Case Number: 3200107/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr K McDermott**

Respondent: **Vault & Vega Limited**

Heard at: **East London Hearing Centre**

On: **4 April 2017 and 11 April 2017**

Before: **Employment Judge Goodrich**

Representation

Claimant: Ms Ayesha Farah (Solicitor)

Respondent: Mr Brian Headley (Consultant)

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's breach of contract claim (wrongful dismissal) succeeds. The Respondent is order to pay the Claimant £692.31.

2. The Claimant's holiday pay claim succeeds. The Respondent is ordered to pay the Claimant £318.46.

3. The Claimant's unlawful deduction from wages claim succeeds. The Respondent is ordered to pay the Claimant £2,322.58.

4. The Respondent failed to provide the Claimant with a statement of employment particulars. The Respondent is ordered to pay the Claimant £1384.62.

REASONS

The Claim and the Issues

1 The background to this hearing is as follows.

2 The Claimant presented her Employment Tribunal claim on 27 January 2017.

3 Prior to issuing proceedings the Claimant had obtained, as required, an early conciliation certificate from ACAS covering the period November 2016 to 29 December 2016. He gave his dates of employment as being 1 October 2015 to 24 October 2016.

4 In Section 8.1 of the Claimant's claim form was ticked that he claimed notice pay, holiday pay, arrears of pay and other payments.

5 Accompanying the Claimant's claim form were detailed particulars of claim. In the summary of his claims, given at the end of the particulars of claim, his claims were described as being non payment of wages for the month of October 2016; non payment of holiday pay for the period 1st October 2015-24th October 2016; non payment of notice pay (one week); unpaid overtime as described in paragraph 6 of the particulars of claim.

6 The Claimant has been represented throughout these proceedings by Nucleus Legal Advice Centre.

7 The Respondent entered a response denying the Claimant's claims. The response was drafted by the Respondent's representatives at that time, Peninsula Business Services Limited. They were replaced by Avensure Limited, who were the Respondent's representatives at this hearing.

8 Initially, on receipt of the Claimant's claim form, the case was listed for a one hour hearing. After receipt of the ET3 response, which had a detailed response to the claim, the hearing was extended for three hours, although the Respondent's representative had written in to propose that at least a day would be needed.

9 At the outset of the hearing I sought to clarify with the parties what were the issues in the case. I made some observations as to the parties pleaded cases, particularly the ET3 response. After I had done so, the Respondent's representative, Mr Headley, made an application to amend the response.

10 I heard submissions as to the proposed amendment from the Respondent. The Respondent's application was opposed by the Claimant. I notified the parties that I would be considering the application in accordance with the Tribunal's overriding objective and the guidance given in the case of *Selkent v Moore (1996) IRLR 661 EAT*.

11 After giving further consideration to the claim form and response I notified the parties that both the claim form and the response had been drafted in ways that were defective. The Claimant's representative asked for leave for the Claimant's particulars of

claim to be amended.

12 So far as the Claimant was concerned, although in paragraphs 1 and 4 of her particulars of claim she referred to the Claimant being employed by the Respondent, there was no mention of the Claimant's back up position that if he was held not to be an employee of the Respondent, he was nonetheless a worker. Neither did the Respondent plead in the alternative that the Claimant was neither an employee nor a worker.

13 Both the Claimant and Respondent did, however, set out the factual basis on which they asserted respectively that the Claimant was or was not an employee of the Respondent. In these circumstances, having in mind the guidance given in the case of *Selkent v Moore [1996] IRLR 661 EAT,* I considered the requested amendments to be minor amendments. They were giving an alternative legal analysis for facts already pleaded to. Although the timing was late, being on the morning of the hearing, no prejudice would be caused by allowing the amendments. The parties witness statements, aimed at establishing that the Claimant was or was not an employee of the Respondent, were also relevant as to whether the Claimant was a worker of the Respondent.

14 I gave, therefore, leave for the Claimant to amend his claim form to add an additional sentence to paragraph 1 of the particulars of claim, as follows:

> "If, which is denied, the Claimant was not an employee of the Respondent, he was a worker of the Respondent".
>
> As regards to the response I allowed an amendment for the first sentence of the Respondent's particulars of response to have added to it the words "or that he was a worker of the Respondent within the meaning of Section 230(3)(b) Employment Rights Act 1996."

