



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Carol Hughes

**Respondent:** Mr. Mark Coward

**Heard at:** Birmingham Employment Tribunal (public preliminary hearing)

**On:** 4 October 2019

**Before:** Employment Judge Cookson (sitting alone)

## Representation

Claimant: Ms. Bachada (consultant)

Respondent: Mrs. Coward (lay representative)

## RESERVED JUDGMENT ON A PRELIMINARY MATTER

1. The claimant was an employee as defined by section 230(1) of the Employment Rights Act 1996.
2. The respondent's application for the claim to be struck out on the basis of the claimant's non-compliance with directions is dismissed.

## REASONS

### Introduction

1. The claimant was allegedly employed as a property manager from January 2011 to 9 August 2018. She brought claims in the employment tribunal for unfair dismissal, a statutory redundancy payment, breach of contract, unlawful deduction from wages, unpaid holiday pay and a failure to provide written particulars of employment under s1 of the Employment Rights Act 1996 by a

claim form submitted on 6 November 2018 following conciliation between 11 September 2018 and 24 October 2018.

2. The respondent denies that the claimant was employed as alleged at all. She rented a room in a property from the respondent. The respondent denies that the claimant acted as his property manager but concedes in his response that the claimant undertook cleaning initially for a reduced rent, and then on the basis that the claimant would live in the rented room rent free.
3. This claim was originally listed for a two day hearing by an order made on 13 November 2018 and at that time a number of directions were made for the substantial hearing. In March 2019 it was listed for a preliminary hearing to determine the claimant's employment status. Both of the initial sets of hearing dates were postponed and in due course the case was listed for the preliminary hearing today, and for the full hearing on **25 and 26 November 2019**. The parties were ordered by Employment Judge Butler in a letter dated 26 September 2019 to exchange any documents relevant to the preliminary issue by 4pm on 30 September 2019.
4. This was a hearing to determine the preliminary issue of the status of the claimant. As the respondent denies that the claimant was an employee or a worker, if he is correct none of the claims could succeed.
5. In reaching my judgment I considered:
  - a. the 33 page bundle of documents presented on behalf of the claimant ("C1");
  - b. the evidence given in the claimant's short witness statement ("C2");
  - c. the document entitled "response to the witness statement" prepared by the respondent ("R1") and his oral evidence;
  - d. an additional document produced by the respondent ("R2");
  - e. the oral submissions of the respondent;
  - f. the written submissions of the claimant ("C3") (which were supplemented and clarified orally).
6. In "R1", which I understand the claimant did not see until the date of the hearing, there are several references to the respondent being able to produce documents to prove various things. As I have noted the parties were ordered to exchange any documents relevant to the preliminary issue by 30 September 2019. The respondent chose not to disclose any documents in compliance with that order and I must make my findings based on the documents and evidence which is before me.
7. The respondent was represented by his wife and the claimant was professionally represented. As document R1 does not really address many of the relevant issues, except to set out factually how the respondent disagrees with the claimant's evidence, and knowing that the respondent had obtained some legal advice on the morning of the hearing from ELiPs, I allowed the respondent to give some witness in chief through questions before cross examination.

### **The strike out application**

1. At the outset of the hearing, the respondent applied for the claim to be struck out because it was alleged that the claimant had failed to comply with orders made by the Employment Tribunal on 13 November 2018.
2. Those orders relate to the full merits hearing and not this hearing.
3. The claimant's representative produced evidence that documents had been posted to the respondent on several occasions, although the respondent claims not to have received these. However, the respondent admitted that he had not complied with the directions of 13 November 2018 or those made for this hearing on 26 September 2019 at all. In those circumstances there is no basis to strike out the claim and the application is dismissed.

