

JERSEY / JUDGMENT

Ms A Coelho v Mystique Enterprises Limited

COURT

Employment Tribunal

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Summary – Identification of employee status

134/2014

Jersey

Employment Tribunal

INTERIM HEARING

7 January 2015

Before :

Deputy Chairman Mrs

Nicola Santos-Costa, Chairman

Panel Members Mrs Sue Armes and Mr John Noel

Between

Ms A Coelho

Applicant

And

Mystique

Enterprises Limited

Respondent

For the Applicant: Ms A Coelho represented

herself with the assistance of an interpreter

For the Respondent: Ms Katherine Burton, Director

Employment

(Jersey) Law 2003

Notification of the tribunal's decision

This award, (subject to the right of appeal to the Royal Court as set out in the law) is legally binding and is the final decision of the tribunal. Each party, if applicable, is

responsible for establishing their liabilities with regard to Social Security and Income Tax payments

THE TRIBUNAL'S JUDGMENT

INTERIM HEARING

JUDGMENT

1. The Applicant had complained to the Tribunal that she had been unfairly dismissed by the Respondent and had also not received notice pay at the termination of her employment or outstanding holiday pay. The Respondent maintained that the Applicant was not employed by it and thus was not entitled to lodge a complaint of unfair dismissal or claim notice pay or holiday pay. The Tribunal was convened in order to adjudicate upon the employment status of the Applicant as a preliminary issue to the administration of her claims. The Applicant had also made a claim for unpaid wages but the Tribunal was informed that this sum had in fact now been paid to the Applicant.
2. The Tribunal heard evidence from the Applicant and from Ms Burton for the Respondent. In addition the Tribunal heard evidence from LM on behalf of the Respondent. It was unfortunate that evidence from F, the previous owner of the Respondent's business, was not available for the Tribunal.
3. The Tribunal was given a bundle of documents by each party and general references to documents herein are to documents appearing in those bundles.
4. The Tribunal finds the following to be the relevant facts in this case: THE FACTS
5. The Respondent runs a hairdresser and barber's shop. Ms Burton explained that she used to work with F and bought the business from him when he decided to leave the island due to poor health. Both parties gave evidence that the Applicant had looked for work in the salon some time before she started, whilst F was still working there, and Ms Burton and F had described the job to the Applicant adding that the Applicant was 'responsible for her own tax and social security returns'. Ms Burton said that F stated this in Portuguese and English and she thought that the Applicant had understood what he meant. Unfortunately when Ms Burton became aware that the Applicant did not have 5 years' prior residency in the Island, she realised that she could not take her on to work in the business. In the meantime Ms Burton and the Applicant kept in touch. Ms Burton explained that it proved to be very difficult to recruit a hair stylist who could cut both ladies and gentlemen's hair and also provide a wet shave and eventually the Population Office said that she could take on the Applicant 'for 9 months' provided that the Applicant was self-employed. Ms Burton gave evidence that she explained this to the Applicant and thought that she understood the situation. She also told her that she was responsible for her own payments of tax and social security and, again, thought that the Applicant understood. Ms Burton said that the Applicant assured her that she had worked on that basis at another salon in the Island. Ms Burton informed the Tribunal that as this was her first business, 'it was too much responsibility' to employ someone at that stage. Both parties gave evidence that it was agreed that the Applicant would pay 25% of the payment that she received for her work to the salon as 'rent for her chair'. Ms Burton said that it was also agreed that the Applicant would pay a further 25% of her takings by way of flat payment for all the salon products and

equipment that she used in the course of her work.