15 The second application to amend by the Respondent was a substantial one. Mr Headley, on behalf of the Respondent made an application to add the following sentence to paragraph 26 of the particulars of response namely:

> "It is denied that the Claimant is entitled to holiday pay at this time because he did not take his holidays in the first 12 months of his employment and he was not prevented from doing so through illness."

16 I heard submissions for and against this application to amend.

17 Having in mind the guidance in the *Selkent* case this appeared to me to be a substantial amendment as it made entirely new factual allegations. The ET3 response made no reference to this proposed amendment, the basis of the response being only that he was not an employee of the Respondent.

18 The timing of the application was late, coming only on the day of this hearing and in response to the observations I had made at the start of the hearing.

19 I did not consider there would be any significant prejudice to the Claimant if I were to allow the amendment. The Claimant's pleaded case set out the dates of his holiday

pay claim and in his witness statement he also gave evidence to the effect that he had not taken any holiday. If successful in his evidence and arguments on holiday pay then ultimately he would be successful in his claim. The Respondent, on the other hand, would have the prejudice of not being able to make what might otherwise be a successful response.

20 After discussing the issues with the parties Mr Headley made a further application to amend the response. This was a request to add an additional paragraph to the response as follows:

> "If the Tribunal were to find that the Claimant was an employee or worker of the Respondent, it is averred that the Claimant took holiday when he went to the places described at paragraph 17 above for which he was carrying out his own personal business arrangements rather than working for the Respondent."

21 This application was opposed by the Claimant.

22 I considered the Tribunal's overriding objective, together with the guidance in the *Selkent* case. Having done so I decided to refuse the application to amend because:

22.1 In the opening paragraph of the particulars of response there was an assertion that if, which was denied, the Tribunal found the Claimant worked for the Respondent under a contract of employment, the Respondent denied that the Claimant was owed any payment in respect of the contract. This might appear to imply that the Claimant had been paid sums (including holiday pay) under the contract of employment. In paragraph 27, however, as part of heading "conclusion" clarification was given that the Claimant was a self-employed contractor and therefore there was no entitlement to the payments sought.

22.2 It was, therefore, a substantial application to amend, not a minor matter.

22.3 Crucially, however, the application to amend was in direct contradiction to the Respondent's witness statement which had been signed and contained a statement of truth.

22.4 In paragraph 8 of Ms Donskaya's witness statement was the statement "I did not provide sick pay or holiday pay."

22.5 Either the Respondent is saying that there was some agreement between Ms Donskaya and the Claimant that his time on the trips abroad concerned was paid holiday or there was not. Ms Donskaya stated quite categorically that she did not pay the Claimant holiday pay.

22.6 In these circumstances it would be inappropriate to allow the amendment sought.

23 The issues for me to determine in the case were as follows.

Wrongful Dismissal

24 The Claimant contends that he was an employee of the Respondent and is entitled to one week's notice pay.

25 The Respondent disputes that the Claimant was an employee of the Respondent. Additionally it contends and the Claimant disputes that he committed an act of gross misconduct so as to be entitled to dismiss him without notice pay.

Holiday Pay

26 The parties dispute whether the Claimant was an employee or worker of the Respondent so as to be entitled to holiday pay.

27 If the Claimant was an employee or worker of the Respondent the Claimant contends that he is entitled to holiday pay from 1 October 2015 to 24 October 2016. Alternatively, he contends that his leave year was or should have been from 1 January 2016 and he is entitled to holiday pay from 1 January 2016 – 24 October 2016. Alternatively, if unsuccessful in both these aspects of his case, he would contend that he is entitled to holiday for the period from 1 – 24 October 2016.

28 If the Claimant is held to have been an employee or worker of the Respondent, the Respondent would contend that he failed to take any holidays during his employment or engagement with the Respondent and that he was not prevented from doing so. The Respondent would accept that he would be entitled to holiday pay for the period from 1 – 24 October 2016.

Arrears of Pay (overtime payment claim)

29 The Claimant contends that he was employee of the Respondent and is entitled to overtime payments for 32 days overtime at £131.46 per day, amounting to £4430.72 net.

30 The Respondent contends that the Claimant was not an employee of the Respondent. Further or alternatively the Respondent contends and the Claimant disputes that he was paid £3,000 per month irrespective of the hours he worked and is not entitled to overtime payments.