### **The question of employment status**

#### **Findings of Fact**

4. It is common ground that the claimant undertook cleaning for the respondent.
5. There is a certain amount of confusion about when this relationship began. The claimant's claim form says she started in January 2011 and the schedule of loss refers to 10 January 2011. The response form says that the cleaning arrangement began in January 2011. The claimant's witness statement refers to May 2008 at paragraph 3. The tenancy agreement for 47 Mercer's Meadow is dated 1 November 2008. That appears to mean the start of the working relationship between the parties cannot be May 2008 as suggested. In her oral evidence Miss Hughes referred to starting in 2009. However, that evidence was confused and no satisfactory explanation was offered to me to explain the contradictions between the various dates offered by the claimant. I find it impossible to make a finding that the start of the working arrangement that I have to consider (however it is categorised) was earlier than January 2011.
6. Mrs. Coward, in her cross examination of the claimant and in her submissions, and the respondent in his evidence, were insistent that the arrangement with the claimant was "flexible". However, I accept the evidence of the claimant that she was required to do the cleaning. There was some flexibility over times, so if the claimant was doing something else for the respondent on one day, the cleaning might be done the next, but fundamentally it appears she did the same thing week in and week out for, on my findings, 7 years.
7. Before she started doing extra work for the respondent, the claimant had set days and times starting at 9 am on Mondays, Wednesdays, and Fridays and that any changes to the hours were because of other tasks the respondent had asked her to do. The respondent would telephone the claimant or she would phone him to confirm the cleaning had been done and to answer questions. Although there was dispute about the amount of extra activities that the claimant did, it was accepted that she did some.

8. Initially when the claimant began cleaning for the respondent her rent of £360 per month was reduced by £162.50 per month. She would pay the balance of £197.50. It is common ground that the arrangement changed in 2014 so that the claimant was living in the property rent free in return for cleaning services. The claimant says she began to do more additional work. The respondent says that until 2014 she was only cleaning 2 properties (47 Mercers Meadow and 97 Wheelwright Lane) and in 2014 she began to clean 36 Romsey Road and Duckham Court as well. What is material for the purposes of understanding if this was a contractual arrangement or something else as alleged by the respondent, is that when the rent was further reduced it is clear that the respondent expected the claimant to do more in return.
9. I was referred to a document which sets out a schedule for cleaning 4 properties: 47 Mercers Meadow, 97 Wheelwright Lane, 36 Romsey Road and Duckham Court (page 21 in C1). The claimant says this is what she was given to tell her what she must do. The respondent denies producing that document and says it is not a format that he would use. In the R1 he says that the claimant asked him for a cleaning schedule, but he does not recall providing one.
10. Whether that document was prepared by the claimant or the respondent, I find that document at page 21 in the bundle sets out the basic agreement between them as to what the claimant was to do.
11. The claimant says that the time set out in the document was insufficient for her to do the job. That may or may not be the case, but I do not think evidence on that assists me to answer this fundamental question of status.
12. It appears that the claimant to a certain extent set her own standards for her work. However, the respondent's evidence was that he was satisfied with the standard of cleaning and never had any serious complaints from tenants. This did not assist me.
13. The claimant did not provide her own equipment. She would either use materials for cleaning in the house which were left for that purpose by tenants or the respondent would pay her £25 to pay for things like bleach. In cross examination when the respondent was asked about this, he said that "*of course*" he would not expect the claimant to provide the materials.
14. The only breaks in the continuity of the cleaning were when the claimant went on holiday to Austria and on the rare occasions, she was unwell. The claimant's evidence that she agreed the dates of that holiday with the respondent were not disputed.
15. The claimant's evidence was that on a couple of occasions when she had been unable to do the cleaning her niece had done it for her. The claimant had asked the respondent's permission before sending her niece.
16. After legislation in relation to multi-occupancy housing changed, the respondent decided to move to renting to single occupancy houses. He evicted all of his tenants, including the claimant. On 8 August 2018 the claimant was

given a letter which says “*due to restructuring of our property business I am sorry to say that we will no longer require your services going forward from 10 August. If you require a reference in the future or I can be of any help, please let me know*” (C1, p25).

17. On 9 August 2018, the respondent gave the claimant a letter of reference (p26 in C1”) addressed “*to whom it may concern*”. That letter says that the reference is in respect of Ms. Carol Hughes “*who has worked as a property manager for our family run business for over 10 years*”. It sets out what her duties were and says “*I can’t recommend Carol highly enough to any company that she works for in the future and over time has become a good friend*”.
18. The respondent now says in R1 and in his oral evidence, that the letter on 8 August was only given to the claimant because she needed something to claim benefits, and the letter on 9 August was only provided as a favour to help her apply for another job and was not in any way accurate. I find that implausible. The respondent gave evidence that he is a small businessman and an experienced senior employee. A person who provides a reference owes a legal duty to the person who relies upon it. I find it extremely unlikely that a person of the respondent’s experience and standing would create such a document which was so fundamentally untrue.

