



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101601/2022 (V)**

5

**Held via Cloud Video Platform in Edinburgh on 7 & 8 September 2022**

**Employment Judge M Sangster**

10 **Mr D Parker**

**Claimant  
In person**

**Staff Buddy Limited**

**Respondent  
Represented by  
Mr R O'Rorke  
Director**

15

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that:

20

- The claimant was not an employee or worker of the respondent in the period from 14 June to 31 December 2021. The Tribunal accordingly have no jurisdiction to consider the complaints of unauthorised deductions from wages and/or breach of contract in respect of that period.

25

- The claimant's complaints of unauthorised deductions from wages and/or breach of contract in respect of commission arising in the period from 2 January to 19 February 2022 do not succeed and are dismissed.

### **REASONS**

#### **Introduction**

30

1. The claimant brought complaints of unauthorised deductions from wages/breach of contract in respect of salary and commission. A further complaint contained his ET1 form, for unfair dismissal, was dismissed on 12 May 2022.

2. The respondent resisted each of the complaints and the case called for a final hearing.
3. Each party lodged a bundle of documents in advance of the hearing. The claimant's bundle of documents extending to 134 pages and the respondent's bundle extended to 39 pages.
4. The claimant gave evidence on his own behalf.
5. The respondent led evidence from:
  - a. Ryan O'Rorke (**RO**), one of the respondent's directors;
  - b. Calvin Victor (**CV**), formerly a recruitment consultant for the respondent; and
  - c. Elle Moncrieff (**EM**), formerly a recruitment consultant for the respondent.
6. At the outset of the hearing it was clarified that the sums claimed by the claimant were as follows:
  - a. Salary for the period from 14 June to 31 December 2021, based on a salary of £21,000;
  - b. Commission, in respect of the period 14 June to 31 December 2021, amounting to £18,666.66, being 2% of the revenue of the respondent in that period; and
  - c. Commission in respect of the period from 1 January to 19 February 2022, and in respect of three named clients (Manual, Walkers Logistics and Growers Garden), amounting to £4,405.20.

### Issues to be Determined

7. Was the claimant an employee or worker of the respondent, entitling him to bring a complaint, under section 23 of the Employment Rights Act 1996 (**ERA**), that the respondent has contravened the terms of s13 ERA, or, if he was an employee, a complaint of breach of contract under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994?

8. If so, did the respondent pay the claimant less than the wages (including commission) which were properly payable (i.e. which he had a legal or contractual entitlement to) on any occasion?
9. If so, had the claimant consented in writing to that deduction, or was it authorised by statute or a provision of the claimant's contract?
10. Alternatively, if the claimant was an employee, did he have a contractual entitlement to any sums which were not paid to him by the respondent and did the respondent act in breach of contract by not paying those sums to him?

### Findings in Fact

11. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
12. The respondent is a recruitment agency business. In the period up to January 2022, they focused on temporary recruitment for e-commerce businesses.
13. In June 2021, RO posted on LinkedIn that the respondent was looking to bring someone in as a director of the business, to secure growth, in return for equity. The claimant responded to the post and RO and the claimant met in Edinburgh, to discuss the potential opportunity.
14. On 8 June 2021, following their meeting, RO emailed the claimant setting out proposed financial terms for discussion. His email included reference to the following:
- a. 25% equity in the respondent, via a share option scheme;
  - b. Commission per new client brought on board, stating *'we would factor this into the margin per client, so probably a set amount per hour billed goes to you for X period of time. Again to be agreed between us and what works from a margin perspective.'*
  - c. *'Salary, as soon as the business can sustain (i.e. when new clients come on board)';* and
  - d. Expenses to be paid by the respondent.

15. The claimant responded that day stating, *'sounds like a sensible remuneration plan, sort of what I expected...Commission and expenses suits me for now.'*
16. On 23 June 2021, the claimant and RO signed a document entitled 'Agreement in Principle'. This was a short document, spanning 1.5 pages, which confirmed that the claimant was to join the company from 14 June 2021 as a Business Development Manager, to grow the business through new client acquisition. The Agreement in Principle stated that, by way of remuneration, the parties had agreed the following:
- 5
- a. 25% A ordinary shares of the respondent to be offered via a share option scheme, with no shares vesting in the first 12 months;
- 10
- b. *'Salary to be offered once new clients are brought on board. This can be reviewed at month 6 from the date of this agreement (14<sup>th</sup> December 2021). If/when salary is offered it will be in-line with other company directors at a fair market rate.'*
- 15
- c. A commission structure, effective immediately but to be reviewed at 6 monthly intervals and based on the financial performance of the business and margin analysis, namely *'A set 2% of billed revenue per client'*.
17. Accordingly, in the first 6 months at least under the Agreement in Principle, the claimant could only receive commission. The claimant and RO understood that, in relation to commission, the *'set 2% of billed revenue per client'* was per client which was introduced by the claimant, as per the discussion which they had had in advance of signing the Agreement in Principle.
- 20
18. The Agreement in Principle made no mention of issues such as hours of work, holiday entitlement, reporting structure, sickness absence/pay, pension or grievance/disciplinary issues.
- 25
19. The claimant commenced working under the terms of the Agreement in Principle on 14 June 2021. In the period from 14 June to 31 December 2021, the claimant:

- a. was not paid a salary and did not receive wage slips. He did not question this;
  - b. was not enrolled into the respondent's pension scheme;
  - c. did not work a minimum number of hours, or at set times, and did not  
5 require to inform the respondent when or how many hours he was working;
  - d. did not require to request holidays, but instead either informed the respondent via text/group chat that he would not be working on a particular day/week, or that he was unavailable when contacted as he was taking  
10 time off or engaged in other activities;
  - e. had complete control over how he provided his services to the respondent and could have had others conduct the work if he wished. Whilst the Agreement in Principle was silent on this point, and the claimant did not do so, the respondent's only concern was business growth, it was  
15 irrelevant to them whether the claimant did this personally or was assisted by third party/parties in doing so; and
  - f. continued to work on his separate business ventures, which the respondent was aware of.
20. From the start of 2022, the respondent changed the focus of their business to  
20 sourcing permanent recruitment options for e-commerce businesses and moved away from temporary recruitment. As part of this shift in focus, it was agreed that the claimant would become an employee of the respondent, on a full time basis, from 2 January 2022 as Chief Growth Officer. A 'statement of particulars of employment pursuant to the Employment Rights Act 1996' was  
25 drawn up and signed by the claimant and RO on 26 January 2022. This 5 page document set out in detail all the normal terms of employment, including provision for hours of work, holidays, sickness absence, grievance/ disciplinary procedures and other company rules. In particular, it included the following:

- a. That the claimant's employment commenced on 2 January 2022 (which the claimant did not query, question or dispute); and
- b. That he would be paid a gross annual salary of £21,000, in weekly instalments.

- 5 21. Separately, the respondent's directors agreed that the claimant and the respondent's other two employees should be entitled to commission on the successful placement of individuals with clients, once the individual had commenced in their role and the client had paid the respondent's invoice. A set percentage of each recruitment fee paid was to be allocated for  
10 commission, with 75% of that sum going to the claimant, if he introduced and secured the business, and the remaining 25% going to recruitment consultant who worked on the account.
22. On 10 February 2022, the claimant sent a WhatsApp message to RO indicating his intention to resign. It was agreed, at a meeting on 14 February  
15 2022, that the claimant's employment would terminate at the end of that week, namely on 19 February 2022.
23. In the period from 2 January to 19 February 2022, the claimant introduced two clients to the respondent, namely Manual and Walker Logistics. Whilst the respondent sought to place candidates with them, they were not successful  
20 in doing so. The claimant accordingly was not entitled to any commission, under the agreed commission structure, in respect of these clients.
24. In the same period, the claimant worked on an account for a separate client, Growers Garden. That client was however introduced to the business via RO, so the claimant would not have been entitled to any commission under the  
25 agreed commission structure, even if the respondent successfully placed a candidate with them. No recruitment fees were however invoiced to, or paid by, Growers Garden in the period from 2 January to 19 February 2022.

### **Submissions**

25. The claimant gave a brief submission stating that he was entitled to the sums  
30 claimed. As he was working for the respondent, he was entitled to be paid at

least the national minimum wage. He did not agree to not be paid. He submitted that the friendships between RO and the witnesses called for the respondent undermined the credibility of their evidence.

26. RO submitted a written submission, which he read. In summary, he submitted that the claimant was self-employed in the period from June to December 2021. None of the terms agreed, or what occurred in practice, were consistent with him being an employee or worker in that period. The claimant is not entitled to any commission in that period, or in the period from 2 January to 19 February 2022, during which period the respondent accepts the claimant was an employee.

### Relevant Law

27. S13 ERA provides that an employer shall not make a deduction from a worker's wages unless:
- a. The deduction is required or authorised by statute or a provision in the worker's contract; or
  - b. The worker has given their prior written consent to the deduction.
28. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church [2000] IRLR 27***).
29. Section 3 of the Employment Tribunals Act 1996 and article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provide jurisdiction for Tribunals to consider claims, brought by employees, for damages for breach of contract.
30. Section 230(1) ERA defines 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*' Section 230(2) provides that a contract of

employment means *'a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.'*

31. Section 230(3) ERA defines 'worker' as *'an individual who has entered into or works under (or, where the employment has ceased, worked under)-*
- 5
- 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*
- 10 *perform personally any work or services for another part 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 out by the individual*
32. The issue of the status of a person as employee, worker or neither of those terms has been the subject of much case law.
- 15
33. The essential test for employment status was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] All ER 433, which referred to the need for an irreducible minimum of personal service, control and other factors consistent with a contract of service.
- 20
34. In determining whether an employee has employee status it is not a mechanical exercise of running through items on a checklist. In ***Hall (Inspector of Taxes) v Lorimer*** 1994 ICR 218, CA, the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:
- 25
- 'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of*
- 30



*evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation.'*

35. The Supreme Court ***Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening)*** 2014 ICR 730, SC, considered the definition of 'worker'. Lady Hale confirmed that *'there can be no substitute for applying the words of the statute to the facts of the individual case'* in relation to whether an individual is a worker for the purposes of s230(3) ERA, but recognised that there is not *'a single key to unlock the words of the statute in every case'*.
36. S230(3)(b) sets out that the following factors are necessary for an individual to fall within the definition of 'worker', where they are not classed as an employee:
- a. There must be a contract, whether express or implied, and, if express, whether written or oral;
  - b. That contract must provide for the individual to carry out personal services; and
  - c. Those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

## Discussion & Decision

### Was the claimant an employee?

37. The Tribunal first considered whether, in the period from 14 June to 31 December 2021, the claimant was an employee of the respondent. The conclusions reached are set out below.
- a. **Personal service.** In ***Pimlico Plumbers Ltd and Mullins v Smith*** [2018] UKSC29, the Supreme Court framed the relevant question as *'Was Mr Smith's right to substitute another Pimlico operative inconsistent with an obligation of personal performance?'*. In answering that question the

Supreme Court stated that consideration should be given to whether the dominant feature of the contract remained personal performance.

As set out above, the Tribunal found that the claimant was not required to deliver business development services personally. Whilst the Agreement in Principle was silent on this point, the reality was that he could outsource that work to whoever he wished, or be assisted by third parties in the delivery of the service. The dominant feature of the contract was business development and growth for the respondent. It was irrelevant to the respondent how this occurred. Personal performance was not the dominant feature.

- b. **Control.** In *Ready Mixed Concrete*, MacKenna J stated that '*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 of these factors need to be considered together to determine whether one party has control to a sufficient degree for there to be an employment relationship. Following *Ready Mixed Concrete*, the Court of Appeal in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 agreed that the requirement for a sufficient degree of control by the employer forms part of the irreducible minimum, without which there can be no employment contract.

The claimant was able to carry out business development for the respondent however and whenever he thought best, or to not undertake any such work at all. The work he undertook was not monitored by the respondent in any way on a day to day basis, nor did they have any (contractual or otherwise) authority to do so. There was no evidence that the claimant was subjected to the respondent's day-to-day direction or rules and policies, for example in relation to standards at work or in relation to sickness absence and pay or annual leave. In all the circumstances, the Tribunal found that the claimant was not subject to a level of control by the respondent consistent with there being a contract of employment.

- 5 c. **Mutuality of obligation.** The Tribunal concluded that there was insufficient mutuality of obligation to support the existence of a contract of employment. The claimant could choose, under the Agreement in Principle and given the reality of the relationship between the parties in the period in question, not to provide any business development services to the respondent at all, if he so wished. There was also no obligation on the respondent to provide any work to the claimant.
- 10 d. **Other factors.** The claimant was not paid a salary or through PAYE. He received no employee benefits. This was in accordance with the terms of the Agreement in Principle and was not questioned by the claimant. This was not consistent with an employment relationship. The claimant's ability to undertake other paid roles was not restricted in any way. This was not consistent with an employment relationship.
- 15 38. Adopting the approach, expressed by Mummery J in *Hall*, the Tribunal concluded that the reality of the relationship between the parties was that the claimant was not an employee of the respondent, as defined in s230(1) ERA.

### **Was the claimant a worker?**

- 20 39. The Tribunal then moved on to consider whether the claimant was a worker in the period from 14 June to 31 December 2021. For these purposes, the Tribunal considered whether the claimant's status fell within the scope of s230(3)(b) ERA (or limb b) during that period, the issue of whether the claimant was an employee at that time having already been considered. The
- 25 conclusions reached are set out below.
- a. **Contractual Relationship.** It was accepted by both parties that the Agreement in Principle was entered into in respect of the period in question. The requirement for an express or implied contract between the claimant and the respondent has accordingly been established.
- 30 b. **Personal Performance of Work or Services.** The Tribunal's findings in relation to personal performance are set out at paragraph 37a above.

c. **Client or Customer Exception.** In *Byrne Brothers (Formwork) Ltd v Baird and ors* 2002 ICR 667, EAT, the EAT held that the intention of this exception was to create *'intermediate class of protected worker'* and *'the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves'*. The EAT noted that the tests in relation to this were similar to that of employment status, but the effect of basic effect of limb (b) is to 'lower the pass mark', so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless reach that necessary to qualify for protection as workers.

The Tribunal noted that:

- i. the respondent did not exercise any control over how the claimant provided the services, when he did so or the amount of time he should spend doing so – the claimant could work as much or as little as he wanted;
- ii. the claimant was not required to provided services exclusively to the respondent and could provide similar services to anyone he wished; and
- iii. the claimant he was to be paid commission only (without deduction of income tax or national insurance), so assumed all risk in relation to the provision of the services.

40. In these circumstances, the Tribunal concluded that the claimant was not a worker in the period from 14 June to 31 December 2021: There was no dependence on, or control by, the respondent and the claimant did not require to personally perform the services. Rather, he was an independent contractor who was providing services to the respondent, who could properly be regarded as his client or customer.

## Conclusions

41. Given the Tribunal's findings that the claimant was not an employee or a worker in the period from 14 June to 31 December 2021, the Tribunal does not have jurisdiction to consider the complaints of unauthorised deductions from wages and/or breach of contract in respect of the period from 14 June to 31 December 2021.

42. The claimant was an employee of the respondent from 2 January to 19 February 2022. This was not disputed by the respondent. The claimant sought the sum of £4,405.20 in respect of commission which he stated ought to have been paid to him during that period, in relation to placements with three named clients in that period. As set out in paragraphs 23 & 24 above however, the claimant had no contractual or legal entitlement to commission from any of these clients. The respondent did not place any candidates with two of the three named clients. In respect of the third client, any commission would not have been payable to the claimant as he did not introduce or secure the business. In any event however, no entitlement to commission arose during that period. The claimant's complaints of unauthorised deductions from wages and/or breach of contract in respect of commission due in the period from 2 January to 19 February 2022 accordingly do not succeed and are dismissed.

Employment Judge: Mel Sangster  
Date of Judgment: 13 September 2022  
Entered in register: 13 September 2022  
and copied to parties