Unlawful Deduction from Wages/Breach of Contract

31 The Claimant contends that he was an employee or worker of the Respondent and entitled to be paid from 1 – 24 October 2016.

32 The Respondent contends that he was neither and therefore not entitled because the Tribunal has no jurisdiction to consider his claim.

33 If the Claimant does have jurisdiction it accepts that the Claimant is entitled to pay for 1 – 24 October 2016.

Statement of Employment Particulars

34 The parties dispute whether the Claimant was an employee of the Respondent so as for the Respondent to be required to issue him with a statement of employment particulars.

Other issues

35 The case was part heard, with Mr Roberts giving his evidence on the first day of the case and being released; and the case resuming for a day's hearing the following week.

36 On the second morning of the case, Mr Headley made an application on behalf of the Respondent for further documents to be admitted. Ms Farah, on behalf of the Claimant did not object to their inclusion, other than one document which she submitted was relevant to the evidence of Mr Roberts, who had given his evidence and been released. Mr Headley did not press his application in respect of the document objected to; and I permitted the inclusion of the remaining documents.

The Evidence

37 On behalf of the Claimant I heard evidence from Mr Marc Roberts, friend of the Claimant and a barrister; and the Claimant himself. In addition I was provided with signed witness statements from Ms Millie Cockton, a former employee of the Respondent; and Mr Alex Wysman, an individual who worked nearby. Neither of these witnesses attended to give evidence.

38 On behalf of the Respondent I heard evidence from Ms Elena Donskaya, director and owner of the Respondent.

39 In addition I considered the documents to which I was referred in bundles of document provided by the Claimant, the Respondent and the additional documents to which I have referred above from the Respondents.

Findings of Fact

40 I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to decide.

41 I do not seek to set out each detailed provided to me. Nor do I seek to make findings on every detail as to what occurred on which the parties versions of events differed. I have, however, considered all the evidence provided to me, it is fresh in my mind and I have borne it all in mind.

42 The Claimant, Mr Keven McDermott, has long experience of working in the fashion industry. He described himself as having worked in the industry for over 30 years.

43 The Respondent, Vault & Vega Limited, is a fashion store. The owner of the store is Ms Elena Donskaya.

44 The Respondent opened on or around 15 March 2015. Ms Donskaya had not run a retail store before this.

45 At around the time Vault & Vega opened its store the Claimant's employment in the job he had been working in, with a company called Layers, ended. He obtained a job for five months from the beginning of May until around the end of September 2015 working in a store on the Greek Island of Mykonos.

46 The Claimant and Ms Donskaya knew each other through meeting each other when the Claimant as an employee of Layers, the fashion store at which the Claimant had been working. Ms Donskaya was a client of Layers.

47 On or around 29 March 2015 the Claimant and Ms Donskaya met as he was passing the newly open store with his partner and child. They had a conversation which developed into a discussion about the Claimant working for the Respondent.

48 The Claimant followed up his conversation by writing an email to Ms Donskaya. The Claimant set out what he described as a proposal of what he would like to be considered in any negotiated contract. The main terms proposed by him were the following:

48.1 For the month of April 2015 I would be able to work with you and help in the store four/five days a week and would request a basic monthly salary of £3,000.

48.2 As we verbally discussed I would be able to accompany you on buying appointments and advice on future purchases.

48.3 Expenses during buying trips (I would provide you with receipts).

48.4 £100 per day (this is for, whilst I am abroad travel to show rooms in advance, covering phone calls and daily meals etc.)

48.5 3 – 4 star hotel/accommodation would need to be provided for the length of time in each country.

48.6 Also I would like to discuss at that time (after returning from working in Greece) the possibility of a mutually agreeable clothing allowance.

49 So far as I was made aware Ms Donskaya provided no written response to the Claimant's email, although both parties agree that he worked for the Respondent in April, before going to Mykonos; and that they had various telephone conversations whilst the Claimant was in Mykonos. Both parties agreed in their evidence that the terms set out in the Claimant's email were agreed by Ms Donskaya.

50 From Ms Donskaya perspective she had experience of the fashion industry but no experience, prior to opening her store, to running a retail business. She needed the Claimant's expertise both for making decisions as to what clothes to buy that would sell in her store and on line; and for the Claimant's contacts in order for certain well-known brands to agree to sell their clothes to the Respondent in order for the Respondent to sell them to customers.

