer work (starting at 10 hours a week and increasing over time until the Claimant left, when the obligation was 30 hours a week) and the Claimant was obliged to do this amount of work. These hours were to be undertaken over days set with the agreement of the Respondent.

51. The Claimant received a payment came from the Respondent for the work she did.

52. I find, therefore there were mutual obligations for the Respondent to offer work and the Claimant to undertake it.

*Personal Service*

53. On my findings the Respondent required the claimant to undertake the work personally. Whilst there was an assertion the Respondent did not require this I saw nothing to support this and the Respondent's (not unjustified) concerns over its data and competitive information led me to conclude that the Respondent did not want anyone to have access to its database. This along with the lack of any evidence that anyone, the claimant or otherwise, had, in-fact sent a replacement leads me to prefer the Claimant's evidence that she was required personally to undertake the work.

*Control*

54. I have to look to see whether the ultimate authority over how the Claimant goes about carrying out her duties resides with the Respondent. This is not a question of day-to-day detailed control by the Respondent of the Claimant but rather whether the employer had a contractual right to direct the individual in relevant respects. Here I find they do: pay, hours, working location all appear to be determined by the Respondent.

55. This appears to me to be a "dependant work relationship" where the Claimant had little autonomy rather than an arm's length one in which the Claimant was able to look after her own interests

*Other Factors*

56. Having found that the irreducible core of a contract of employment has been made out I am required then to look at the surrounding circumstances to see whether the relationship is, in fact, one of employer and employee. I find that it was.

57. The Claimant was at the heart of the Respondent's business, she was the primary point of contact for half the country. She was required to be at the Respondent's premises for 30 hours a week and was not, I find, in business on her own account, she was dependant on the Respondent as her paymaster and had one long-term commitment to the Respondent for which she was required to undertake a not

insubstantial number of hours each week and for which she got paid an hourly-rate.

58. To a greater degree she did not bear any financial risk. The payment of a commission is not unusual in sales-based roles and so I do not consider it is indicative on its own, of the Claimant taking a financial risk.
59. I also bore in mind that when there were changes to the rate of payment these came at the proposal of the Respondent and did not, on the evidence I have heard amount to any form of negotiations, rather the Respondent merely informed the Claimant of the changes.
60. I have considered the provision of equipment but find this is ambiguous in isolation. The Claimant worked from Goring Road that was the home address of Ms. Savill. Ms Savill had an office at her home and so the equipment the Claimant used was that equipment.
61. I do not draw any conclusion from the Respondent's failure to pay sick pay or holiday pay beyond that this is indicative of what they believed that the Claimant was self-employed. I do not find that this was a deliberate attempt by them to deceive.
62. The Claimant accepted she paid tax as a self-employed person, but, I accept this is because she was mindful of her tax-paying obligations.
63. Weighing all this in the balance, along with the irreducible minimum, I find the Claimant was an employee of the Respondent in accordance with s203 of the Employment Rights Act 1996. The Claimant's claim for a redundancy payment succeeds.

#### Holiday Pay

64. In light of my finding above that the Claimant is an employee the Claimant is entitled to holiday pay. The issue for me therefore is to determine what level of holiday pay she would be entitled to.

65. The Respondent contends that the effect of r13(9) of the WTR prevents the Claimant from claiming more than one year's unpaid holiday.
66. As far as the "European" element of holiday pay is concerned (e.g. 20 days a year in accordance with the Working Time Directive) the European Court of Justice has recently held that an employee is entitled, in circumstances such as this, to back pay for unpaid or untaken holiday without limitation (King v Sash Windows Workshop and another [2018] ICR 693).
67. As far as the Working Time Regulations are concerned, the Claimant worked four days a week, therefore the 5.6 weeks she was entitled to every year leads to a shortfall of 1.6 week a year. This would be capped by r13(9) at one week.
68. The Claimant has claimed 74.8 days holiday pay. However, the Sash Windows decision only applies to the 20 days a year leave granted by the Working Time Directive. So in 2013/2014 the claimant is claiming 14 days leave, in 2014/2015 this would be 20 and the same in 2015/2016. With 16 days owed for 2016/2017 this amounts to 70 days (14 + 20 + 20 + 16).

#### FINANCIAL PENALTY

69. There having been a breach of any of the Claimant's rights to which the claim relates I am empowered to consider a financial penalty under s12A of the Employment Tribunals Act 1996.
70. On the evidence I have before me I do not consider however, that there are any aggravating circumstances in this case. I have heard no evidence that the Respondent was motivated by any malice or improper motive to form the view that they did as to the Claimant's employment status, it was a genuine mistake; indeed the unchallenged evidence appears to be of naïve optimism as to the claimant's status.
71. Whilst this breach has been ongoing for a long time, it is a small employer and, as I find, this has not been motivated by any malice or intention to deceive by a Respondent with a dedicated Human Resources team.
72. Accordingly I make no order under s12A Employment Tribunals Act 1996.

MATTERS ARISING FROM MY DECISION

73. The parties, having received my judgment, are to notify the tribunal if they can agree the figure owed to the claimant or whether they require a remedy hearing to determine the amount owed to the claimant for holiday pay. They are to notify the tribunal of this within 21 days of the date the judgment was sent to the parties.

Employment Judge Salter

11<sup>th</sup> September 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE