



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Miles

Respondent: Mr G Hesp and Mrs L Hesp trading as The Great Western Hotel

Heard at: Cardiff **On:** 1st August 2019

Before: Employment Judge Howden-Evans (sitting alone)

Representation

Claimant: In Person

Respondent: Ms Nevins, Solicitor

RESERVED JUDGMENT

The employment judge's decision is that from 5th January 2015, until her resignation on 20th May 2018, the claimant was an employee of the respondents and has worked under an implied contract of service.

REASONS

1. On 24th October 2018, the claimant submitted an ET1 claim form, that amongst other claims, asserted she had been constructively unfairly dismissed from her employment as a housekeeper at the respondents' hostel, The Great Western Hotel ('the hotel'). This claim was submitted after an ACAS conciliation period (13th August 2018 to 25th September 2018).
2. In their ET3 response of 10th December 2018, the respondents asserted the claimant was self-employed and worked for them "on a casual basis" from January 2015; they assert she only became an employee on 1st May 2017. An employee needs to have 2 years' continuous service with their employer before they have the right to not be unfairly dismissed. As the claimant's employment ceased on 20th May 2018, if the respondents' description of the claimant's employment status prior to 1st May 2017 had been correct, the claimant would not have had sufficient employment service to bring an unfair dismissal claim.

3. At a preliminary hearing on 23rd May 2019, Employment Judge Povey listed this half-day hearing to determine the issue of the claimant's employment status during the period 5th January 2015 and 20th May 2018.
4. At the preliminary hearing the claimant represented herself and the respondents were represented by Ms Nevins.
5. I heard evidence on oath from the claimant. On behalf of the respondents, I heard evidence on oath from Mr Hesp, joint owner of the hotel, and Mr Lloyd, who had previously been a member of bar staff and was now a manager at the hotel.
6. In addition, the claimant produced written statements from Ms Jones, Ms Hardisty and Ms Sarairoh who did not attend as witnesses. The respondents did not object to me reading these statements, however as these people were not available to have their evidence tested by cross examination, I have not given their statements any weight in making my decision.
7. In addition to hearing witnesses' evidence, I had the benefit of a bundle of documents of 48 pages and 2 legal authorities handed in; the decisions of the Central Arbitration Committee and subsequently of Mr Justice Supperstone, sitting in the High Court, in the case of *Independent Workers' Union of Great Britain v RooFoods Limited t/a Deliveroo*. At the end of the hearing, both parties gave oral closing submissions. Unfortunately, there was insufficient time for me to consider my decision. I sincerely apologise for the delay in providing this reserved judgment and for any inconvenience this has caused the parties; I experienced a personal bereavement in August, which caused me to fall behind with my work.

Findings of Fact

8. In 2005, Mr Hesp purchased The Great Western Hotel and started employment as the Managing Director of the hotel. However, during the period in question, Mr Hesp also worked as a full-time salesperson for a bathroom company, a role which required him to cover the Devon and Somerset region.
9. The hotel (which is based near Abergavenny) comprises of a Bar / Public House and a Bed and Breakfast / Hostel. The hotel can sleep up to 30 people – it has one dormitory that can accommodate 10, 2 dormitories that can accommodate 6, a fourth dormitory that accommodates 4 guests and 2 en-suite rooms. The hotel had an average occupancy rate of 6 to 8 guests per night. The hotel often has contractors staying for a number of nights. In 2015, the hotel's turnover was approximately £150,000 of which £40,000 was taken from accommodation, with the remainder being taken by wet sales. The hotel charged £16 per guest per night.
10. On a number of occasions in 2014, the claimant stayed at the hotel as a guest. As a regular guest she became friendly with the former housekeeper "Sandra" and noted Sandra appeared to be "snowed under" with work. The claimant would sometimes help Sandra to complete her duties. That housekeeper ceased working at the hotel in September 2014, at which point a couple called "Sean" and "Rennie" took over the cleaning for the hotel. They ceased working at the hotel at the end of 2014, at which point the claimant started undertaking the hotel's cleaning and housekeeping duties.

11. There was no written contract of the agreement reached in 2014 between the respondents and the claimant. The only contemporaneous document is a letter drafted by Mr Hesp on the hotel's headed paper, dated 19th December 2014, addressed to Abergavenny Credit Union, which reports *"I am pleased to confirm that [the claimant] works as a cleaner / housekeeper at the Great Western Hotel. The role involves 'living in' and as such this is [the claimant]'s home address."*
12. In 2015, the claimant worked alone, completing all the cleaning functions for the hotel. On a daily basis, for each room that required servicing, she would strip the beds, wash, dry and iron the bed linen, make the beds with fresh sheets, clean the bedroom / dormitory. She was expected to complete this work before the room was needed later in the day. In addition, the claimant was expected to Hoover and mop the bar area and clean the toilets in the bar. The claimant received regular instructions from Mr Hesp via telephone, indicating which rooms needed cleaning and which tasks she should prioritise. She did not work particular hours each day – she alleges she was having to work long hours each day to keep up with the laundry and cleaning requirements of the hotel; Mr Hesp believed it would only take the claimant 3 or 4 hours each day to complete the cleaning and laundry work. I accept it is more likely than not that the cleaning and laundry work was taking the claimant considerably longer than 4 hours each day, as Mr Hesp confirmed 2 ladies are now each working 3 or 4 hours per day completing the cleaning and laundry; whilst I accept the hotel may now be busier, I do not accept there is twice the amount of work that existed during the claimant's employment at the hotel.
13. Whilst Mr Hesp's witness statement had indicated the claimant moved into the hotel on 1st May 2017, during oral evidence, in response to my question, Mr Hesp confirmed the claimant had actually lived in the hotel since 1st January 2015. The claimant and Mr Hesp agree that in late 2014 they verbally agreed that in return for undertaking the hotel's cleaning and laundry duties, the claimant would be provided with free accommodation at the hotel and paid £36 per week. The change that occurred in May 2017 was that the claimant was provided with a proper bedroom in the hotel at that point in time. For at least a year prior to May 2017, whilst the claimant had been residing at the hotel, the claimant had been sleeping in a chair in the laundry room.
14. During the period in question, the claimant was only working for the Hotel; she was not operating a cleaning business or cleaning any other premises. In 2016 and 2017, the hotel was busier and the claimant was struggling to complete all the housekeeping tasks. She asked Mr Hesp for help and was told she could have cleaning assistants if she wished. The claimant did pay part of her wages to an assistant on occasions. Mr Hesp also paid an assistant cleaner directly on occasions. However, I am satisfied that these "assistant cleaners" were not undertaking the same overall housekeeping function that the claimant was undertaking, rather they were working alongside the claimant helping her to get through the volume of work. In reality the claimant could not send another person to the hotel to work as "the housekeeper" – she was expected to undertake this role personally and was expected to live in the hotel to be available as and when required. Whilst the hotel appears to have had a number of "managers", none of these were living in the hotel. I accept the claimant would regularly check guests into the hotel and show them to their rooms and would step in and undertake whatever task was required.

