



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE K ANDREWS  
sitting alone

**BETWEEN:**

Mr D Haviland

Claimant

and

The Andrew Lownie Literacy Agency Ltd

Respondent

**ON:** 10 & 11 February 2021 by video link

**Appearances:**

**For the Claimant:** Mr T Dracass, Counsel

**For the Respondent:** Mr J Lewis-Bale, Counsel

## **RESERVED JUDGMENT ON PRELIMINARY ISSUE**

The claimant was not an employee of the respondent and therefore his claims fail and are dismissed.

### **REASONS**

1. In this matter the claimant complains that he was unfairly dismissed and is owed significant wages. At a preliminary hearing in January 2020 Judge Hyde identified the following preliminary issues:

**A Employment Status:**

(i) At the relevant times, was the Claimant an 'employee' of the Respondent within the meaning of Section 230(1) of the Employment Rights Act 1996 ("ERA"), namely "an individual who has entered into or who works under (or where, the employment has ceased, worked under) a contract of employment"?

(ii) If not, the Claimant had no entitlement to:-

- (a) The national minimum wage (section 1 of the National Minimum Wage Act ("NMWA"));

- (b) A statutory minimum notice period pursuant to section 86 ERA; or
- (c) The right not to be unfairly dismissed provided by sections 94 and 98 the ERA.

B. National Minimum Wage – Jurisdiction

(iii) Is the Claimant's claim relating to the national minimum wage limited by section 23(4A) ERA which operates to limit unauthorised deductions from wages that can be recovered under section 13 ERA to those that took place in the two years preceding the date of the claim?

(iv) Did the alleged deductions form part of a series of deductions ending within three months of the claim form being presented (as extended for early conciliation) for the purposes of section 23(3)(a) ERA? If so, was the series broken at any time?

2. I agreed with the parties that the issue identified at B(iii) cannot properly be described as preliminary issue. It is agreed that section 23(4A) does indeed limit the claim as stated. The issue at B(iv) would have to be dealt with by evidence at a full hearing if the matter survived this hearing.

**Evidence & Submissions**

3. I heard oral evidence from the claimant. For the respondent I heard from Mr Lownie, Mrs Lownie and Mr Hamilton, the managing director of another literacy agency.
4. There was also an agreed bundle of documents before me. There had been an unacceptable level of non-cooperation between the parties with respect to the finalisation of documentation. I make no finding as to blame for this state of affairs but it undoubtedly led to increased costs for the parties as well as significant confusion in the days immediately preceding this hearing and at its outset. It also slowed down my reading of the documents both during the hearing and in my deliberations.
5. I received helpful oral submissions from both Counsel. After the hearing had concluded I received a joint bundle of authorities although the law in this area is uncontroversial.

**Relevant Law**

6. S.230(1) ERA defines an employee as:

'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. S.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'.

7. The well-established starting point to determining if a person works under a contract of service is found in *Ready Mixed Concrete (South East Limited) v Minister of Pensions and National Insurance* ([1968] 1 QB 497). There it was stated that such a contract exists if the following 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.'

8. This multiple test approach has been approved and commented on by numerous subsequent Courts including at the highest level leading to what is now regarded as an irreducible minimum for such a contract to exist. That minimum comprises mutuality of obligation, personal performance and control.
9. Mutuality of obligation is most commonly seen as an obligation on the employer to provide work and pay with a corresponding obligation on the employee to accept and perform that work.
10. Personal performance amounts to an agreement by the employee to do that work him or herself.
11. Control does not necessarily mean day-to-day exercise of control but that there is a sufficient contractual overarching right of control i.e. the right to direct the employee if required.
12. That irreducible minimum being present, however, is not definitive. It is necessary to then look at all the other relevant circumstances which must be consistent with the contract being one of service. Those relevant circumstances will vary from case to case but particular examples include financial risk, provision of benefits, integration and the intentions of the parties.

### **Findings of Fact**

13. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.
14. The respondent is a UK based literary agency. It was founded in 1988 and incorporated in 2003 by Mr Lownie. Mr and Mrs Lownie are the sole directors and shareholders of the respondent and, Mr Lownie says, also the only employees as shown on the respondent's business accounts. Copies of returns were before me for the period April 2017 to March 2020 showing both Mr and Mrs Lownie as employees each earning the corresponding amount of the personal tax allowance. The claimant disputed that Mrs Lownie was an employee of the respondent saying that she performed no role there. Having heard both Mr and Mrs Lownie's evidence I find that she was registered as an employee albeit probably more for tax purposes than reflecting the reality of her role. She has no job title nor contract of employment, is paid annually and performs limited tasks. She also has her own full-time job as a house historian. Nonetheless she was the other employee referred to in the company returns. The claimant was not.
15. The parties already had a relationship as the respondent represented the claimant as an author and ghost writer and had also paid him separately as a 'reader'. In May/June 2012 agreement was reached between them that

the claimant would become an agent for the respondent with responsibility for fiction titles, Mr Lownie continuing to have responsibility for non-fiction. There was no written contract between them recording the terms of their agreement although it is common ground that they agreed the claimant would be paid 10% commission on sales he achieved (a larger overall commission being charged to the author with the balance retained by the respondent). Throughout his engagement the claimant received only that commission; he did not receive any basic salary, holiday or sick pay or other benefits. Both Mr Lownie and Mr Hamilton gave evidence that commission only agency is a common arrangement in literary agenting but it is equally clear that agents may also be employees. Either way it is also clear that building up a list of authors would take some time, perhaps years.