## **Submissions**

19. Mrs. Coward made brief oral submissions. She argued that the arrangement with the claimant was simply one which had been arranged with a friend. The respondent regretted not being able to continue the arrangement with the claimant but had had no choice because of the new rules about multioccupancy lettings and “*it has all now backfired*”. In essence she maintained that the claimant was neither an employee nor a worker.
20. Ms Bachada had prepared written submissions (R3) which she clarified slightly in oral submissions. In summary she submits that if the test in the Ready Mixed Concrete case is applied to the facts in this case, the claimant will be found to be an employee.

## **The law**

### ***Was there a contract at all?***

21. The starting point in this matter is whether there is a “contract” of any nature at all. The existence of a legally binding contract is denied by the respondent. Mrs Coward, on his behalf, and the respondent repeated many times that this was a “flexible” arrangement, not a contractual one.
22. For a contract to exist, several conditions must be satisfied. There must be an agreement made between two people, the agreement must be made with the intention of creating legal relations and the agreement must be supported by consideration, that is something of benefit must pass from each of the parties to the other.

23. For a contract to be effective the parties must intend both the agreement itself and its terms to be legally binding. Clearly there is an advantage for the alleged employer to claim there was no such intention, so I have sought to approach this objectively, based on an analysis of all of the relevant circumstances.
24. In the case before me the respondent admits that the arrangements which he put in place with the claimant, which he denies amounts to a binding contract, was to enable her to remain in the room she was renting from him. In his words *"we agreed she would clean the communal areas of the house that she lived in and also the property around the corner"*, he also says *"it was always my intention of not seeing her being evicted due to not having enough money to cover the rent"*. It is clear that the respondent required the claimant to perform cleaning services for him in order that she was not evicted. I conclude from this that there was an intention on both parties to create a legally binding relationship.
25. I conclude that what the respondent says was a "flexible arrangement" was a contract of some description. I must therefore determine the nature of that contract. The question which I must determine is whether the arrangements between the claimant and the respondent amounts to a contract of employment between an employer and an employee, or some other type of contract, such as a contract between a business and an independent contractor.

### ***Employee or worker?***

The statutory definitions

26. The definition of an employee is to be found in section 230(1) of the Employment Rights Act 1996 ("ERA") which defines an employee as *"an individual who has entered 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 expressed) whether oral or in writing."* No further definition of a contract of service is provided although it does make clear that the fact there was no written contract, which the respondent sought to make much of here, does not prevent there being a contract of employment in law.
27. The definition of a "worker" is set out in section 230(3) of the ERA. A worker is *"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"*.

The approach of the courts

28. The courts and tribunals have developed a number of tests to help identify a contract of service and to distinguish between employees and the self-employed. Perhaps the most helpful test can still be found in the judgment of Mr Justice McKenna in Ready Mixed Concrete (South East) Ltd v The Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD in which he stated

*“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 it the master;*
- (iii) the other provisions of the contract are consistent with it being a contract of service.”*

29. In considering the third condition, there are number of provisions which might be inconsistent with a contract of service:

- a. What is the economic reality? This test suggests that we must look at factors such as the opportunities for profit or loss, the degree to which the worker was required to invest in the job in the way of provision of tools or equipment, the skill required for the allegedly independent work, and the permanency of the relationship. The question to be answered may be put in various ways, but there is a common theme: Was the worker really a small business rather than an employee?
- b. Is there mutuality of obligation? Does the individual have the option to turn down work? If the work is offered is the individual under an obligation to do it?
- c. Is the individual obliged to provide personal service?

In Pimlico Plumbers Ltd V Smith [2017] EWCA Civ 51 which is concerned with the statutory definition of worker which requires “personal service”, Etherton MR provided a summary of the case law in relation to substitution. He noted that an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. A conditional right to substitute another person may or may not be inconsistent with personal service depending on the conditionality. A right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional factors, be consistent with personal service and a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent, will be consistent with personal service.

- d. Is the individual integrated into the business? This is a test which is often applied. Lord Denning sets it out in this way “*under the contract of [employment] a man is employed as part of the business, whereas under a contract for services his work although done for the business is not integrated into it, but only an accessory to it*” (Stevenson Jordan and

Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101, CA). However, in a situation where there are no other alleged employees and no “organisation” to speak of in the ordinary sense this test is not a helpful one in this case.

