



EMPLOYMENT TRIBUNALS

Claimant: Ms K Ogunkoya

Respondents: (1) Nightingale Residential Care Home Limited
(2) Mr A Oduleyu

Heard at: East London Hearing Centre

On: 6 November 2020 and
18 January 2021 (in chambers)

Before: Employment Judge O'Brien sitting alone

Representation:

Claimant: Mr F Akpan-Inwang, consultant

Respondent: Mr R Daby, solicitor

JUDGMENT

The judgment of the Tribunal is that

1. The claimant was not an employee nor a worker as defined in s230(1) and s230(3) respectively of the Employment Rights Act 1996.
2. Consequently, the claimant's complaint of unauthorized deductions from wages fails and is dismissed.
3. The claimant's claim for accrued but untaken holiday pay fails and is dismissed.
4. The claimant's claims for damages for breach of contract fails and is dismissed.
5. The second respondent's counter-claim for damages for breach of contract fails and is dismissed.

REASONS

1 ***This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are set out below. Both parties were content with the way in which the hearing was held.***

2 On 19 November 2019, the claimant presented claims for wrongful dismissal, arrears of pay, unpaid holiday pay, and breach of contract by failing to repay authorised expenses. The respondent resisted the claims by response dated 7 December 2019.

3 Employment Judge Gardiner gave permission at a preliminary hearing before on 10 August 2020, for the claimant to add the second respondent. The second respondent subsequently issued an in-time employer's contractual counter-claim, without prejudice to his principal case that he had never had a personal contractual relationship with the claimant.

ISSUES

4 It was agreed at the outset that this hearing should be limited to the preliminary issues of whether the claimant was an employee of or worker for either of the respondents. All of the parties' claims against each other required that the claimant fell into one or the other of these categories as defined in s230 of the Employment Rights Act 1996.

EVIDENCE, SUBMISSIONS AND APPLICATIONS

5 Over the course of the one-day hearing, the Tribunal heard evidence from the claimant and the second respondent.

6 The claimant's evidence was based on a witness statement provided in support of her application before Judge Gardiner for permission to amend her claim. She claimed to have received the draft bundle late from the respondents and so had been unable to settle any statement specifically for this hearing. However, after giving her and her representative an appropriate period of time to consider the modest bundle, it was agreed that she could supplement her statement with oral examination in chief and that no prejudice would thereby be suffered.

7 The second respondent gave evidence on the basis of his written witness statement. The respondents also relied on statements from Elaine Martin, former Registered Manager of the Nightingale House Care Home, and Flomar Fevre, former Deputy Manager of the Care Home. However, neither was called to give oral evidence and be cross-examined. Only where those witnesses' evidence was uncontentious or was corroborated elsewhere could I give it any material weight.

8 The parties both relied on a bundle of documents comprising approximately 80 pages. I was provided by the claimant (and with the respondents' consent) with the text of messages between the claimant and second respondent and a picture of a name badge it was alleged was worn by the claimant at the material time.

9 The parties each made oral submissions, which I took into account in their entirety, and reserved my decision at the end of the hearing.

FINDINGS OF FACT

10 In order to determine the issues as agreed between the parties, I made following findings of fact, resolving any disputes on the balance of probabilities.

11 Regrettably neither witness gave straightforward and entirely reliable evidence. On the contrary, whether because of emotional investment or otherwise, both adopted positions which were in certain respects manifestly false, as set out below. For instance, the claimant originally claimed that she had been an employee of the first respondent throughout, whereas by the time of this hearing she accepted that she had been a self-employed contractor until 1 July 2019. Moreover, it was her evidence that her pay increased in July 2019 to reflect her change in employment status, whereas, because she was paid in arrears, her pay had in fact increased in June 2019, before her status allegedly changed. The second respondent similarly claimed that the claimant had appointed herself manager without his knowledge or consent, whereas the correspondence shows that he had either asked her to, or at least knew that she had, taken over temporary management of the Care Home after the Registered Manager's retirement. Therefore, I was unable to accept unquestioningly either of the witnesses evidence where unsubstantiated by contemporaneous documentary evidence.

12 The claimant is a registered nurse who has, throughout her career, been both employed and a self-employed consultant. When her working relationship began with the respondents, the claimant was still finishing some consultancy work for another client.