15. Mr Hesp confirmed the hotel had 5 part-time employees. As the live-in housekeeper, the claimant performed an integral role within the hotel's business.
16. The 'tools' that the claimant required to undertake her work were all provided by the hotel; these included mops and buckets, washing machine, washing powder, cleaning products.
17. In May 2016, the chef was leaving the hotel, so the claimant agreed to increase her duties to include preparing breakfasts as and when needed. It was agreed she would be paid an additional amount for work involved in preparing breakfasts. The claimant continued to undertake this additional role up until the end of her employment with the hotel.
18. Nearly twelve months after the Claimant started preparing breakfasts, Mr Hesp wrote to the claimant on 12th April 2017, *"With reference to our discussions regarding working with me to develop the food offering at the Great Western whilst also working as housekeeper. I am pleased to confirm that your remuneration will include live in accommodation in the form of your own private room. I have put a commercial value of £120 a week on this accommodation but discounted to £80 per week as part of your remuneration."* This letter ended with *"by signing this letter you also confirm that you have been responsible for your own tax and national insurance up to this point."*
19. On 15th May 2017, Mr Hesp made arrangements for the claimant to be paid via the business's payroll provider *"[The claimant] moved into the pub on 1st May. The idea is that she lives in and can perform several roles, the main one being to cook meals. She will also be cooking breakfasts for the bed and breakfast guests and doing some cleaning. I will take another month or so before we get the food going but in the meantime she has been cleaning / washing and ironing in return for the accommodation, I have set a value of £80 per week for the accommodation and she has also been cooking some breakfasts. She has been paid cash for these. Last week this amounted to £50. So I guess that effectively she has commenced employment. I assume that even on a week one / month one basis she will not be paying tax on these amounts?"* In fact, as noted earlier, the claimant had been working as a cleaner / housekeeper and living in the hotel and paid wages continuously since the end of 2014 / start of 2015.
20. On 16th May 2018, Mr Hesp wrote to the claimant, *"With reference to our recent meeting and discussions regarding your position as Housekeeper and breakfast chef. I am pleased to confirm that with effect from Monday 21st May 2018 your revised hours of work will be 7.00am until 11.00am 6 days a week. Your remuneration will be £7.83 per hour based on 24 hours per week. As part of your employment package you will receive subsidised accommodation in the form of a private single bedroom with shared shower facilities. The charge for this is £80 per week which will be deducted from your wages. You are the only member of staff living in and for safety reasons we need you to advise us if you are staying away overnight or for any longer period of time. As you are aware Lisa Gregory will be covering your day off (4 hours) and working a further 6 hours assisting you in ensuring the bedrooms are ready to be occupied, the common areas, showers and toilets are cleaned, the laundry is processed. For clarity I restate our conversation that I expect you to be in attendance at the Great Western between the hours of 7.00 am and 11.00am six days per week"*

that you are working. Any shopping or other errands should be carried out after 11.00am....It is not acceptable to me for you to request other members of staff to carry out your duties and remunerate them yourself. Please ensure that this doesn't happen in future..." Just as the documents quoted in paragraph 19 and 20 of this judgment do, this letter paints a misleading picture of what was actually happening in practice. The claimant was having to work long hours each day for the hotel, far longer than 4 hours per day – the shopping being referred to was shopping for the hotel, ie food for breakfasts and cleaning provisions. To be able to complete her workload, the claimant was often ironing late into the night. Crucially, the claimant was not *"requesting other members of staff carry out her duties and remunerating them herself"*, rather, with Mr Hesp's knowledge, as the claimant could not physically complete all the cleaning work, the claimant, and sometimes Mr Hesp, were paying other people to work as assistant cleaners, albeit he was asking the claimant to physically pass on their wages to them. Nobody else was carrying out the claimant's role as housekeeper and since May 2016, as breakfast chef.

21. On 20th May 2018, the claimant resigned by letter addressed to Mr Hesp *"Please accept my resignation with immediate effect. The unreasonable working conditions, scant help, long daily hours covering several departments, no day off or minimum wage for three years do not augur well for my future at the Great Western Hotel. Moreover the contract you have recently proposed does not reflect the content of several discussions we have shared since May 2016 when I began breakfast duties"*.

The Law

22. Only an "employee" can present a claim of unfair dismissal. S230 (1) Employment Rights Act 1996 provides:

"(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."

23. An employee works under a contract of service, whereas a self-employed person works under a contract for services.

24. As there is no precise definition of a contract of service the courts and tribunals have adopted a mixed test to identify whether an individual was working under a contract of service. The starting point is Mr Justice MacKenna's formulation of the test in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB,

"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.

...As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be...

...As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

What matters is lawful authority to command so far as there is scope for it, and there must always be some room for it, if only in incidental or collateral matters.

To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

...An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control..."

25. For a contract of employment to exist, four essential elements must be fulfilled:
 - a. a contract (either express or implied) must exist between the respondents and the claimant;
 - b. there must be an obligation on the claimant to provide work personally;
 - c. there must be mutual obligation, ie an obligation on the respondents to provide the claimant with work and an obligation on the claimant to accept and complete any work offered to her; and
 - d. the respondents must have sufficient degree of control over the claimant.