16. Throughout his engagement as an agent the claimant worked from home, provided his own equipment and tools of the job (very limited though they were), had no fixed hours, was responsible for paying his own tax and claimed no expenses.
17. Mr Lownie also runs another business, Thistle Publishing Ltd. He invited the claimant to become an equal partner in Thistle in December 2012 which the claimant did becoming a director and shareholder alongside Mr Lownie. It is agreed between the parties that the claimant earned significantly more income over the relevant period from his role at Thistle than he did with the respondent.
18. The relationship between the claimant and Mr Lownie appears to have been successful for some time however by mid-2018 a conflict had arisen between them in respect of Thistle. Mr Lownie also raised with the claimant some complaints he had received from authors represented by the respondent which ultimately led to Mr Lownie terminating the claimant's contract with the respondent with effect from 31 August 2018. The circumstances of and reasons for both that termination and the claim being made are not matters within the scope of this Judgment and I make no finding on them. Commission payments continued to be paid to the claimant under his agency agreement beyond that termination through to October 2019.
19. The parties' business relationship in respect of Thistle continued, although clearly with some difficulty, and by the end of 2018 there were acrimonious exchanges between them as to who should buy whom out and at what price. In the meantime the claimant had submitted this claim to the Tribunal on 30 November 2018.
20. In order to determine the claimant's employment status, it is necessary – particularly in the absence of a written agreement and only a brief express oral agreement - to consider the reality of the day-to-day working arrangements between the parties and in doing so I make further specific findings of fact as set out in the conclusions section below. Both parties have pointed to examples of particular contemporaneous use of language as indicating support for their respective positions. I have not found that approach to be generally helpful. The loose use of terms such as

'employed', 'sacked', 'boss' or 'hired' is not necessarily indicative of the true nature of a relationship. One may well talk about employing or hiring and then sacking one's lawyer or estate agent but that clearly would not indicate an employment relationship.

### Conclusions

21. The starting point is to establish if the 'irreducible minimum' requirement of a contract of service was present between the parties.
22. It is clear that there was mutuality of obligation. Mr Lownie was obliged to refer his fiction authors' submissions to the claimant and to pay commission to him in respect of any successful sales. In return, the claimant was obliged to review those submissions and to adhere to certain standards in how he dealt with the authors. He was required to respond courteously and encouragingly to all submissions and to do so relatively promptly.
23. Equally clearly the claimant was obliged to perform his role personally. He had no discretion to pass on the consideration of submissions to a third party (as distinct from the freedom to pass on any rejected authors which he did have).
24. The claimant was not however subject to the necessary level of control by the respondent to indicate a contract of service. Although he did have the obligation to adhere to the standards described above with regard to mutuality of obligation, he also had a complete freedom of decision as to which submissions would be accepted. I accept that the claimant was required to provide updates in the early years of the relationship but this was a reasonable monitoring of his progress (and therefore likely income for the respondent) when he was relatively inexperienced and was not inconsistent with a contract for services.
25. I was referred to some exchanges between the parties which the claimant said amounted to an application of pressure or direction but I do not find that to be the case or certainly not sufficient to indicate control. Almost all of the examples given by the claimant were from 2013/14 and very often comprised Mr Lownie either requesting information or giving advice (sometimes in response to a specific request for the same from the claimant). None of the examples indicated control. The claimant himself in his evidence said that if Mr Lownie had wanted him to take on a particular author he probably would have done. That answer in itself indicated a lack of overall control.
26. That being the position the claimant does not meet the irreducible minimum required to show that he was an employee of the respondent notwithstanding that it is clear that he was very firmly integrated into the business of the respondent and did carry out functions beyond the narrow remit of a fiction agent. This can be at least explained in part however by the fact that he and Mr Lownie's relationship was not just that of agency but also as partners in Thistle.

27. I have also given very careful consideration to the terms of public announcements that were made by the respondent regarding the claimant's position. The language used in many of them is consistent with an employment contract. However, absent control they are not sufficient to establish that relationship at law and further, the very fact that they were in the nature of publicity means that they were aimed at raising the respondent's profile and securing business rather than accurately representing the state of their relationship.

28. In all the circumstances, as matter of law the claimant was not an employee of the respondent and therefore his claims must fail and are dismissed.

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Employment Judge K Andrews  
Date: **5 March 2021**

Judgment sent to the parties and entered in the Register on: **24 March 2021**

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for the Tribunal Office