



EMPLOYMENT TRIBUNALS

Claimant:
Ms S Viscal

v

Respondent:
Nick Thomson Limited

Heard at: Reading

On: 20 March 2019

Before: Employment Judge S Jenkins (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr M Cameron (Consultant)

RESERVED JUDGMENT

1. The Claimant's claim in respect of unpaid holiday succeeds and the Respondent is ordered to pay the Claimant the gross sum of £2,329.60 in respect of that.
2. All other claims fail and are dismissed.

REASONS

Background

1. The hearing was to deal with various claims brought by the Claimant, namely:
 - (i) Redundancy payment;
 - (ii) Failure to enrol within a pension scheme;
 - (iii) Health and safety breaches;
 - (iv) Recovery of personal payments from one of the Respondent's directors;
 - (v) Notice;
 - (vi) Failure to provide rest breaks;
 - (vii) Unpaid holiday;
 - (viii) Expenses.
2. The Claimant also asserted that she had not received a written statement of employment particulars, and therefore should receive additional compensation of up to four weeks' pay, pursuant to section 38 of the

Employment Act 2002, in the event that I found in her favour in relation to her claims.

3. I explained at the outset of the hearing that the Claimant lacked sufficient service to be able to pursue her first claim and that the Employment Tribunal did not have jurisdiction to consider her second, third and fourth claims. Only therefore her fifth, sixth, seventh and eighth claims remained to be considered.
4. I heard evidence from the Claimant on her own behalf and from Mrs Jacqueline Thomson, Director, and Mr Owen Karau and Mrs Stephen Wickins, both family friends of the directors, on behalf of the Respondent. I also considered a very small number of documents adduced by the Respondent.

Issues and Law

5. The crux of the case revolved around the Claimant's employment status. The Respondent asserted that the Claimant provided services at all times as a self-employed business and was therefore neither an employee nor a worker. The Claimant, whilst conceding that she had entered into her relationship with the Respondent on a self-employed basis, nevertheless contended that once the relationship had ended and she had received advice, she realised that the relationship had at all times been one of employment, or that she was at least a worker, and could therefore pursue her claims.
6. In terms of the various claims left for me to consider, the claims in relation to notice under the Employment Rights Act 1996 ("ERA"), and for expenses, which could only be pursued as a breach of contract claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, can only be brought by employees. The Claimant therefore had to establish that she was an employee, the statutory definition being set out at section 230(1) of the ERA as follows:

"An individual who has entered into, or works under (or, where the employment has ceased, worked under) a contract of employment."

7. The claims of a failure to provide rest breaks and unpaid holiday fall under the Working Time Regulations 1998 ("WTR") and relate to workers. The definition of 'worker' under regulation 2(1), whilst including an individual who works under a contract of employment, goes further and includes, at sub-paragraph (b):

"An individual...who works under...any other contract [i.e. other than a contract of employment] 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 carried on by the individual."

8. With regard to the issue of employment, there has been a considerable amount of case law on the point, going back as far as the case of Ready Mixed Concrete (South East) Ltd v the Minister of Pensions and National Insurance [1968] 2 QB 497. That case, and several subsequent cases, including many recent ones, have made it clear that it is possible for an employment relationship to be concluded from the underlying substance of the relationship between the parties. The Ready Mixed Concrete case, and others, notably Nethermere (St Neots) Ltd v Gardiner [1974] ICR 612, have confirmed that in order for there to be considered to be a contract of employment between two particular parties, there needs to be an “irreducible minimum” in relation to three core matters: personal service, control and mutuality of obligations. The case law has also indicated that the other factors present within the relationship should be consistent with there being a contract of employment.
9. With regard to worker status, my focus would need to be on the question of whether the Claimant provided her services to the Respondent as a business with the Respondent being a client or customer of that business.

