



EMPLOYMENT TRIBUNALS

Claimant: Miss C Thomson
Respondent: S W Highland Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Bury St Edmunds **On:** 12 February 2019
Before: Employment Judge M Warren (sitting alone)

Appearances

For the claimant: In person
For the respondent: Mr S Highland, Director

JUDGMENT ON PRELIMINARY ISSUE

The claimant's service at the Greenfields Service Station between 17 November 2015 and 30 September 2016, was that of an employee. Her employment was transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the respondent on 1 October 2016. The claimant therefore has sufficient continuity of employment to bring a complaint of unfair dismissal following the termination of her employment with the respondent on 4 June 2018.

REASONS

Background

- (1) Miss Thomson brings a complaint of unfair dismissal. A preliminary issue has arisen, that is whether Miss Thomson has sufficient service to bring a complaint of unfair dismissal as none of the exceptions to the two year rule set out in section 108 of the Employment Rights Act 1996 apply.

- (2) Miss Thomson had worked in a petrol station since November 2015. It was taken over on 1 October 2016. The date of termination of whatever the working relationship was, was 4 June 2018. Whether on the facts there was a dismissal is disputed. The respondent says that Miss Thomson was self-employed until 1 October 2016 and therefore has insufficient service. Miss Thomson says that she had been employed since 2015 and her employment was transferred to the respondent by virtue of the Transfer of Undertakings Regulations 2006.
- (3) I decided to determine the question of status as a preliminary issue, for if it is the case that Miss Thomson was not an employee between November 2015 and October 2016, her claim must fail because she does not have the required two years' service.
- (4) In dealing with this matter today, I have been hampered by poor preparation. Despite the clear national standard directions issued by the tribunal in the case of unfair dismissal, in this case set out in the standard letter dated 5 October 2018 and further, despite a letter written on my instructions dated 29 January 2019 when it was apparent that statements had not been exchanged, it remains the case that today, I have no witness statements from the respondents at all.
- (5) Further, the respondent, whose obligation it is to prepare the trial bundle, has presented me with a bundle which does not contain all the documents the claimant wished to refer to, as it should have done. Mr Highland has pleaded not understanding what was required of him in the directions that I have referred to. In terms of a witness statement, he said that he did not think he had to do any more than refer to the documents which he had put in the bundle.
- (6) I considered whether I should simply strike out the respondent's response due to its failure to comply with case management orders. I decided that it was not in accordance with the overriding objective to do so, that would have been a draconian step to have taken and in my view, a fair hearing was likely to still be possible. I resolved to proceed and to see how things went, keeping in mind the possibility of an adjournment if it became apparent that it would not be possible to proceed fairly.

The Relevant Law

- (7) The following law is relating to the question of status as to whether or not a person is an employee.
- (8) There are certain basic minimum requirements for there to be an employment relationship. The individual in question would have to provide his or her own work personally and must be paid for that work. There must be a sufficient degree of control over that individual in his or her work, for the relationship to be consistent with that of employer and employee. The other contractual provisions must be consistent with there being an employment relationship, (Readymix Concrete South East Ltd v The Ministry of Pensions and National Insurance 1968 2 QB 497, approved by the Supreme Court in Autoclenz Ltd v Belcher and Others [2011]UKSC 41).

- (9) It is said that there is an absolute minimum requirement of there being control, mutual obligation to provide and to undertake work and of personal service. If one has those minimum requirements, one then looks to other aspects of the relationship to inform a decision as to whether or not an individual is an employee, (Carmichael v National Power Plc 2000 IRLR 43).
- (10) As for those other aspects of the relationship one looks at, for example, and these are just examples:
- a. Can the claimant send a replacement?
 - b. How long has the relationship lasted?
 - c. Is the individual integrated into the employer's business?
 - d. Is the individual in business on his or her own account, running his or her own business and taking a financial risk providing his or her own capital?
 - e. Does the individual provide his or her own tools and equipment?
 - f. What is the regularity of payment?
 - g. How is tax and national insurance paid?
 - h. Was the claimant free to work elsewhere?
 - i. What labels do the parties put on the relationship?
 - j. How was the relationship terminable?
 - k. What are the arrangements for sick pay and holiday pay?
 - l. Is there any provision for pensions?
 - m. Is there any flexibility?