13 The second respondent is the owner and managing director of the first respondent. The claimant and second respondent met in January 2019 and quickly became friends and, later, lovers. The second respondent suggested in evidence that he had resisted the claimant's romantic overtures and that that was the reason for the antipathy between them; however, the first respondent's ET3, completed by the first respondent, repeatedly asserts that she was at the time his 'girlfriend and lover'. This and the other inconsistencies identified herein undermined the second respondent's credibility.

14 The claimant initially provided informal support to the second respondent in his management of the first respondent. However, by 2 March 2019 they formalised this arrangement and the claimant began to provide her services to the first respondent as a self-employed consultant from 1 April 2019. The basis upon which the claimant was engaged by the first respondent was set out in a letter dated 2 March 2019 signed by the second respondent. The claimant alleged that she had never seen this document before; however, it became clear on further questioning that she accepted having drafted much of the content and was essentially complaining never to have seen the signed version. I am satisfied therefore that the scope of the claimant's engagement described in that document had expressly been agreed between the parties, as well as her period of engagement, amount of pay and that she would be providing her services as an independent consultant on a 'contract for services' basis. The fact that the claimant alleged in her ET1 to have been an employee even at this stage of the parties' relationship undermines her credibility.

15 The scope and duration of works expressly agreed between the parties therefore was:

'With regards to the scope of work, the proprietor requires the consultant to provide care home consultancy services and support in the following areas: -

- Staff Recruitment, induction, Supervision and Management as required
- Support of the management team as required
- Support regarding the development and maintenance of care plans and care folders and Audits
- Support regarding liaison with councils regarding financial issues and Clients Fees Review
- Any other support as required by the proprietor as it arises

The agreement will run for a period of 6 months 1st April 2019 to 31st September 2019. The Contract is renewable at the end of each contract period.'

16 Although the second respondent signed the letter of engagement and was the individual with whom the claimant agreed the terms therein, he was acting in his capacity of director and owner of the first respondent and not in a personal capacity.

17 On 4 April 2019, the claimant was paid £1,000 each for February and March 2019. In each case, the payment was made from a business account named 'ODUYELU A T/A NI' and described 'KRISTINE OGUNKOYA, CONSULTANCY' plus the month for which the payment was made.

18 The claimant sent a report by email to the second respondent on 8 April 2019. It said:

This letter is to follow on and summarize the conversation we had on Saturday 6th April following the deep dive of your provision. My findings from the deep dive were shared with yourself and Anita Martin Home Manager at the meeting.

There were significant concerns about the leadership of the home which impact on other aspects of running the home. The home manager has demonstrated poor performance and she lacks skills for her current' position.

In my structured view and in the interest of the public I have made these recommendations based on factual evidences:

- The Home Manager is to step—down from her position and do a handover report to the proprietor
- The Proprietor to consider internal promotion of other staff member to run the home effectively and or advertise to recruit a new manager.
- The Proprietor to consider an interim management support to oversee the quality governance of the home and transition to a new manager.
- The Proprietor to update the Care Quality Commission (CQC) of change of management and update their Statement of Purpose.

19 The claimant signed the email report 'Kris Ogunkoya Independent Consultant'.

20 The claimant was paid £1,200 on 3 May 2019 for April 2019, £1,500 on 4 June 2019 for May 2019, and £2,000 on 4 July 2019 for June 2019. The monthly payments remained at £2,000 for July and August 2019. In each case, payment was made from the

same business account and described as 'KRISTINE OGUNKOYA , CONSULTANCY' plus the month for which the payments were made.

21 The evidence is unclear about exactly when Mrs Martin stood down as Registered Manager. The claimant maintains that she did so at the end of June 2019 before the second respondent departed for a long stay in Nigeria. He says that it happened at the end of July 2019 after he left. That is also what Mrs Martin says in her witness statement; however, she was not called to be cross-examined on the point. In an email to the claimant on 8 August 2019 (which I set out more fully below), the second respondent said the following in an email:

'I do appreciate that you are doing a good job with managing the Care Home. That fact has never been disputed. I do value and appreciate your contributions.

The stress level created last month was the result of a combination of factors which we hope will not occur too often once you have managed to train up a Deputy.'

22 I infer from that email that Mrs Martin had been out of post for the whole of July 2019 and so resolve that issue of fact in the claimant's favour.