### **Application to the facts**

30. Applying the first Ready Mixed Concrete condition, “did the worker agree to provide her own work and skill in return for remuneration?”, it is clear to me that the claimant agreed to clean the properties belonging to the respondent in return for being allowed to continue living in her double room rented from him. The respondent accepted her services and instead of paying her in cash, he provided her with accommodation. That is a form of remuneration and for the purposes of the issues at this initial stage, I find that I have to go no further than that.
31. Second, did the claimant agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee? The claimant was clear that she was told which properties to clean and on what days and how long she was expected to take on each task. She refers to the document at page 21 in C1 which I have found to be a reflection of what was agreed between the parties. The respondent does not seem to have exercised a great deal of control as to the standard of the work, but the evidence was he found that the work was carried out to a satisfactory standard so that is not surprising. The claimant’s evidence was that she was in contact with the respondent to confirm the cleaning had been done. The respondent told us that if the tenants had complaints about the cleaning, which he did not pay much attention to it seems, they were made to him. He did not suggest that complaints should have been directed to the claimant directly or that if there had been merit in those complaints, he would have been powerless to do anything. I find that the respondent did exercise sufficient control to make him the claimant’s “master” in an employment sense.
32. Thirdly I have looked for factors that are consistent or inconsistent with employment status:
- a. There was mutuality of obligation. There was an obligation on the claimant to clean the properties in return for being allowed to continue living in the double room she was renting. Although the respondent says that this was flexible arrangement, on his own evidence the arrangement was a very long-standing one. The only periods when it appears that the claimant had not carried out her cleaning duties were when she took holiday, or on the rare occasions she was unwell.
  - b. The claimant did not clean for anyone else. This was not her “business”. The claimant carried no financial risk and she was not required to provide her own materials or equipment. Indeed, when the respondent was asked about this, he said that “of course” he paid for cleaning materials.



- c. The claimant volunteered that on one or two occasions when she had not been able to clean the property her niece had done so on her behalf, but she had asked the respondent's permission first. I have considered this carefully. As was noted in the Ready Mixed Concrete case "*freedom to do a job either by one's own hands or another's is inconsistent with the contract of service, although a limited or occasional power of delegation may not be*".
- d. No argument was put forward by the respondent that there was a substantial right of substitution. The claimant's evidence was that while, on occasion, her niece had done the cleaning work, this had only been when she was unable to and that she had always had to ask the respondent's permission. Having weighed the caselaw carefully, especially that from the Pimlico Plumbers case set out above, I find that this is consistent with personal service.
33. In cross examination much was made of the fact that the claimant had never asked for a contract of employment, holiday pay, sought to assert that she was an employee or say that she was unhappy with the arrangement. The respondent also sought to make significance of the fact that the arrangement had been initiated because the claimant was in severe financial difficulty and the cleaning arranged enabled her to stay in the room she was renting. What this shows to me was that the claimant was in a vulnerable situation. This cleaning work kept a roof over her head for 7 years. It is not surprising that she did not complain or seek to "rock the boat" with the respondent. If she had done so she would have risked losing her home.
34. This argument does not help the respondent. The respondent had the upper hand in this relationship. I cannot accept that weight should be attached to the fact that the respondent chose not to set out in writing any detail about the nature of the "bargain" that had been made with the claimant. Even if it was "flexible" as asserted, something could have been set out in a letter or a short document. The respondent seeks to take advantage of his own dominant bargaining position and to argue that I should allow the consequences of that to be taken into account against the claimant. I consider that would be unfair. I have not attached any weight to the absence of complaint or written documents. At best I find the respondent simply did not turn his mind to the nature of the unwritten contract that had been put in place with the claimant, but that is not the claimant's fault.

## Conclusion

35. I find that the claimant was an employee of the respondent from 10 January 2011 to 8 August 2018. It follows that the claimant is therefore also a worker as she meets the first limb of the definition in s230(3) set out above.
36. It follows that the hearing listed for 25 and 26 November 2019 will go ahead to consider the claimant's claims in this case. At the conclusion of the hearing I held a short case management hearing in private to consider case management in this matter and have made a number of orders accordingly.

Employment Judge Cookson  
Date 16 October 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16 October 2019

FOR EMPLOYMENT TRIBUNALS