26. If the four essential elements are established, I should go on to consider the surrounding circumstances as these will also indicate whether this is a contract of service (and the claimant is an employee) or a contract for services (and the claimant was not an employee).

27. From the authorities I have derived the following:
 - a. "Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be": whilst there must be an obligation on the claimant to personally perform the work, it is possible for this to still exist despite a limited or occasional delegation of work.
 - b. I should consider the extent to which the claimant was integrated into the respondent's business. As part of this, it might be helpful to consider whether the claimant actively marketed her services to the

world in general or whether she was recruited by the respondent to work as an integral part of their operations.

- c. If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it.

Conclusions

The contract

28. There was no written contract. There is scant evidence of the oral agreement reached in 2014. I note it was orally agreed between Mr Hesp and the claimant that in return for undertaking the hotel's cleaning and laundry duties, the claimant would be provided with free accommodation at the hotel and paid £36 per week. In December 2014, Mr Hesp also reported "*the role involves 'living in' the hotel.*"

Personal Service

29. The claimant was required to personally perform this contract. I note she was occasionally assisted in undertaking the cleaning duties, by one or two ladies that she shared her wages with or that Mr Hesp paid, but this was only part of her duties. She did not expect anyone else to perform her role as Housekeeper (or from 2016 as breakfast chef). Further and in the alternative, as Lord Wilson pointed out in *Pimlico Plumbers v Smith* [2018] UKSC 29, "*assistance in performance is not the substitution of performance*". Mackenna J noted in *Ready Mixed Concrete* that "limited or occasional power of delegation" may not be inconsistent with a contract of service. I am satisfied that the claimant was required to personally perform this contract and that the dominant feature of this contract was that it would be performed by the claimant herself.

Mutual Obligations

30. From the outset there was an obligation on the respondents to provide the claimant with work; she was to undertake the cleaning and housekeeping function for the hotel and was to be paid partly in accommodation and partly in cash for this work.

31. Equally there was an obligation on the claimant to accept and complete any work necessary to keep the hotel clean, to service bedrooms and laundry as required and from 2016 to prepare any breakfasts required, as well as undertaking any shopping the hotel needed.

Sufficient Control

32. Whilst the claimant was not closely supervised, quite clearly the respondents did exercise control over which tasks she prioritised, and Mr Hesp was in regular contact by phone, providing the claimant with instructions as to what she needed to do. Practically she had the pressure of turning around rooms quickly enough for guests that were booked into the hotel - she was just expected to complete the work and meet these urgent deadlines, no matter how long this made her working day.

Other Considerations

33. It has been submitted that the fact that the claimant was not included on the respondent's payroll until May 2017 is indicative of her being self-employed rather than an employee prior to that date. I found the documents referred to in paragraphs 18, 19 and 20 of this judgment to be self-serving and not representing the true position. The claimant only signed the letter referred to in paragraph 18 as she was desperate to sleep in a bed and to have a bedroom rather than having to sleep in the laundry room. This reflects how difficult the claimant's circumstances were and how little bargaining power she had in this relationship. The claimant was not included on the respondent's payroll earlier as this required the respondent to make the arrangements.
34. In this case, the claimant was, at all relevant times, highly integrated into the respondent's business – she was a key person, the go-to person that ensured rooms were ready for guests, breakfast was served and the hotel was presentable.
35. From December 2014 onwards, the relationship that existed between the claimant and the respondents was one of master and servant – it was only by the claimant complying with the respondent's every instruction, completing work quickly, turning her hand to whatever was necessary to get the rooms ready and more importantly by being at Mr Hesp's beck and call around the clock, that Mr Hesp was able to keep the hotel ticking over whilst working fulltime in Devon and Cornwall.
36. At the hearing, it was suggested that once the issue of employment status was determined the parties may be able to resolve the remaining issues. In the event of there being further issues to be determined, parties are requested to agree suitable case management directions and write to the Tribunal within 14 days of receipt of this Judgment, confirming the directions that have been agreed.

Employment Judge **Howden-Evans**

Date: 6 January 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 7 January 2020

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FOR EMPLOYMENT TRIBUNALS