EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Roman**

Respondent: **A Plus Care Limited**

Heard at Ashford on: **14th and 15th August 2017**

Before: **Employment Judge Pritchard**

Representation
Claimant: **Mr M Foster, solicitor**
Respondent: **Mr T Kirk, counsel**

RESERVED JUDGMENT

The Claimant presented her claim outside the statutory time limit and the Tribunal has no jurisdiction to consider it.

REASONS

1. The Claimant claimed overtime pay and pay for accrued but untaken holiday pay outstanding at the termination of her employment. The Respondent resisted the claims.

2. The Tribunal heard evidence from the Claimant. The evidence contained in the witness statements of Claudiu-Adrian Bordei and Alina Elena Bordei was accepted by the Respondent. The Claimant also put in evidence the witness statements of Victoria Mihaela Vandici and Maria Pelegrimi; these witnesses did not attend the Tribunal and since their evidence could not be tested under cross examination, the Tribunal gave it little weight.

3. On the Respondent's behalf, the Tribunal heard evidence from Razvan Roman, sole director and majority shareholder of the Respondent company. The Respondent also placed in evidence the witness statement of Mihai Amariutei, an employee of the Respondent; this witness did not attend the Tribunal and since his evidence could not be tested under cross examination, the Tribunal gave it little weight.

4. The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral

submissions supported by written argument. Mr Kirk provided the Tribunal with a bundle of documents comprising extracts from Harvey and various authorities.

Issues

5. Mr Foster made it clear at the outset that the Claimant was not claiming unpaid overtime pay as a breach of contract under the Employment Tribunals Extension of Jurisdiction Order 1994 but as an unlawful deduction of wages under sections 13 and 23 of the Employment Rights Act 1996, albeit relying on a written contract of employment to support the Claimant's claim that such wages were properly payable. Similarly, the Claimant claimed outstanding holiday pay under the unlawful deductions provisions in reliance of the entitlement set out in the Working Time Regulations 1998.

6. The issues before the Tribunal can broadly be described as follows:

   6.1. Did the Claimant present her unlawful deduction of wages and holiday pay claim within the statutory time limit contained in section 23(2) of the Employment Rights Act 1996?

   6.2. What was the Claimant's employment status? The Claimant claimed to have been employed by the Respondent, alternatively a worker. The Respondent alleged that the Claimant had been a self-employed contractor.

   6.3. What is the amount of wages, if any, properly payable to Claimant?

Findings of fact

7. The Respondent company was established in 2014 as an agency which sources and provides care workers for care homes and hospitals. Razvan Roman is and was at material times the sole director and majority shareholder. At material times the Razvan Roman and the Claimant were husband and wife.

8. The Tribunal heard evidence that the Claimant has had a recent addiction to prescription drugs and a dependence on alcohol, that she has a past criminal conviction for the theft of the drug, and that she has been suspended from practice as a pharmacist by the General Pharmaceutical Council.

9. The Claimant assisted her husband in setting up the business. Until the end of January 2015 the Claimant worked as what she described as a "volunteer", although she also carried out some care work for which she invoiced the Respondent at an agreed hourly rate.

10. Mr Roman provided his wife with a contract of employment dated 24 March 2015 which she duly signed. This showed that the Claimant was employed by the Respondent as Office Manager/On Call Coordinator at the rate of £12.50 per hour. The contract states that the Claimant's employment had been continuous since 1 February 2015. The contract provides, among other things:

4 *Your working hours will be 40 hours per week… Overtime payments are made in line with the Company Remuneration Policy*

…

9 *You will be paid monthly on 24th or last Friday of the current month in arrears to a bank account of your choice*

11. Both the Claimant and Mr Roman usually left home together to travel to the office leaving their nanny and Mr Roman's mother to care for their child. They would often return home together at about 3.00 pm or 4.00 pm. The Claimant would take main responsibility for dealing with out of hours telephone calls which mainly concerned emergency requests for carers.

12. Although the Claimant had been provided with the contract of employment referred to above, she was not paid on a PAYE basis. It is, and was, Mr Roman's understanding that an individual can choose whether to be employed or self-employed. According to Mr Roman, his wife chose self-employment because she was in debt and payment on a gross basis would be to her benefit in the short term. The Claimant invoiced the Respondent at the end of each month. She did not invoice for the exact sum that would be due under the contract; she invoiced at the rate of £2,000 per month which is slightly less. The Claimant accounted for her own income tax by self-assessment.

13. Individuals who work for the Respondent and choose to be employed are paid under the PAYE scheme in the usual way.

14. In July 2015, Mr Roman agreed with the Claimant that she should invoice at the rate of £2,500 per month and she did so.