51 Although there was extensive disagreement between the parties as to what took place whilst the Claimant worked for the Respondent there are also substantial areas of agreement between them.

52 In particular, the parties agree:

52.1 The Claimant worked for the Respondent from 1 October 2015 to 24 October 2016 when Ms Donskaya sent the Claimant by email a letter of dismissal (drafted, she said, by the accountant she engaged to provide services for her).

52.2 He was paid £3,000 per month by the Respondent which was described by both of them in various written communications as "salary" (Ms Donskaya's evidence when cross-examined on this, was that she did not understand the significance of this expression).

52.3 The sum of £3,000 per month was paid into the Claimant's bank account without deduction of tax and national insurance (the Claimant's evidence was that he assumed that she had deducted tax and national insurance).

52.4 The Claimant was provided with no wage slips.

52.5 The Claimant was never provided with any statement of terms and conditions of employment.

52.6 Some of those who worked for the Respondent were provided with statements of terms and conditions of employment. In particular I was shown a statement of terms and conditions of Ms Millie Cockton, whose job title was described as "back office/shop floor sales"; and Ms Velislav Petrov, whose job title was described as "social media and sales consultant".

52.7 The Claimant took no paid holidays. He gave no evidence, however, that he requested paid holidays. Although Ms Donskaya gave evidence that the Claimant received no sick pay, I was provided with no evidence that he had any days off for sickness absence, or that the matter was discussed by them.

52.8 The store opened from 11.00am – 7.00pm Tuesday – Saturday and 12 – 5.00pm on Sundays.

52.9 Although the store was closed on Mondays, from time to time those that

worked at the store came in to work on Mondays on occasions when fashion shoots took place on Mondays when the store was closed. Mr Donskaya accepted that the Claimant did come in at least on some of the occasions of the fashion shoots.

52.10 The Claimant advised Ms Donskaya on what brands to buy.

52.11 The Claimant used contacts of his in order for a company called "Far Fetch" to sell clothing of the Respondents on line, for which they charged a commission. Ms Donskaya also accepted that the Claimant's contacts enabled the Respondent to stock clothing of various brands that would otherwise not have sold to the Respondent.

52.12 Ms Donskaya accepted that the Claimant attended various trade fairs abroad for which the Respondent paid his fares and expenses as had been proposed in the Claimant's email on 29 March 2015. Ms Donskaya disputed whether his trips abroad other than to Paris fashion events were for the Respondent rather than on his own behalf.

52.13 The Claimant had an email address of the Respondent and business cards describing himself as a buyer for Eizenstein (the trading name of the Respondent, the Claimant giving himself various descriptions including "buying director").

52.14 The Claimant had the use of the Respondent's computers and laptops from the store, using the Respondent's password to gain access to the computer or laptop concerned.

52.15 The Claimant did not clock in and out.

53 The main areas of disagreement were between the parties included the following:

53.1 How often the Claimant worked in the store. The Claimant's evidence was that he worked there every day that it was open, apart from when he was on business trips to fashion events abroad on the Respondent's behalf. Ms Donskaya's evidence was that he was there when he wished to be and by no means everyday.

53.2 Whether the Claimant was in effect managing the store day-to-day, or whether Ms Clockton was the manager.

53.3 Whether the Claimant both advised and bought clothing from the Respondent (as was Ms Donskaya's evidence); or whether he advised Ms Donskaya and she made the final decision whether or not to accept his advice.

53.4 The degree of autonomy the Claimant had whilst working for the Respondent; in other words whether he worked primarily at the direction of Ms Donskaya, or be it with a degree of autonomy because of his areas

of expertise and areas in which Ms Donskaya lacked experience (as was the Claimant's evidence); or whether he acted as a freelance working as and when he chose (as was Ms Donskaya's evidence).

53.5 Whether, when working on fashion events abroad, other than in Paris, the Claimant was working for the Respondent or on his own behalf or customers or would be customers of his.

53.6 Whether the Claimant was using the Respondent as a base for carrying out work for his own clients; or whether he was working exclusively or almost exclusively for the Respondent.

53.7 Whether the Claimant was dismissed or services dispensed with for taking an item of clothing worth over £1,000, or for the reasons given by the Respondent in the letter of termination.