Findings

10. I set out below my findings relevant to the issues, resolving any areas of dispute on the balance of probabilities.
11. The Respondent is a precision engineering company, effectively Mr Thomson himself, operating from a small workshop in the grounds of Mr and Mrs Thomson’s home. He produces various metal components for various customers. Up until the summer of 2017, he was assisted by his daughter to one degree or another.
12. The Claimant had, for some three to four years prior to 2017, operated an unincorporated business under the name of “Suzie Homemaker” providing cleaning and related services, such as ironing, to a range of clients, as many as 12. This was operated as a business with the Claimant receiving her income gross from her clients and paying all appropriate tax via her self-employed tax return.
13. One of the Claimant’s clients was Mrs Thomson, a longstanding friend, and the Claimant attended to clean Mr and Mrs Thomson’s house, initially on Fridays, with this later extended to half of Mondays as well, paid at an hourly rate of £14 per hour, increasing to £15 per hour.
14. The Claimant never formally invoiced Mrs Thomson in respect of her services, and was always paid by the Respondent even though those services were not provided to the Respondent. Mrs Thomson however provided evidence, in the form of a letter from her accountant provided some time after the relationship between the Claimant and the Respondent had ended, confirming that payments in respect of private housekeeping had been treated by the Respondent as drawings by her. The Claimant was never aware of that.

15. The Claimant's other clients were private individuals, apart from one business, a travel agency. That was the only client to which the Claimant ever submitted formal invoices and the Claimant also took out a policy of personal liability insurance at that client's request.
16. The relationship between the Claimant and the Respondent, and indeed the Thomson family, expanded in August 2017. Just prior to that, the involvement of Mr and Mrs Thomson's daughter in the business appeared to have come to an end and Mr Thomson therefore needed assistance in the workshop. The Claimant was asked to provide that and agreed to do so from 21 August 2017, until the relationship ended in July 2018. The Claimant was engaged full time by the Respondent on the basis that she would work for 40 hours per week, initially at a weekly sum of £600 but that was subsequently increased to £640.
17. The parties agreed that that relationship would be one of self-employment and therefore all payments were made gross to the Claimant at all times and she later included them in her tax returns. The Claimant gave up all her other clients, due to the increased work she was doing for the Respondent, save for the travel agency, where cleaning services continued to be provided, indeed up to February 2019, but on the basis that the Claimant engaged others to do the work, only occasionally stepping in herself to help out.
18. With regard to the Claimant's work for the Respondent, and indeed the Thomson family generally, Friday remained a day for cleaning the family home, but the Claimant would otherwise work with Mr Thomson in the workshop assisting with the work on the components, in the form of drilling and tapping, as well as cleaning the products and the workshop and delivering products to customers. In that regard, the Claimant used her own car for deliveries but no recovery of expenses for that element of her duties was ever sought or agreed.
19. Occasionally, when the Respondent was particularly busy, the Claimant would also spend parts of Fridays in the workshop, carrying out such cleaning of the home as could be achieved in the remaining time. At other times, when the Respondent itself was not as busy, the Claimant assisted with other domestic work, for example, gardening. There was also a period, when Mrs Thomson had broken her leg, when the Claimant assisted her at the start of each day. The Claimant also house-sat for Mr and Mrs Thomson when on holidays and walked their dog during that period.
20. Just prior to the ending of the relationship between the Claimant and the Respondent, Mr and Mrs Thomson started to operate a letting business from part of their premises, known as "Lowman's Retreat", and the Claimant provided some cleaning services in relation to that element of the premises, which simply formed part of the main house, but only in a very limited manner.