- (11) None of these matters are determinative, they are just examples of the sort of thing that we should take into account. There will be other factors in an individual case that will be relevant to take into account in painting the overall picture. As Mummery J said with the subsequent approval of the Court of Appeal in Hall (Inspector of Taxes) v Lorimer [1994] IRLR 71:

“The object of the exercise is to paint a picture from the accumulation of detail...It is a matter of evaluation of the overall effect of the detail which is not necessarily the same as the sum of the individual situation”.

The exercise is not one of simply preparing and ticking off a checklist.

Evidence before me today

- (12) As I have mentioned, I have no witness statements from the respondents. I had a witness statement from Miss Thomson. The first five paragraphs of that statement dealt with the issue of status and made reference to some documents which she had put in a bundle on her own, because the documents she wanted to refer to had not been included in the bundle prepared by the respondent.
- (13) As well as hearing evidence from Miss Thomson, I also heard evidence from Mr Crooks, the former owner of the business and his former Manager, Mrs Lloyd. I am quite satisfied the evidence that I have heard from everybody was honest.

The Facts

- (14) Miss Thomson ran a business she called 'Sparkles'; she cleaned for an estate agent. In that capacity, one way or another, she met Mr Crooks. She began cleaning some properties for Mr Crooks. She then began helping Mr Crooks look after his elderly aunt. She stopped working at the estate agents and in November 2015, began working for Mr Crooks as a forecourt attendant at his service station; Greenfields Service Station. She invoiced him or his business for that work, just as she did for the work that she did cleaning his properties and looking after his aunt. Working for the service station, she was paid £10 per hour and accounted for her own tax.
- (15) In February 2016, Miss Thomson agreed with Mrs Lloyd, hours of work set out in a document in the claimant's bundle at document 5. Twenty six hours of work spread over four days; Tuesday, Thursday, Friday and Saturday. Document 5 was not disputed. Mrs Lloyd would ask Miss Thomson if she could do other hours and if she could, she was put on the rota to do those hours too.
- (16) I have before me from Miss Thomson, copies of all the invoices that she had submitted during the relevant period. In summary, each month she invoiced as follows:
 - a. For November 2015 for 16 hours;
 - b. For December 2015 for 40 hours;
 - c. For January 2016 for 32 hours;
 - d. For February 2016 for 32 hours;
 - e. For March 2016 for 64.5 hours;
 - f. For April 2016 for 52 hours;
 - g. For May 2016 for 27 hours;
 - h. For June 2016 for 80 hours;
 - i. For July 2016 for 60 hours;

- j. For August 2016 for 99 hours; and
 - k. For September 2016 for 132 hours.
- (17) None of these hours coincide with the exact total that would be suggested by document 5.
- (18) Whilst working for Mr Crooks' business at the Greenfields Service Station, the following arrangements for Miss Thomson were in place:
- 19.1 For holidays, she had to agree her holiday dates with Mrs Lloyd. In principal, she was not permitted holiday if two members of staff had holiday booked already. Although, in practice, Mrs Lloyd would not hold out on that arrangement. The same arrangement was applied to other staff and Mrs Lloyd's evidence to me was that if staff insisted, even though two others were already off, she would give in. The same applied to Miss Thomson. Miss Thomson was not paid for her time off for holidays, whereas of course, other staff were.
 - 19.2 She was never off work sick, but she understood that if she was away sick she would not be paid.
 - 19.3 Other staff had contracts of employment, Miss Thomson did not. The staff contracts of employment provided for holiday pay and statutory sick pay.
 - 19.4 She was paid approximately £2.50 per hour more than her colleagues.
 - 19.5 She could not, under any circumstances, send a replacement.
 - 19.6 She understood that if she made a mistake, she would be get told off. Although in fact, that never happened.
 - 19.7 She, along with her work colleagues, was required to wear a red, "Shell" branded polo shirt, which was provided, together with black trousers and suitable footwear.
 - 19.8 She did not provide her own tools.
 - 19.9 She did, however, maintain her own public liability insurance.
 - 19.10 She received, from Mr Crooks, Health and Safety training in common with that provided to her colleagues.
- (19) In due course Mr Crooks formed an intention to sell his business to the respondent. And, as it happens, Mrs Lloyd planned to retire.
- (20) In anticipation, Mr Crooks trained Miss Thomson on how to receive a tanker. Mrs Lloyd trained Miss Thomson and a colleague, Mrs Huffle, on office work and administration procedures; including for example, banking and managing staff

rotas. The thinking was that this would help Mrs Lloyd in the meantime and might help them, that is Miss Thomson and Mrs Huffle, gain high positions with the respondent when it took over the business.