54 From reading and listening to all the evidence of the parties I found the Claimant's evidence and those of his witnesses to be, on the whole, more convincing than that of the Respondent. My reasons for so finding in respect of the areas in dispute recorded above include the following:

54.1 I found the Claimant to be, on the whole, a plausible and convincing witness and for there to have been more support in the contemporaneous documentation of his account of events than that of the Respondent.

54.2 I found Mr Roberts to be a convincing witness on the Claimant's behalf. Although Mr Roberts is, I understand, a friend of the Claimant's, he did not have to attend the Tribunal on the Claimant's behalf; and as a practising barrister, is no doubt, keenly aware of the need to give accurate and honest evidence. I found him to be an impressive witness.

54.3 Although I give little weight to the Claimant's witnesses who did not attend the Tribunal, they do at least provide some support for the Claimant's account of events.

54.4 Ms Donskaya's evidence gave the impression to me of being tailored to suit what she considered at this hearing to be to her advantage. I give a few of what could be more examples below.

54.5 The Respondent's application to amend the response as to the Claimant having received paid holiday was in flat contradiction to her witness statement and did not help her credibility.

54.6 The letter she wrote the Claimant dismissing him (from his service or services for the Respondent) was at sharp variance to the reasons she has subsequently given for dismissing him. Her explanation for the stark discrepancy was thoroughly unconvincing – that it was drafted by her accountant. If so, I do not believe that it would have been drafted other than on her instructions. The letter was in her name and although I was

not provided with a signed copy of the letter, have no reason to doubt that Ms Donskaya signed and sent the letter.

54.7 When written documentation of hers more generally was inconvenient she sought to excuse it on her lack of expertise and her being Russian. For example, she did this as to her description of the Claimant having a "salary" and describing the Claimant in her letter of dismissal as being "full-time". This was unconvincing.

54.8 When being cross-examined I had to remind Ms Donskaya on many occasions to answer the question put to her and her evidence appeared at times to be evasive.

54.9 More generally the Respondent's manner was aggressive. When Mr Roberts was giving his evidence she was making numerous comments to her representative, to an extent that Mr Roberts answered the Claimant's asides as well as Mr Headley's questions. The Claimant persisted in doing this on many occasions despite reminders from me, until I told her that unless she stopped doing so I would send her out of the Tribunal.

55 As to the Claimant's hours of work and degree of integration I accept Mr Roberts's evidence and make the following findings. Mr Roberts visited the Respondent's store on most weekends throughout the time the Claimant worked there, and frequently on weekdays. When doing so he observed the Claimant running the store in that he sold items of clothing to members of the public; he dealt with customers; he managed the staff (including Millie Clockton, who deferred to him, although Ms Dunskaya described her as the store manager, despite her type of employment to which I referred above being that of "back office/shop floor sales"); he set up and operated the online website to sales conducted in the shop; and he organised from time to time collections on items of clothing for website purchases.

56 I also find, as was the Claimant's evidence and supported to the extent Mr Roberts was able to observe, that he did in fact work on a daily basis at the store other than when on buying trips abroad.

57 Although the Claimant had a degree of autonomy, he worked under Ms Donskaya's direction. She made the ultimate decisions about what clothing should be bought and she gave him permission to attend various trade fairs he went to abroad that were not in Paris (such as in Milan, Dubai and Tbilisi).

58 The Claimant was working for the Respondent, not using it as a base for running a business on his own account. The Claimant was not registered for VAT and his previous history, working for Layers and in Mykonos was as an employee. I find that he was not conducting business on his own account to any significant extent, although he may have had the occasional enquiry from individuals with a view to working for them in future. I found Mr Roberts's evidence convincing that, when buying clothes through visiting the store, he bought them from the store, rather than entering into an arrangement to buy them personally from the Claimant.

59 I found the Claimant evidence as to his dismissal far more convincing than that of the Respondent. The Respondent's evidence was contradictory. When cross-examined she accepted that the Claimant had returned the item of clothing the following day, whereas previously she had stated that there was a gap in doing so. The Claimant's evidence that the item of clothing concerned form part of his clothing allowance for working for the Respondent is supported by the reference to clothing allowance in his initial email to which I have referred above (in paragraph 48). Ms Donskaya provided no convincing evidence as to why she made no reference to any misconduct on the Claimant's part when she dismissed him, instead writing a polite letter thanking him for his services.

