# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Culley

**Respondent:** Whitehawk Football Club

**Heard at:** **London South** **On: Wednesday, 23 August 2017**

**Before:** **Regional Employment Judge Hildebrand**

**Representation**
Claimant: In Person
Respondent: Response not entered and did not attend

OPEN PRELIMINARY HEARING

# JUDGMENT

1. The Claimant was a worker within the definition in Section 230 of the Employment Rights Act 1996

2. The Sums claimed by the Claimant are wages and fall within the jurisdiction of the Employment Tribunal.

REASONS

**Procedural history**

1. This is the judgment on a preliminary hearing in this case. It was convened by a Notice of Hearing dated 14 July 2017 which identified as the issue to be determined whether the amounts claimed by the Claimant were wages within the meaning of section 27 of the Employment Rights Act 1996. In fact the direction by the Judge who ordered the Preliminary Hearing, Employment Judge Sage, dated 22 June 2017 also required determination of the issue whether the Claimant was a worker.

2. This case has an unusual procedural history in that that the Respondent has, despite having been sent a number of communications by the tribunal, which in accordance with the provisions of the Employment Tribunal Rules included the proceedings, and which it is deemed unless

the contrary is shown to have received, in this case the Respondent has not acknowledged any of the Tribunal's correspondence nor sought to play any part in the proceedings nor indeed has any response been entered to resist the proceedings.

3. A difficulty in this case arose from the fact that the Claimant's claim is expressed in terms that he was not paid sums which should have been paid to him in reimbursement of rent by a way of the relocation payment by the Respondent in accordance with the terms of his contract. There was a concern whether those sums came within the provisions of section 27 of the Employment Rights Act 1996. A preliminary hearing was accordingly listed.

**The findings of fact**

4. I have heard evidence from the Claimant. He has set out with clarity and candour the history of his dealings with the Respondent. He told me that he entered negotiations with the Respondent on terms that he would begin playing for them for £500 per week. The Respondent is a football club with a team presently in the FA National Conference South.

5. The Claimant produced the contract which was finally concluded although he said he had signed earlier versions. In the final version his wages were not £500 per week but £35 per week with the balance being attributed to a "relocation allowance" of £1,860 per month. The total sum equates to £464.23 per week. The Claimant was required to invoice for the relocation allowance as a condition of payment, and did so. He was part paid for his first month with the Respondent, that is he was only paid for three weeks at the end of August 2016. The Claimant was living at that time at the address at which he was located at the time he signed the contract which is in Wimbledon. He subsequently moved to Putney in November although that appears to be irrelevant to the terms of the dispute between the parties.

6. The Respondent has drawn attention in correspondence to the fact that the Claimant was under obligation to move from Wimbledon to some location closer to the Respondent's ground in Brighton. There is no documentary evidence in the contractual documentation or correspondence about this nor indeed was any suggestion made to the Claimant regarding where he should move to, or about the time at which he should move.

7. After the month of August with the Respondent, the Claimant was loaned by the Respondent to a neighbouring football club in Lewes on 5 September 2016. The Claimant has produced a copy of the temporary transfer arrangement concluded and registered with the Football Association under which the Respondent was to be paid £250 a week, said to be towards the player's rent. Clearly this was a payment towards the player's remuneration for attending to play football.

8. The Respondent failed to pay the Claimant further after the payment received at the end of August. The Claimant became increasingly concerned and consequently pressed for payment. The product of his efforts was a letter from the Respondent dated 30 November 2016, although collected by the Claimant from the Respondent's premises in Brighton on 8 December 2016, to the effect that the club was unable to pay the invoices in regard to his relocation on the grounds that the contract with the club was illegal and in breach of Inland Revenue rules.

9. Not long after that correspondence was received, together with the tender by the Respondent in the sum of £35 per week for the period for which the Claimant had been playing to date, the Claimant instructed solicitors who wrote setting out the Claimant's position and claim for payment and tendered his resignation on the grounds of the failure to pay the Claimant's relocation payment.

The Law

10. There is no doubt that the terms of section 27 of the Employment Rights Act 1996 ("the Act") expressly exclude by section 27(2) (b) payments in respect of expenses incurred by the worker in carrying out his employment. The reality of the engagement between the parties, however, is that the Claimant was engaged by the Respondent to pay football for approximately £500 per week and the Respondent has subsequently tailored that arrangement in a way which after 3 weeks it relied on as illegal in an attempt to defeat the Claimant's claim for payment.

11. The definition of worker is found at Section 230 of the Act. A worker is an individual who works under a contract of employment or any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by that individual.

Conclusion

12. The Respondent has played no part in these proceedings and so my findings are entirely based on what the Claimant has told me. I have no reason to disbelieve what he put forward, which is that it was the Respondent's choice to describe the bulk of the payment to him as a relocation payment and it was the Respondent who obtained the benefit in some way from their perspective in so terming the payment to the Claimant as a relocation payment.

13. I found that the Claimant was a worker. He contracted personally to provide service. The Respondent was not a client of his business.

14. Further the sums he claimed represent his wages. There is no basis for saying that he was paid a relocation allowance.

15. I therefore find that the arrangement between the Claimant and Respondent was a sham. The reality of the situation is that the Claimant is entitled to be paid the full amount contracted for, namely £464.23 per week, directly to him.

16. While this is not a final hearing of the case it is clear that, the Respondent having failed to enter the response, once jurisdiction is established a judgment on the rule 21 will follow inexorably.

17. Accordingly, I have identified with the Claimant the amounts which he says are due which derive from the solicitors' correspondence. These do not relate to the whole of the football season for which the Claimant was engaged by the Respondent but are limited to the period during which he worked. That is in respect in the so-called relocation allowance for 16 weeks at £429.23 per week which is £6,867.79 gross plus £560 in respect of the £35 a week so-called wages element for 16 weeks. The total is £7,427.69.

18. Since the decision of the Supreme Court in the case of UNISON announced on 26 July 2017 as ruled in relation to Employment Tribunal fees it would not be appropriate at the present time to add the Claimant's issue fee to the amount to be recovered from the Respondent given that the Claimant will in due course be able to recover that amount directly from the Secretary of State.

19. At the conclusion of the hearing the Claimant also raised the possibility of a claim for costs against the Respondent. No solicitors have been recorded on a record and there has been some pre-action correspondence between advisors for the Claimant and the Respondent. I do not consider in those circumstances there is any basis for an order in costs against the Respondent. Accordingly, the judgment will be for the sum of £7,427.69 to be paid gross and in respect of which the Claimant will carry the liability to pay such income tax as he is obliged to pay.

Regional Employment Judge Hildebrand
Date 29 August 2017