- (21) The business transferred to the respondent on 1 October 2016.
- (22) In anticipation, Mr Crooks provided a list of PAYE employees to the respondent, (of whom there were eleven) and also gave the respondent Miss Thomson's details as a self-employed person.
- (23) All staff, including Miss Thomson, completed a document called 'A New Starter' form, which is at document 16 of the respondent's bundle. Subsequently, Miss Thomson was provided with a contract of employment by the respondents which was dated 1 December 2016, but stated that her employment commenced on 1 October 2016 and gave as her job title that of 'Site Manager'.

Conclusions

- (24) Lay people, non-lawyers, tend to think the question of employment status is simple. If an individual provides an invoice and is not on PAYE, they must be self-employed. It is not that simple. If it was, almost everyone would be retained on a self-employed basis, so that employers could avoid their employer national insurance and the inconvenience of employment law protection and employees could gain tax advantages. There is no suggestion in this case of anybody trying to avoid any tax, it is just an arrangement, it seems, that Mr Crooks and Miss Thomson fell into.
- (25) The facts are that Miss Thomson provided her work personally. She could not send along somebody else. She was rewarded for her work by payment and so there was a contract. She was subjected to a degree of control typical of that for an employee employer relationship. She was obliged to work the hours that she had agreed to work and she was obliged to work the hours set out in the document, at claimant bundle number 5.
- (26) Turning to the other contractual indications, against there being an employment relationship is the fact that Miss Thomson was not on PAYE, she provided invoices, she had insurance in place, she was not paid for holidays nor sickness, she was able to do other work, albeit for Mr Crooks' other businesses, there is no provision as to pension, there is no contract of employment and she was paid more than her colleagues.
- (27) For there being an employment relationship, is that she worked just the same as her other colleagues, she wore a uniform, she had to agree her holidays, she was being trained up for a senior position, she worked regular hours each month between November 2015 and October 2016, she expected to be subject to discipline, she was provided with the same Health and Safety training as her colleagues, she was part of her employer's succession planning and had become well and truly integrated into the business.
- (28) Weighing these matters in the balance, it is clear to me, despite the labels put on the relationship, that this was a relationship of employer and employee. Miss

Thomson's employment transferred to the respondent on 1 October 2016. She therefore has the requisite period of employment to bring a claim of unfair dismissal.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Further Hearing

- 1.1 This matter has been listed for a further hearing to determine whether or not the claimant was unfairly dismissed. This is to take place before an Employment Judge sitting at **The Employment Tribunals, 1st Floor, Triton House, St Andrews Street North, Bury St Edmunds, Suffolk, IP33 1TR**, commencing at 10am on **21 June 2019**. The parties and their representatives, but not necessarily any other witnesses, must attend by 9:30am on that day.
- 1.2 The claimant and the respondent **must** inform the tribunal as soon as possible if they think there is a significant risk of the case not being ready for the final hearing.

2. Documents

The claimant is to send copies of any documents she wants included in the trial bundle to the respondent by no later than **26 February 2019**.

3. Final Hearing Bundle

The respondent is to prepare a bundle containing the documents both parties wish to refer to and deliver a hard copy of the same to the claimant by no later than **20 March 2019**. The respondent is to bring to the final hearing two copies of that bundle for use by the tribunal.

4. Witness Statements

- 4.1 The respondent is to prepare written witness statements in respect of any witness it wishes to call, setting out the evidence that witness wishes to put before the tribunal. Such statements are to be provided to the claimant, (she has already provided her witness statement), by no later than **10 April 2019**.
- 4.2 The respondent is to bring two additional copies of those statements for use by the tribunal.
- 4.3 The claimant is reminded that she will still need to bring two clean copies of her witness statement for use by the tribunal at the final hearing.

5. Other matters

- 5.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 5.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 5.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 5.4 **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 respondent(s) in a case.
- 5.5 The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- 5.6 The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise) ...*"
If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.
- 5.7 The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- 5.8 If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
- 5.9 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 5.10 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or**

restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Warren

19.03.19

Sent to the parties on:

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For the Tribunal:

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