60 As regards to overtime, I found the Claimant's evidence that there was any agreement that would be paid overtime less convincing than other areas of his evidence. He gave no evidence that there was any specific agreement that he should be paid overtime. In answer to questions from me he said that he informed Ms Donskaya (he did not remember when) that he had done a lot of overtime; and that Ms Donskaya said that this would be "sorted out". The Claimant's schedule of loss makes claims for overtime at fashion weeks in Paris, Georgia and on photo shoots from periods between January to October 2016. I found it unconvincing that he would not have pressed more strongly for payment of overtime during these times claimed if there had not been a more definite agreement to this effect.

61 Included in the documentation provided to me were text messages from Ms Donskaya in which she was asking the Claimant about how the shop was and whether to open the store and how much cash had come in. Texts such as these were another example of contradictions between Ms Donskaya's witness statement and contemporaneous documentation.

62 Although Ms Donskaya gave evidence that the Claimant was dismissed for gross misconduct her letter of dismissal, dated 24 October 2016 included the following points, making no reference to any misconduct on his part. Her letter included the following information:

62.1 Having considered the financial situation Vault & Vega Limited and the best way forward for the company I have regretfully decided that I can no longer use your services as a full-time consultant.

62.2 Because you are no an employee of the company I am not required to give you notice of termination of employment or payment in lieu. However, as a gesture of goodwill, I will pay you in full for October, which includes a payment in lieu of one week's notice.

62.3 Thank you for the contribution you have made to the establishment of Vault & Vega Limited as an operating business. I wish good fortune in the future.

63 Ms Donskaya did not, however, in fact pay the Claimant any pay for the month of October either covering the period from 1 – 24 October; or any pay in lieu of one week's notice.

The relevant law

Whether an individual is a worker or employee or neither

64 Section 230 of the Employment Rights Act 1996 ("ERA") contains the following provisions:

"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether it is express or implied and (if it 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;

(3) In this Act, "worker"…. Means 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."

65 In *Ready Mixed Concrete v Minister of Pensions and National Insurance (1968) 1 AER 433 QBD* the following questions were posed. Did the worker agree to provide his or her work and skill in return for remuneration? 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? Were the other provisions of the contract consistent with its being a contract of service?

66 The task of the Tribunal is to paint a picture from the accumulation of detail. It must consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying out business on his or her own account. Issues such as who bears the financial risk, whether income tax and national insurance deductions are made at source, the parties stated intentions, the degree of integration in the workforce, whether the worker is able to carry out work for others at the same time as working for a particular employer, who fixes the hours of work, whether or when the individual takes holiday are all examples of what may be relevant factors.

67 The issue of whether an individual is a worker involves all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services but with the boundary pushed further in the putative workers favour. The essence of the distinction between someone who is a worker and someone who is an

independent contractor is on the one hand of workers whose degree of dependence is essentially the same as that of employees and, on the other hand, contractors who have a sufficiently arm's length and independent position to be treated as being able to look after themselves in the relevant respects.

Wrongful dismissal

68 A breach of contract claim for wrongful dismissal is only available in Employment Tribunals for employees. Section 86 ERA lays down minimum periods of notice that must be given to terminate a contract of employment. Where, however, an employee commits a fundamental breach of contract, namely gross misconduct, an employer is not required to pay notice pay. What amounts to gross misconduct is a question of fact for the Tribunal.

Holiday pay

69 Regulation 13 of the Working Time Regulations provides that a leave year is such date during the calendar year as may be provided for in a relevant agreement; or, where there are no provisions of a relevant agreement, and the worker's employment began on or after 1 October 1998, on the date on which the employment begins and each subsequent anniversary of that date.

70 Regulation 13(9) provides that leave may only be taken in the leave year in respect of which it is due, but this is subject to qualifications. In the case of *NHS Leeds v Larner (2015) IRLR CA* it was held that the regulation should be interpreted as meaning that where the worker was unable or unwilling to take the leave because he was on sick leave and as a consequence did not exercise his right to annual leave, the leave would not be lost. In the case of *The Sash Window Workshop Ltd v King (2015) IRLR 349 EAT* it was held it was not only in cases of sick leave that the right would not be lost, but where the claimant was unable or unwilling because of reasons beyond his control, to take annual leave and as a consequence did not exercise his right to annual leave.

