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EMPLOYMENT TRIBUNALS

Claimant: Mrs S Radecka

Respondents: 1) Craig Bush
2) Mr Radecki
a partnership trading as Atlantic Design & Print

Heard at: East London Hearing Centre

On: Thursday 4 July 2019

Before: Employment Judge Allen
Members: Mr G Tomey
Mr M Wood

Representation

Claimant: In Person
1st Respondent: In Person
2nd Respondent: In Person

JUDGMENT

The judgment of the Tribunal is that:-

- 1 The second Respondent was in partnership with the first Respondent trading as Atlantic Design & Print
- 2 The Claimant was not a worker for the purposes of the Employment Rights Act Part II
- 3 The Claimant was not an employee within the broad definition contained in Section 83 of the Equality Act 2010
- 4 The Tribunal therefore lacked jurisdiction to determine either the Unlawful Deduction from Wages Claim or the Discrimination Claim.

REASONS

1 This is a Claim brought by the Claimant, Sylvia Radecka for unpaid wages and race discrimination based on the Claimant's Polish nationality. The issues for determination were identified at the hearing as being as follows.

- 1.1 The nature of the business trading as Atlantic Design & Print specifically whether it is a trading name of the first Respondent Craig Bush alone or whether it is a trading name of the first Respondent and the second Respondent Mr Radecki (who is the Claimant's husband) trading as a partnership.
- 1.2 Whether the Claimant was a worker for the purposes of Part II of the Employment Rights Act 1996 and her claim for unlawful deduction of wages and/or whether the Claimant was an employee in the wider definition contained within the Equality Act 2010 for the purposes of her discrimination Claim.
- 1.3 If the Claimant has the requisite status, was the failure to pay her for her work done in the period between mid-September and end of September 2018 an unlawful deduction from wages.
- 1.4 If the Claimant suffered a detriment by not being paid wages that she was entitled to, did that detriment amount to less favourable treatment because of her Polish nationality.

2 There was no bundle of documents. However the Tribunal read a number of documents supplied by the Claimant and the first Respondent listed as follows:

- 2.1 17 June 2019 email from the first Respondent;
- 2.2 25 January 2019 partnership breakdown from the first Respondent;
- 2.3 Text exchange from summer and autumn 2018 between the first and second Respondents;
- 2.4 16 January 2019 letter to the first Respondent from an accountant;
- 2.5 A two whom it may concern letter from the accountant which is undated;
- 2.6 27 May 2019 letter from the first Respondent to the Claimant;
- 2.7 26 January 2019 partnership final accounts;
- 2.8 A 'to whom it may concern' letter from Graham Bush, the first Respondents father dated 30 April 2019;

- 2.9 A 'to whom it may concern' letter from Michelle Pontius dated 14 May 2019;
- 2.10 A Witness Statement in email form from Michael Leech dated 24 February 2019;
- 2.11 Some photographs of the Claimant working at home;
- 2.12 An email from the first Respondent to Musto dated 31 August 2018;
- 2.13 A communication dated 22 January 2019 from the second Respondent to the accountant;
- 2.14 A text message exchange between the Claimant and the first Respondent from December 2018;
- 2.15 A print out from the Atlantic Design & Print website which referred to Mr Bush (the first Respondent) but not to Mr Radecki (the second Respondent).

3 We heard oral evidence from the Claimant; the first Respondent; Mr Leech (for the first Respondent); and from the second Respondent. We read the documents from Mr Bush senior and Ms Pontious, but the Tribunal was not able to give more than limited weight to that evidence given their non-attendance at the Tribunal.

4 We heard submissions from the first Respondent and we gave the Claimant and the second Respondent the opportunity to make closing submissions but they indicated that they had nothing further to add to the evidence and the documentation which they had referred to.

5 The relevant legislation is contained in the Employment Rights Act Section 13 which states:

- “(1) An employer shall not make a deduction from wages of a worker employed by him unless –*
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract,*
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
- (2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised –*
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

(b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

(3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

6 Section 230 of the Employment Rights Act gives us a definition of a worker and at sub section 3 it states:

"In this Act, 'worker' . . . means an individual who has entered into or works under (or, where the employment 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 who status is not by virtue of the contract that of a client or customer or of any profession or business undertaking carried on by the individual

and any reference to a worker's contract shall be construed accordingly."

7 A core question in relation to whether or not the Claimant was a worker is whether there was a contractual relationship at all between her and Atlantic Design & Print or whether the work that she undertook was performed on a voluntary basis in order to assist with the new start up business (which the first Respondent says was a joint partnership between him and the Claimant's husband, the second Respondent).

8 Section 83 of the Equality Act 2010 defines employment for the purposes of the discrimination. It states at subsection (2)(a) that employment means "*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*". For the purposes of this case that definition is as broad as the definition of worker for the purposes of the Employment Rights Act.

9 Partnership is regulated by the 1890 Partnership Act, which defines partnership in section 1(1) as "the relation which subsists between persons carrying on a business in common with a view of profit".

10 The establishment or existence of a partnership requires no formalities, no documentation, no registration. It is a matter of fact as to whether a partnership exists. Section 2(3) of the 1890 Partnership Act states that:

"The receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business".

11 The Tribunal find the following relevant facts.

12 The first and second Respondents were friends and former work colleagues. They entered into discussions about forming a business and we have seen evidence of those discussions from mid to late 2018. In particular when a customer known to them, Musto, indicated that they would be a sizable amount of work available, they seized the opportunity. There were other smaller customers of this new business as well. It was the clear intention of both the first and second Respondents to form in time a limited company. They took advice in doing so and they met together with Brian Nutkins accountant on 27 October 2018.