6. The Applicant said that she signed a contract of employment shortly after starting work and that Ms Burton took this from her and she never saw it again. Ms Burton said that she tried to prepare a 'self-employed' contract for the Applicant's use but could not get any advice on its contents from JACS and accordingly did not present it to the Applicant.
7. Evidence was heard regarding the manner in which the Applicant worked and was paid. The Applicant said that she provided her own scissors, brushes and combs (although she was of the opinion that this was standard practice in Jersey) and worked from 10am to 5pm each day and sometimes had evening appointments too. The Applicant was sure that she was not permitted to work anywhere else at this time and, even if she did not have any appointments, she stayed in the salon as she needed to have the Respondent's permission to come in late or leave early. The Applicant said that she would put the monies that she was paid directly in the till and not make a separate note of the amount she had charged. Thereupon at the end of the week Ms Burton would 'pay her in cash for the work she had done that week' in a white envelope. The Applicant added that she did not receive a wage slip or any form of information of how her payment was calculated and, when she asked, she would be told 'that was her money'. The Applicant denied ever seeing the copies of the notes of her takings contained in the Bundles (see the reference to 'dockets' in paragraph 4 below) and also denied agreeing to pay 25% of her takings for the salon's products. The Applicant added that after a while she asked to change the basis of her pay to a fixed wage as that would be more 'certain' for her but Ms Burton did not commit to this method of paying her.
8. Ms Burton gave quite contrary evidence on behalf of the Respondent. Ms Burton was clear that the Applicant 'dictated' her own hours which were 'as and when' she wished. Ms Burton said this was reflected in the copies of the appointments book in the Bundle which clearly showed a line down through certain hours of a day if the Applicant (or any other worker) was not in the salon at that particular time. Ms Burton said that she now employed some members of staff and they are expected to be in work from 8.45 to 5pm each day. Ms Burton added that if the Applicant was not in the salon then she always 'checked with her first' to see if a new appointment was convenient for her before putting it into the appointments book for her and she would not have done this if the Applicant had been employed. With regard to the method of payment for the Applicant's work, Ms Burton informed the Tribunal that the Applicant had her own price list, which was not exhibited in the salon, and when the Applicant complained that she was not earning enough, Ms Burton suggested that she start by putting up those prices but she had no influence over them. Ms Burton added that the Applicant was expected to complete a 'docket' when she finished a client, noting on that docket the treatment or service she had provided and the price she had charged. These dockets were then saved and counted up at the end of the week and returned to the Applicant together with a receipt noting the total and the 50% of the monies taken by the Applicant. Ms Burton added that each stylist had a different coloured docket so they knew which 'docket book' was their own and in effect ran their own 'invoice book'. Ms Burton

informed the Tribunal that only permanent members of staff were given 'brown envelopes' containing their wages, which did not apply to the Applicant as she was 'something else' in the salon's system. Ms Burton was certain in her evidence that the Applicant had been told to deal with 'her ITIS and social security herself' and that she had understood what was meant by this instruction.

9. The Applicant was unclear about the amount of holiday she was entitled to take over the course of a year, thinking that it was 2 or 3 weeks. The Applicant did not take any holiday leave during her employment but was sure that, if she had wanted to take a holiday, she would have had to ask Ms Burton's permission first. Ms Burton in turn gave evidence that this was not the case and that the Applicant could have taken her holiday leave whenever she wished – all she had to do was inform Ms Burton that she would not be in work and mark herself 'out' of the appointments book. Ms Burton agreed that the Applicant had covered for her absence on sick leave whilst she worked at the salon but added that the Applicant did not need to do this. Ms Burton informed the Tribunal that the Applicant could have worked in another salon as well as the Respondent's if she had wished to do so and that Ms Burton was aware that the Applicant saw clients in her own home too sometimes and made no objection to this. It was acknowledged by the parties that the Applicant worked as a cleaner on a Monday and no objections were made about this by the employer.
10. Some evidence was heard about mistakes that the Applicant had made at work. Ms Burton agreed that she had dealt with these mistakes herself and did not confront the Applicant directly or terminate the arrangement because 'they were friends' and she knew that the Applicant needed to work to support her family. She added that she also knew that the arrangement 'was only for 9 months'.
11. Evidence was heard from LM, a friend of Ms Burton's who agreed to let the Applicant use her flat's car parking space when the Applicant was working. LM said that the Applicant would pop in for a chat after parking her car. LM gave evidence that the Applicant told her that she was 'self-employed' and LM had expressed surprise at this. LM added that the Applicant told her that she knew that she had to make her own social security contributions but she could not afford the payments; LM told her 'not to leave it' and afterwards would regularly check with the Applicant whether she had sorted out her position as she was concerned for her.
12. During September 2013 the Applicant said that she learned at that no social security payments had been made on her behalf by the Respondent. The Applicant gave evidence that she believed that the Respondent was deducting these sums from her wages and making payment on her behalf so she spoke to Ms Burton about the position. Shortly afterwards the Applicant's job was terminated by the Respondent. Ms Burton informed the Tribunal that the termination was because the Applicant consistently failed to supply her with information about her professional qualifications.