23 At some point, not entirely clear to me, the claimant ordered for herself and began to wear a badge saying 'Hello, my name is Kris Ogunkoya, Home Manager Nightingale House'.

24 On 3 August 2019, the claimant sent the following text to the second respondent:

'Hi Abi the payment for the additional hours worked to cover clinical duties need to be made ASAP at no less than the rate paid to Anita. Otherwise it will not feel right. This is work expenses and I trust your judgement in the matter. I am not going to buy into the figures pulled together by your accountant. It's because it not right hence we keep having this disagreement. If those shifts were covered by your staff you will pay them without any argument. Could you kindly resolve this as a matter of urgency. Regards'

25 The respondent replied on 5 August 2019 by text and email saying:

'Good afternoon Kris,

I hope you had a restful weekend and you are feeling much relaxed now. And I hope the boys are keeping well too.

In response to your text message of Saturday 3rd August, about your JULY 2019 SALARY PAID TO YOUR BANK ACCOUNT on the 2nd August, I would like to respond as follows:-

I do appreciate that you are doing a good job with managing the Care Home. That fact has never been disputed. I do value and appreciate your contributions. The stress level created last month was the result of a combination of factors which we hope will not occur too often once you have managed to train up a Deputy. Currently, the present salary arrangement, as discussed before my travelling, is as follows:-

- 1) £2,000 to be paid monthly to your Bank account, to make a total of = £24,000 per annum;
- 2) £10,000 to be paid to you per annum to cover for your taxation, as a self employed staff.

This £10K annual allowance to be paid to you either quarterly or six monthly or annually.

THE TOTAL OF 1 & 2 ABOVE GIVES AN ANNUAL TOTAL PACKAGE OF = £34,000.

I find it embarrassing to have to argue about money every month.

Given that Nightingale House is a 30-bedded Home, with our average monthly occupancy of about 27 clients, I would appreciate if you would come forward with your own proposal for discussion, bearing in mind the salaries paid by other employers to manage a 30-bedded, Residential Care Home,

I look forward to your response.

I will also forward this correspondence by email.

26 A payment of £745.50 was made by the first respondent to the claimant on 6 August 2019. This time the payment was described 'KRISTINE OGUNKOYA , OVERTIME PD-JUL 19'.

27 The claimant responded by text later that day:

'Hi, Notification of payment received via Simon. Which I think is inappropriate and breach of my confidentiality. But thanks for making the payment. Hard for you to pay out but you did it. I thought my effort and commitment needed to be acknowledged in certain way But I had to spell it out to you which is extremely annoying and hurtful. If I went to Agency for those hours you will pay substantial amount. I have given my all to you. And you got it without sweat. And the share anguish of doing day and nights without a break and fell ill as a result which You didn't register and care about. I hope things will never escalate to this level again. You need to start to treat me well and understand and act your Eto, Omo karo oji re. And stop using women. I am peaced off with you Abi. How do you expect me to be positive towards you and your business when you're letting yourself down with payment. It has to stop. There is a lot of work at hand in the care home. I want to get on with things but I will not tolerate this silliness that is going on about payment. When you come back we got to sit and talk. You could ask Sara to manage the home for you for 24k. Anything short of 40k I will not do it and that is from immediate. I am happy to PAYE. Or you look for a manager. Regards'

28 Regrettably, relations between the claimant and second respondent continued thereafter to deteriorate. Amongst the messages sent by the claimant to the second respondent on 16 September 2019 was a Whatsapp message at 8:34pm:

I will need to know who this person is that you have placed higher than me in your organisation that you would have requested the rota from. And I would like to hand over to that person and part ways immediately. I have run your organisation with

professionalism, trust, transparency and dedication and there is a limit to what I can tolerate.

29 On 17 September 2019, the claimant sent him another Whatsapp message at 6:48pm, saying amongst other things:

Abi,

Despite raising my concerns to you previously regarding the unspoken relationships between yourself and staff and the unprofessional gossips that you engage with staff that I manage as well as requesting for information to be sent to you by the most junior staff.

You have carried on with this damaging behaviour on top of your 24/7 CCTV monitoring of my activities in the care home. I feel undermined by your conduct, I no longer feel safe to be part of your organisation and I have no choice but to handover the management of the care home back to you today. That includes:

...