13 It is the second Respondent's evidence and view that there was unacceptable delay by the first Respondent in setting up this limited company. That question is not one that is relevant for this Tribunal to determine.

14 However, the company had not been formed prior to the breakup of the business and was never formed.

15 It is not a matter for the Tribunal to allocate responsibility for the breakup of the business, merely to determine the status of the relationship between the first and second Respondent prior to that break up taking place.

16 The Tribunal saw final accounts prepared for the business and also bank statements for an account in the sole name of the first Respondent, Mr Bush. That bank account was used solely for the business. Those bank statements showed equal payments, described by Mr Bush as drawings, being taken by the first and second Respondents from the business.

17 The Tribunal took into account the fact that only Mr Bush's name was on the bank statements and also that only Mr Bush was referred to on the business website, albeit that Mr Bush said that this was because the second Respondent, Mr Radecki had not supplied the desired information for the website in time.

18 Mr Bush's evidence was that pending the establishment of a limited company, he and the second Respondent were in business as partners.

19 The second Respondent's evidence to the Tribunal was somewhat contradictory. We did take into account that the second Respondent was not a native English speaker albeit that he (and the Claimant) clearly understood the proceedings, but he did state clearly at the commencement of his oral evidence that he was not employed by the first Respondent and that the first Respondent was not employed by him. He also said that they were working together and that they had set up the business together albeit that he firmly expressed his dissatisfaction that a limited company had not been set up as soon as he thought that it should.

20 He also said in oral evidence that he expected that he would be a 50% owner when this limited company was set up (if it had been set up) and he accepted that he had been paid 50% of the profits which is also demonstrated by the documentary evidence which the Tribunal had seen.

21 He did however also state in oral evidence that he worked for the first Respondent, Mr Bush. The Tribunal have been told by the parties that he has brought his own Employment Tribunal Claim for unpaid wages against the first Respondent.

22 Taking all of these matters into account, the Tribunal considered that the status of the business relationship between the first and second Respondent in this relevant period was one of partnership. This was clearly a relationship which existed between the first and second Respondents, carrying on a business in common with a view to profit and a relationship in which those two individuals shared the net profit.

23 The second Respondent is therefore correctly joined to this case as a Party and the partnership is the status between him and the first Respondent for this period of time.

24 Moving on to the question of the Claimant's Claim for unpaid wages, Mr Bush (the first Respondent) argues that he and Mr Radecki (the second Respondent) both had assistance from friends and family in the initial period of setting up their business and this is why the Claimant assisted by working in particular on the Musto contract in the later half of September 2018.

25 The Claimant did not allege that the first Respondent directly told her that she would be paid for the work that she did but she gave clear evidence that she understood via the second Respondent that the first Respondent had told her that she would be paid.

26 There was a very clear conflict of evidence as to whether the first Respondent had told the second Respondent that the Claimant would be paid. The second Respondent was clear in his evidence that that was what he had heard from the first Respondent albeit that there had been no detailed discussion as to how many hours that she would do, exactly what the basis of her payment would be or any other detail.

27 The Claimant says that she did this work in late September roughly between 14-30 September 2018. However, she did not ask for any money until early December 2018, a number of days after the business had broken up following the departure of the second Respondent.

28 There need not be any written contract for worker status to be established but some form of contractual relationship is required – which can be established without a written document.

29 On balance, the Tribunal preferred the evidence of Mr Bush that he had not told the second Respondent that the Claimant would be paid. In general his evidence was clearer and more consistent than that of the second Respondent.

30 The Tribunal find on balance that the mutual understanding at the time was that the Claimant was helping out her husband's start up business in its delicate initial period in the same way as there was assistance of a different kind from the first Respondent's family and friends.

31 We did take into account Mr Bush's response to the Claimant's request for money on the 5 December 2018. It was not a response which immediately denied that there was

any responsibility to pay. His response was that his accountant was dealing with everything.

32 However, the Tribunal accepted Mr Bush's explanation that this was in the context of his shock and panic at the time following the second Respondent's departure from the business a matter of days beforehand, taking his equipment and in the context of the second Respondent's own demands from money that had been made at this time.

33 The Tribunal considered that the timing of the Claimant's demand for payment was significant in that she did not demand it after or shortly after the time that the work was done but over two months later. In addition, the Claimant was unable to articulate any specific times on which she did the work merely being able to tell us of a grand total of hours worked during that period.

34 There was no contract between the Claimant and the partnership. There was insufficient certainty in the arrangement for the Claimant to do work, but more importantly it was not the understanding of the parties at the outset that the Claimant was working for remuneration. She was helping out in the new business being set up (in part) by her husband.

35 It follows that the Claimant is not a worker for the purposes of the unlawful deduction from wages claim, nor is she an employee for the wider definition of employee within the Equality Act 2010.

36 Accordingly, her claim fails and that is because the Tribunal lacks jurisdiction when someone does not fall into those statutory categories.

37 The Tribunal however, did go on to determine whether, if they were wrong about that matter, there was sufficient evidence to have determined that the Claimant had made out a prima facie case for race discrimination.

38 Given that her assertions in that regard did not go further than stating that she has a protected characteristic and that she had suffered a detriment, the Tribunal firmly concluded that there would be insufficient evidence even on that basis to establish any discrimination claim on her part and had it had jurisdiction to determine the discrimination part of the claim, it would have rejected that claim.

39 It follows that all of the claims brought by the Claimant fail and are dismissed.

Employment Judge Allen

29 July 2019