13. The Applicant complained to the Tribunal on the 17th October 2014, as recorded in the opening paragraph, and the Respondent denied that she had been an employee of its business. THE TRIBUNAL'S DECISION
14. Article 1A of the Employment (Jersey) Law 2003 ('the Law') defines an 'employee' as 'someone who is employed by an employer' and works for a person 'under a contract of service or apprenticeship'. In this case the question of apprenticeship does not arise. It must be noted that a contract for services is not a contract of employment and the distinction is discussed below.
15. Article 1A of the Law goes on to state that it is 'immaterial' if the contract of service is express or implied, and if it is express, such contract may be oral or in writing.
16. It should be noted that in this case the Respondent does not deny that a contract existed between the parties, only that it was not a contract of service (an employment contract). It is clear from the evidence that the contract (in whatever form) was not evidenced in writing and the Tribunal has looked at the evidence before it in order to determine the nature of that contractual arrangement. However, if the Tribunal finds that the contract is in fact a contract of service, by virtue of Article 1A of the Law (above), it does not matter that such contract was not in writing.
17. So, was the arrangement in this case potentially a contract of employment (therefore a contract of service) or a contract for services (and made with an independent/self-employed person)? Only the former is an employment contract giving rise to rights under the Law. Thus the Applicant's employment status is highly relevant.
18. The courts in England and Wales have toyed with various tests in order to try and decide whether an individual's employment status is employed or self-employed. These include the 'control test' (was the individual subject to the employer's control?), the 'integration test' (was the individual fully integrated into the employer's business?) and the economic reality test (was the individual in business on his own account?). However in actual fact there is no single factor which will determine an employee's status and over the years the employment law in England and Wales has developed the 'multiple' or 'mixed' test. The Tribunal has adopted this test in previous cases before it. The test involves the Tribunal looking at the actual terms of the employment relationship of the parties and determining the nature of the real arrangement between the parties evaluating all the evidence, taking into account that some factors are more important than others (and these will vary from case to case).
19. The established test of employment status was set down originally by Mr Justice McKenna in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* 1968 1 All ER 433, QBD, in which he set out these three questions for the Tribunal to consider:
 - (a) Did the worker agree to provide his or her own work and skill in return for remuneration?

- (b) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?
 - (c) Were the other provisions of the contract consistent with its being a contract of service?
20. It was frustrating that no evidence at all was heard or received from F as he could have supported the version of events that took place when the Applicant first spoke to F and Ms Burton about working in the salon as the evidence of the parties completely differed on this important point. It is also frustrating that there was no advertisement of this job and that Ms Burton did not write a simple letter to the Applicant when she started work setting out the terms on which they had agreed that the Applicant would work for the Respondent. In fact there is no unequivocal evidence in this entire case and the Tribunal have had to reach a decision based on the 'balance of probabilities' of the evidence, that is to say by assessing, where the evidence is contradicted, which evidence is more likely than not to be true.
21. It is clear from the evidence that Ms Burton and the Applicant were friends and the Tribunal has reminded itself that a friendly relationship often masks 'master and servant' qualities in a working relationship as steps may be taken by an employer in order not to jeopardise a friendship through assertive management. This was also (in the early stages) a very small business in which just the Applicant and Ms Burton worked and it can be very difficult for the Tribunal to identify specific roles in small businesses where the workers often combine in a common purpose just to get the job done. Accordingly the 'integration test' is of little value in this case.
22. No evidence was heard from other workers of the Respondent but Ms Burton referred to having taken on 'permanent employees' now and she was quite clear that they were treated differently to the Applicant and gave specific evidence, about the hours they worked for example, to show that she understood the difference in their status.
23. It was plain to see from the copies of the appointments book provided to the Tribunal that the Applicant could mark herself out as not available at any particular time/s if it suited her. In addition, from the sheer regularity of those absences, the Tribunal accepts Ms Burton's evidence that the Applicant did not have to seek her permission to be absent from work and was not expected to be in the salon from 9am to 5pm. The Tribunal also notes that the Applicant did not deny Ms Burton's evidence that she would telephone the Applicant to check if an appointment was convenient for her before putting it in the appointments book. The effect of all of this evidence is that it is plain that the Applicant chose the hours that she worked.