Your new deputy Joseph was inducted into his post. We both carried out the personal allowance audit and he was given the key to the safe. He was given a verbal handover of activities within the home. You also have an up to date information of activities in the home. Timesheets and two starters details have been emailed to you. I will forward details of expenses to date. Kindly advise who to give the cabinet keys to. Your house was cleaned and locked up. I will put your house key through your door in Eastham. Lastly I hold a sum of £400 raised by the NCS kids which I want Simon to witness the transfer to you. Please make arrange to make my payments including holiday pay.

30 The second respondent's reply was:

Hello KRISTINE.

I received your text and whatsapp messages yesterday, Tuesday 17th September, regarding your intention to withdraw your services to Nightingale House and hand over the operations to third parties.

You would recall that I handed over the Care Home to you in person, in good faith and with utmost trust before I travelled to Nigeria. If therefore you no longer wish to provide services for the Care Home, the right, proper and professional way is to undertake the handover to me directly and in person. And not to any third parties. As a qualified and professional nurse, I am sure you will appreciate that some of the functions and activities involved in running a Care Home are sensitive, private and subject to Data Protection Laws.

In view of the above, I would request that you wait for my return at the end of the month to enable you undertake a proper, correct and professional handover to me in person.

Thanks

From - Abi Oduyelu

31 The claimant responded:

Hi Abi,

Received. Many thanks Abi, I have discharged all my duties and responsibilities to you and your service with total honesty, professionalism, integrity, sacrifices, dedication, due diligence and above and beyond the call of duty. As Stated in one of my messages to you, I no longer feel safe to continue to support you and the service Due to been undermined by you and your staff and the continued gossips which you have encouraged. You have also stated that my been there is costing you money. You also stated the staff are fully equipped to run the home. I am certain that with your support they will run the home successfully.

Best wishes

Kris

32 The claimant sent a lengthy message to the second respondent on 19 September 2019 with detailed handover notes. Correspondence continued thereafter between the parties, apparently getting progressively more acrimonious.

THE LAW

33 Pursuant to section 13 ERA, a worker has the right not to suffer unauthorised deductions from his wages. The definition of 'wages' includes 'any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise' (section 27(1)(a) ERA).

34 An employee may bring a claim in the Employment Tribunal for damages for breach of contract arising from or outstanding on termination of his employment under article 3 of the Employment Tribunals Extension of Jurisdiction Order (England and Wales) Order 1994.

35 An employee who has been employed for more than one month but less than two years is contractually entitled to a minimum of a week's notice of termination of employment (s86 ERA).

36 Unless the employee's contract provides for a more generous entitlement, an employee is entitled to 5.6 weeks' paid leave every year (regulations 13 and 13A of the Working Time Regulations 1998). The employee is entitled on termination of employment to payment in lieu of accrued but untaken holiday (regulation 14).

37 Pursuant to article 4 of the 1994 Order, an employer may bring a counterclaim in the Employment Tribunal for damages in respect of a breach of contract which arises or is outstanding on the termination of the employment of the employee against whom it is made, if the employee has brought a claim under article 3.

38 The terms 'employee' and 'worker' are defined in s230 ERA as follows:

(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.

39 In **Cotswold Development Construction Ltd v Williams [2006] IRLR 181**, at paragraph 16 Langstaff J cited the well-known dicta of MacKenna J in **Ready Mixed Concrete (SE) Ltd v Minister of Pension and National Insurance [1968] 2 QB 497** regarding the existence of a contract of service:

'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He 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. (iii) The other provisions of the contract are consistent with its being a contract of service.'

40 At paragraph 53, Langstaff J considered further the definition of 'worker':

'It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that 'other' is neither a client nor customer of theirs – and thus that the definition of who is a 'client' or 'customer' cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.'

41 Whether someone is the employee of another requires a multifactorial approach taking into account all of the relevant circumstances, including not only the degree of control exercised by respondent over claimant or the extent of the claimant's integration into the respondent organisation, but also the tax arrangements and the basis of the relationship as expressed in the contract. However, in the context of employment, where, taking into account the relative bargaining power of the parties, the written documentation might not reflect the reality of their relationship, it is necessary to determine the parties' actual agreement by examining all the circumstances, of which the written agreement was

only a part, and identifying the parties' actual legal obligations (Autoclenz Ltd v Belcher and others [2011] ICR 1157).