21. Ultimately therefore the majority of the work the Claimant did during this period was for the Respondent itself in the workshop, with the rest being undertaken by way of personal service, principally by way of cleaning, to the directors, principally Mrs Thomson. In terms of her hours, the Claimant generally arrived at 7.40 am to feed ducks and chickens at the Thomson's premises, although she confirmed that she did this only because she liked to do so and did not expect to be paid. Otherwise, she worked between the hours of 8.00 am and 4.00 pm.
22. The Claimant's evidence was that she rarely took breaks and generally had lunch whilst working in the workshop. Mr Thomson did not appear to give evidence to confirm this but Mr Karau, who was living with the Thomsons from December 2017 and who provided some services in the workshop free of charge in return for that, confirmed that the Claimant would sometimes have lunch with him or Mrs Thomson in the kitchen but at other times would have lunch with him in the workshop. The Claimant herself confirmed that she was never denied any break that she was requested.
23. With regard to the work itself, whilst the Claimant was given some latitude in the manner of completing tasks in the workshop, she was largely told what to do by Mr Thomson. Indeed, I did not consider that the Claimant would have had any ability to do anything other than follow Mr Thomson's directions, not having had experience of the work in the past. With regard to cleaning, however, the Claimant appeared simply to carry on with her previous tasks, as well as undertaking the additional tasks such as gardening already referred to.
24. Apart from the services provided by Mr Karau, no-one else undertook work in the workshop in addition to the Claimant and at no time was any substitute provided. With regard to her cleaning work, whilst there was no indication that any substitute was sent by the Claimant to do that element of the work, the Claimant confirmed, as noted above, that with regard to the single other client she retained, the travel agency, she engaged others to undertake the work on her behalf and only carried out occasional services at those premises to help out.
25. The Claimant took very little time off, apart from a period of three weeks in November 2017 when she went to visit her brother in the USA who was ill. She was given time off for other matters such as medical appointments, for which she was not paid, but appeared to otherwise work throughout the whole period between August 2017 and July 2018.
26. As I have already noted, after the relationship between the Claimant and the Respondent had ended, Mrs Thomson's accountant provided a letter to her confirming the allocation of payments made by the Respondent to the Claimant and they were allocated as follows:

Director's drawings - housekeeping	£5,784.00
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Director's drawings – assistance with the

preparations for your new business
venture "Lowmans Retreat" £4,288.00

Nick Thomson Ltd – sub-contract work in
Workshop £10,153.00

27. In relation to the evidence I received, I did not consider that the figure for the assistance with the preparations for the new business venture was accurate, as that only appeared to have been commenced just prior to the termination of the relationship between the Claimant and the Respondent. Otherwise, discounting that element, I noted that, even by the Respondent's own assessment, approximately two-thirds of the time spent by the Claimant appeared to be on work for the Respondent in relation to the engineering work.
28. The relationship came to an end in July 2018 when an issue appeared to have arisen over an error with the provision of components to a customer. That seems to have led to there being some anger on the part of Mr Thomson and Mrs Thomson which led to the Claimant leaving. Ultimately, there was an exchange of texts between Mr Thomson and the Claimant, although only the Claimant's text was adduced to me. The Claimant confirmed however, and this was not disputed by the Respondent, that Mr Thomson's text had been a very kind one confirming that he and his wife wished the Claimant to continue. The Claimant's response noted that she intended to take the long weekend off and then, if Mr Thomson still wished her to work, she would be in on Monday. She confirmed however that she would not be going to Italy (a pre-arranged holiday with Mrs Thomson) as she did not feel well. That led Mrs Thomson to cancel that holiday and when the Claimant became aware of that over the weekend, she decided she would not return.

Conclusions

29. Applying my findings to the issues above, and looking first at the test for employment status, I was satisfied that the duties the Claimant undertook for the Respondent's engineering business amounted to employment. There was mutuality of obligation in the form of the Respondent providing the work to the Claimant to do and the Claimant committing to undertake that work. There was personal service in that there was no indication that the Claimant could involve anyone else in the provision of her services, and she certainly had not done so. Also, there was control in that, as I have noted above, I did not consider that the Claimant would have been able to have taken any initiative in relation to the work that she was undertaking.
30. However, with regard to the Claimant's other duties, principally the cleaning, I was not convinced that there was an employment relationship. Although the Claimant did provide those services exclusively, and without any substitute, she had previously provided those services as part of her business and I did not consider that Mrs Thomson agreed that she would

do anything other than continue with those services. I noted that the Claimant had, albeit only in relation to one client, continued her cleaning business, where she engaged others to do that work, and I therefore considered that she had maintained that business, albeit in a much more limited form.