24. It is clear that Ms Burton did not confront the Applicant about the mistakes she made at work which supports the contention that she did not see herself as the Applicant's superior at work as no disciplinary processes were commenced. It is also clear that the Applicant did not formally lodge any grievance about changing the manner in which her pay was calculated. Accordingly it appears that the Applicant operated outside a formal employment relationship although this factor is muddled by the parties' friendship at that time.
25. It was accepted by the parties that the Applicant provided her own equipment for her role but this seems to be standard in the hairdressing profession and thus does not add any weight to the discussion. The Tribunal accepts that the Applicant paid the Respondent for the use of its resources whilst at work and this is not typical of an employment contract. The Applicant said that she objected to making this payment as time went on but she clearly accepted it when she started work for the Respondent and did not seek subsequently to alter it or indeed move to work in another salon.
26. The evidence regarding the Applicant's right to take holiday leave (and how she would have informed the Respondent of her plans) was entirely conflicting and unfortunately not tested during this employment relationship. Accordingly the Tribunal makes no finding on this factor.
27. The Tribunal has considered carefully the manner in which the Applicant was paid for her work by the Respondent as again the evidence was largely conflicting. Firstly, the Tribunal accepts the docket system described by Ms Burton as a means of the Applicant recording the services she has provided and the Respondent in turn accounting to its workers for the monies they earned. This is a common and easy way for hair salon workers to record the work they have done and there is no reason for the Respondent not to adopt it too. The Tribunal also accepts Ms Burton's evidence that she developed a system whereby the value of the dockets earned by a self-employed worker during the course of a week would be recorded in an invoice book, the top copy of which would be returned to the worker with the original dockets (for verification) and the cash earned that week. It was also clear that a different system was developed for employees of the business who were paid a wage for their services with no reference to dockets. This methodical way of working seemed entirely in character for Ms Burton and the Tribunal accepts her evidence with regard to the payment of wages and thus accepts that the Applicant was paid by reference to an invoice, completed dockets for that week and corresponding cash in an envelope. The Tribunal notes that the invoices issued make no reference to deductions for ITIS or social security. The Tribunal concludes that the whole picture of this type of payment arrangement is typical of someone who is working for their own account and not for a wage, as that would be paid irrespective of the services provided that week.
28. The Tribunal found LM to be a credible witness and accepts her evidence that the Applicant told her that she was self-employed and had not paid her social security contributions.

29. Ms Burton's evidence regarding the advice she had received from the Population Office was unclear. However it could be seen that Ms Burton believed that she had been given permission to rent out F's chair during his 9 month anticipated absence in order to cover that absence. The Tribunal accepts Ms Burton's evidence that she did not want to take on any employees at this early stage as it was 'too much responsibility for her' whilst she was finding her feet. These findings support Ms Burton's evidence that she engaged the Applicant as a self-employed temporary replacement for F and not as an employee of the business. THE TRIBUNAL'S CONCLUSION
30. It is apparent in this case that the Applicant had complete autonomy over the hours that she worked and the fees that she charged for her services. These factors coupled with the manner in which she was paid, which was based entirely on the services provided as opposed to hours spent in the salon, as well as the facts that she paid a rent for her chair in the Salon and a separate payment for the products and facilities that she used in the course of her work, all lead the Tribunal to conclude that the Applicant enjoyed the freedom of self-employed status. Accordingly the Tribunal finds that the Applicant was not an employee of the Respondent

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