CONCLUSIONS

42 Consequent to my findings of fact above, I have reached the following conclusions.

43 The claimant and second respondent were introduced in 2019 by a mutual friend, and quickly became friends and then lovers. She was already an established self-employed consultant to the health and care industry, and was still provided services to another client at stage. The claimant and the second respondent had in broad terms equal bargaining power throughout their association.

44 The claimant began providing her services to the Nightingale House Care Home informally at the second respondent's request. It is arguable that the agreement to provide those services was personal between the couple at that stage; however, I have serious doubts that they intended at that stage to create legal relations such that their agreement was enforceable as a contract.

45 Nevertheless, by 4 April 2019, the couple had decided to enter into a formal agreement for the claimant to undertake a comprehensive assessment (a 'deep dive' in her words) of the setting. It was expressly agreed between the parties that the claimant would be an independent self-employed contractor. Moreover, I am satisfied that the second respondent entered into that agreement as director of the first respondent and not in his personal capacity.

46 Consequently, I find that the claimant was at no material time an employee of or a worker for the second respondent, and dismiss all claims against him. It follows also that the second respondent's contractual counterclaim must be dismissed.

47 The claimant now accepts that she was an independent contractor prior to 1 July 2019. She argues, however, that from that date she was employed to be manager of the Nightingale House Care Home.

48 I accept that the existing care home manager (its registered manager for regulatory purposes), Mrs Martin, had ceased employment at the end of June 2019. However, that departure had been contemplated in the claimant's report of 8 April 2019. The claimant herself had proposed that the second respondent consider internal promotion of another staff member to run the Care Home, or to advertise externally. She also proposed that he considered 'an interim management support to oversee the quality governance of the home and transition to a new manager.' In the latter regard, the 4 April agreement provided that the scope of the services provided by the claimant as an independent contractor included 'staff recruitment, induction, supervision and management as required.'

49 Therefore, I do not find that the claimant's interim management of the care home of itself indicates a change of employment status. Neither do I accept that it indicates a degree of control over the claimant or a level of her integration into the organisation to point overwhelmingly to her becoming an employee. There is little evidence of the second respondent telling her what to do let alone how to do it. Furthermore, it is evident from the latter correspondence that the claimant had been training a deputy to the second

respondent who could (and at that stage would) replace her (see her Whatsapp message of 6:48pm on 17 September 2019).

50 It was the claimant's evidence that her pay increased to £2,000 per month to reflect the fact that she had become an employee of the care home. However, that claim is demonstrably false and undermines her credibility. Her pay increased to £2,000 in June 2019, the month before she now claims that she became an employee. Instead, I find that the claimant's pay had steadily increased from the originally agreed £1,200 per month to reflect the additional time it was taking her to cover the full scope of her brief. The fact that there is no documentary record of those increases being discussed or agreed is indicative of the intimate relationship the couple were then in.

51 The claimant has not provided any evidence of whether she holds separate personal and business bank accounts nor, if so, which bank account these payments were made to. Neither has the claimant disclosed her tax return or business accounts for the period in question, despite an order to that effect by Employment Judge Reid dated 26 September 2020. What I have seen is an exchange of messages in which the second respondent proposes increased remuneration on the basis that the claimant continues to be responsible for her own tax affairs, which the claimant rejects and indicates she is 'happy to PAYE'. This change was never agreed. I find that the claimant's tax arrangements throughout were consistent with her being a self-employed contractor and not an employee.

52 There is evidence that the second respondent did by the date of termination believe that the claimant owed him some of the obligations of an employee. For instance, he told me that he thought she should have given him 'statutory notice'. Despite his protestations to the contrary, it appeared clear to me that he meant the minimum notice prescribed by the Employment Rights Act 1996. However, it has never been the claimant's pleaded case that she became an employee at some point after 1 July 2019. Moreover, there is no evidence of any later agreement to change her status.

53 Taking all of the relevant circumstances into account, I find that the claimant was not an employee of the first respondent and so her claims for damages for breach of contract fail.

54 As for whether the claimant was a worker for the first respondent, I have no hesitation in finding that she was required to provide her services personally, again contrary to the second respondent's protestations. However, for the reasons given above, I find that the first respondent was the client of a business undertaking of the claimant. Consequently, the claimant was not a worker for the first respondent and so her complaints of unlawful deductions from wages and or for accrued but untaken holiday pay also fail.

Employment Judge O'Brien
Date: 25 January 2021