Overtime payments

71 Whether an individual is entitled to overtime payments is a question of the construction of the contract of employment, with the usual principles of contractual interpretation.

Closing submissions

72 Both parties' representatives gave oral submissions. Both made submissions as to why their client's version of events was to be preferred where there were disputes of fact.

73 On behalf of the Respondent, Mr Headley's closing submissions included the following:

73.1 He accepted that the Claimant had provided personal service, referring to the case of *Hospital Medical Group v Westwood (2013) ICR 415 CA* and

realised that I might find that the Claimant was a worker or employee.

73.2 If the Claimant was held to be a worker he accepted that the Claimant was owed holiday for October 2016, but not for the year from October 2015-2016, as the Claimant had lost his right to claim holiday for that year. The holiday year started from the anniversary of when the Claimant started working for the Respondent, namely 1 October 2015.

73.3 There was never any discussion of overtime, so no overtime was owed to the Claimant.

73.4 He accepted that the Claimant was entitled to pay for 1-24 October 2016.

73.5 If I did hold that the Claimant was an employee of the Respondent, he had committed gross misconduct by taking an item of clothing worth £1000 and could have been dismissed for gross misconduct.

74 On behalf of the Claimant, Ms Farah made the following submissions:

74.1 Referring to the case of *Pimlico Plumbers Ltd v Smith (2017) IRLR 323 CA* the Claimant was at the very least a worker of the Respondent.

74.2 He was an employee. She referred, for example, to the Claimant taking no financial risk on his own account, providing no tools, helping run the store on a day to day basis, supervising staff and that the Respondent had not shown that he was actively marketing his services. He was recruited to work for the business and introduced himself as a buyer for the business. He was paid a monthly salary of £3000 per month.

74.3 If the Claimant was classified as a worker, his leave year started when he started on 1 October 2015, but it had not been possible for him to take holiday and he was entitled to the holiday for the whole period he worked for the Respondent. If he was an employee the leave year should start at the same time as other employees of the Respondent.

74.4 The Claimant had not committed gross misconduct and was entitled to notice pay.

Conclusions

Whether the Claimant was an employee of the Respondent, or a worker, or neither

75 Although Mr Headley did not concede that the Claimant was a worker of the Respondent, he did not resist such a conclusion with any great force. The Claimant worked for the Respondent rather than on his own account. My findings of fact were that he was not carrying on his own business at the time he worked for the Respondent. He was not a client or customer of the Respondent. He worked exclusively for the Respondent from 1 October 2015 until he was dismissed by letter dated 24 October 2016.

76 I find and conclude, therefore, that the Claimant satisfies the test of being a worker set out in section 230(3) ERA.

77 The question of whether the Claimant was an employee of the Respondent is a more difficult question and there are factors that support and factors that do not support such a conclusion. Viewing all the evidence provided to me I have concluded, on balance, that the Claimant was an employee of the Respondent. The picture painted overall is, on the whole, that of an employee, including because:

77.1 The Claimant was paid a monthly salary of £3000 throughout the time he worked for the Respondent and "salary" was how the payment was described.

77.2 It is true that the Respondent did not pay deduct tax and national insurance payments at source, nor did she pay the Claimant holiday. These are factors against the Claimant being held to be an employee of the Respondent.

77.3 The Claimant provided a personal service to the Respondent- he could not provide a substitute.

77.4 My findings of fact show that the Claimant was not working for others- he was working exclusively or almost exclusively for the Respondent.

77.5 The Claimant was integrated into the workforce. Apart from when he was abroad on buying trips for the Respondent, he was working at the Respondent's shop on the days it was open; and occasionally when it was closed and he was helping with fashion shoots.

77.6 Whilst working at the shop the Claimant played a full part in the running of the shop. He served customers. He supervised staff. Mr Roberts believed the Claimant to be the store manager. He operated the computer.

77.7 To customers, such as Mr Roberts, the Claimant appeared to be running the shop. The Claimant had business cards.

77.8 Although the Claimant had some autonomy he worked under Ms Donskaya's direction. She made the ultimate decisions about what clothing should be bought and he needed her permission in order to attend trade fairs on behalf of the Respondent.