31. In relation to the Claimant's duties for the Respondent in terms of its engineering business, I recognised that most Fridays were spent cleaning, and that a proportion of time on other days was also spent on providing personal services to the family. I therefore concluded, noting the letter provided by the accountant referred to above, albeit provided some time after the relationship had ended, that the Claimant was employed by the Respondent for some 70% of her working time. I considered that the remaining 30% related to her cleaning business and in respect of that she was neither an employee nor a worker.
32. Having reached a conclusion that the Claimant was an employee of the Respondent in relation to the engineering work, it was not necessary for me to consider whether she was also a worker in respect of that work. As I have indicated, I did not consider that the Claimant was a worker in relation to her cleaning services as I considered that the other party to the contract for those services, be it Mrs Thomson, the Thomson family generally or the Respondent, was a customer of the Claimant's business.
33. Applying those conclusions to the Claimant's claims, my judgment was as follows:
 - 33.1 With regard to notice, notwithstanding that the Claimant was an employee of the Respondent to the extent that I have noted above, I noted that the situation had been left in July 2018 that the Claimant should return and that she herself had decided not to, ostensibly in light of action taken by Mrs Thomson purely in relation to a personal matter. I did not consider that those circumstances amounted to a repudiatory breach of contract by the Respondent and therefore there was no breach of contract in the form of the Respondent not providing appropriate notice to the Claimant; I concluded that she left of her own accord.
 - 33.2 With regard to the claim for rest breaks, I considered, on balance, that the Claimant did, for the most part, enjoy a break of at least 20 minutes each working day as required by the WTR. There may possibly have been days when that did not happen, but there was no evidence before me to indicate that the Claimant had not been allowed to take any such break, but rather it had been a case of her not taking one. A claim under the WTR arises where an employer "*has refused to permit [a worker] to exercise any right*" (Regulation 30(1)(a)) and there was nothing to indicate that that had been the case. I therefore did not consider that there was any liability on the part of the Respondent in that regard.

- 33.3 With regard to holiday pay, the Claimant, as an employee, was entitled to paid holiday and it was not provided. She was employed for some 11 months and therefore is entitled to that proportion of the annual entitlement of 28 days, namely 26 days. Applying a rate of pay in respect of her employment position of 70% of £640, that led to a weekly sum of £448, a daily sum of £89.60, and therefore a payment in respect of 26 days of accrued but untaken holiday of £2,329.60.
- 33.4 With regard to expenses, I noted that there was no agreement between the parties as to the payment of expenses and nor did the Claimant ever seek the payment of expenses at the time. Therefore, I did not consider that the Respondent had committed any breach of contract in not paying expenses to the Claimant.
- 33.5 Finally, with regard to the claim under section 38 of the Employment Act 2002, I noted that where I had found in favour of the Claimant in respect of an award under the Working Time Regulations, I should increase the award by a minimum amount of two weeks' pay and a maximum amount of four weeks' pay unless I felt there were exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.
- 33.6 In the circumstances, and as the Claimant herself conceded, I considered that the engagement of the Claimant by the Respondent on a self-employed basis amounted to such an exceptional circumstance. It was not a case where the Claimant was in any sense pressured into agreeing to be engaged on a self-employed basis and therefore I did not consider that it would be appropriate to effectively punish the Respondent for not providing the written statement that, at the time, it did not consider that it needed to provide. Notwithstanding therefore my conclusion that the reality of the relationship between the parties was one of employment in respect of the Claimant's work within the workshop, I did not consider it would be just or equitable to make any award under the 2002 Act.

Employment Judge S Jenkins

Date: 5 April 2019

Sent to the parties on:10.04.19.....

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For the Tribunals Office

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