Wrongful dismissal claim

78 As I have concluded that the Claimant was an employee of the Respondent, he is entitled to bring a wrongful dismissal claim.

79 For the reasons set out in my findings of fact I have found that the Claimant did

not commit an act of gross misconduct. Indeed, in the letter of dismissal, Ms Donskaya agreed to pay the Claimant one week's pay in lieu of notice, although she did not in fact do so.

80 The Claimant's wrongful dismissal claim, therefore, succeeds.

Holiday pay claim

81 The first issue I have considered is when the Claimant's leave year started and ended.

82 In view of Regulation 13(3) Working Time Regulations this is a relatively straightforward issue to decide. There was no relevant agreement between the Claimant and the Respondent. The Claimant started employment with the Respondent on 1 October 2015. This was the date on which his leave year started and the subsequent leave year started on 1 October 2016.

83 I have, next, considered the question posed in the *Sash Windows* case (above), namely was the Claimant unable or unwilling to take annual leave and as a consequence did not exercise his right to annual leave?

84 I find and conclude that the Claimant was not unable or unwilling to take annual leave. He did not take it because he did not ask for it when setting out his proposed terms of contract in the email he wrote Ms Donskaya (referred to at paragraph 48 above). Mrs Donskaya agreed to those terms. At the point the Claimant was setting out his proposed terms he could have asked for paid leave and this might have been agreed, as were the other terms he proposed.

85 Neither, having started working for the Respondent, did the Claimant subsequently ask to be given paid holiday.

86 In view of Regulation 13(9) and the guidance given in the *Sash Windows case* (above) I have concluded that the Claimant is unable to claim for the leave year ending 30 September 2016. His claim for holiday pay for October 2016, however, succeeds.

Unlawful deductions from wages/breach of contract

87 Mr Headley accepted that, if I held that the Claimant was a worker for the Respondent, his claim for pay for the period 1-24 October 2014 would succeed. I have so held, so that this claim of the Claimant succeeds.

88 The parties agree that the Claimant was not provided with a statement of employment particulars. Pursuant to section 38 Employment Act 2002 the Claimant is entitled to either two or four weeks pay, unless I consider that section 38(5) applies.

89 In this case I consider that two weeks pay would be the appropriate award. The Respondent did not consider that the Claimant was an employee of the Respondent and is a small employer. The Claimant was not asking for a statement of terms and conditions

of employment. No submissions were made by the Respondent that it would be unjust or inequitable to make an award, nor do I consider that it would be. Although the Respondent did not consider the Claimant to be an employee, so as to require a statement of terms and conditions of employment, she did not make any written response to the Claimant's email where he set out what he proposed to be the terms on which he would work for the Respondent.

Calculation of award

90 Helpfully, the parties had agreed, to some extent, as to what the Claimant would be owed, if successful in her claims.

91 One point of disagreement between the parties was whether the £3000 per month salary received by the Claimant was to be treated as a gross, or net sum. As the evidence provided to me was that Ms Donskaya did not make deductions of tax and national insurance payments to the Claimant and paid him £3000 per month, as per the terms they agreed in the Claimant's initial email to Ms Donskaya, I have based my calculations on the basis of what Ms Donskaya paid the Claimant- i.e. £3000 per month.

92 For wrongful dismissal the Claimant is entitled to one week's notice pay, namely £692.31. Both parties agree that this is the correct proportion by dividing £36,000 per annum by 52 weeks.

93 For holiday pay the agreed figure by the parties, in view of my conclusion that the Claimant could only receive holiday pay for the current holiday year was £318.46.

94 The sum for payment for unpaid wages from 1-24 October 2016, for which the Claimant was not paid by the Respondent, was not agreed by the parties. Nor do I agree with their figures. My calculation of the appropriate figure is £2322.58.

95 As set out above, I have awarded two weeks pay for failure to provide a written statement of employment particulars. The dispute between the parties' representatives was as to whether this should be paid gross or net. As stated in paragraph 91 above, I base the figure on what the Claimant received from the Respondent each month. I award the Claimant two weeks pay at £692.31 per month, namely £1384.62.

96 So far as I was made aware, the Claimant did not pay Tribunal fees and has not made any claim for the Respondent to pay them. If that is incorrect the Respondent would also be ordered to pay the Claimant the fees he paid for bringing this claim.

Employment Judge Goodrich

30 May 2017