15. The Tribunal heard disputed evidence as to whether or not Mr Roman agreed with the Claimant sometime in the summer of 2015 that overtime would be payable at the rate set out in the contract of employment in accordance with the Company Remuneration Policy and would be paid at the end of the Respondent's financial year, namely 31 March 2016. In her witness statement, the Claimant said that she would not be paid the overtime:

    until the end of the financial year when it was clear what profits were available. He did not suggest the payment was subject to him making a particular profit

    Mr Roman denied having reached any such agreement with the Claimant and denied having seen the document said to be the Company Remuneration Policy. The document said by the Claimant to be the Respondent's Remuneration Policy shows that overtime hours worked would be paid at the following rates:

    Overtime hours worked between

    12 midnight on Sunday and 12 midnight Friday: normal rate plus 25%
    12 midnight Friday to 12 midnight Saturday: normal rate plus 50%
    12 midnight Saturday and 12 midnight Sunday: normal rate plus 100%

The Tribunal considers this aspect of the case in its conclusion below.

16. The Tribunal heard disputed evidence as to whether or not the Claimant resigned in writing in September 2015. There was no copy of any such document placed in evidence before the Tribunal. The Tribunal does not find it necessary to resolve this issue in order to reach a conclusion in this case.

17. At the end of September, the Claimant returned to Romania for three weeks, it was said to sort out some health problems. On 20 October 2015, the Claimant sent Mr Roman a message which, when translated, reads as follows:

    Give me a trial period of 6 months. No pills, no alcohol or other stuff and I will be totally honest with you. And I do not intend to fail

18. Upon the Claimant's return, Mr Roman told the Claimant that he wanted a divorce. At the about the same time, Mr Roman discovered that the Claimant was pregnant. The Claimant again worked for the Respondent, presenting her invoices in the usual way for November 2015 and December 2015 (not invoicing for the time she spent in Romania).

19. In early December 2015, Mr Roman left the marital home.

20. On 28 December 2015, Mr Roman sent a text message to the Claimant which, when translated, reads:

    Leave me alone. You have anything to say do it in the office. You can't work and I will employ someone else. If you want to damage APlus then I will fight. It's the only thing I'm left with. Don't start with sickness and health and safety rubbish just to annoy me

21. Mr Roman gave evidence that he had terminated the Claimant's engagement for a number of reasons which he found intolerable:

    21.1. That the Claimant had entered the Respondent's offices and removed training materials which Mr Roman thought would have enabled the Claimant to provide competing services;

    21.2. Two large envelopes had been received from Romania by Mr Roman containing quantities of the prescription drug to which it was said the Claimant was addicted;

    21.3. A similar envelope was subsequently received (the Tribunal was shown photographs of the envelopes and packets of the drugs);

    21.4. The Claimant's chaotic lifestyle and the inference that she was still addicted;

    21.5. The Claimant taking out a further loan (the Tribunal was referred to a completed but unsigned document from Nationwide dated 8 December 2015 which might indicate that the Claimant had applied for a loan in the sum of £20,000. The Claimant denied having made the application).

22. On 29 December 2016, the Claimant was admitted to hospital with a suspected miscarriage.

23. The Claimant did not return to work thereafter.

24. On 7 January 2016, the Claimant emailed Mr Roman stating that she had worked approximately 5,500 hours overtime for which she remained unpaid on the basis that she had been working 168 hours a week by being on call 24/7. She submitted an invoice for having worked: 3,840 hours between 1 February 2015 and 30 September 2015 at the rate of £12.50 per hour totalling £48,000; and 1,152 hours between 26 October 2016 and 31 December 2016 at £12.50 per hour totalling £14,400. The total invoice sum was £62,400. The Respondent did not pay the invoice sum.

25. The Claimant suffered a miscarriage and was issued with a certificate by her GP on 18 January 2016 stating that she was unfit to work from 2 January 2016 to 1 March 2016.

26. By text message on 7 January 2016 the Claimant stated:

    Dear Mr Roman, I have just sent my invoice for all the overtime worked for aplus. Please let me know what I need to do next. You pretend to be extremely fair and honest. I believe now you have the chance. I am also waiting the paper with the reason for my dismissal and the 4 weeks notice

27. By email dated 7 January 2016 the Claimant emailed Mr Roman in which she said, among other things:

    As per the same contract, the company is obliged to give me 'four weeks notice' before terminating my contract…

    …if you want to dismiss me because of professional reasons, I would like to receive the four weeks notice and the reason for my dismissal…

    Aplus company still owes me my overtime and also the payment for the days of annual leave (for the months worked as per contract)

28. The Claimant thereafter communicated her desire to return to work but in the event she did not do so. The Tribunal was referred to an email dated 23 January 2016, the translation of which was disputed. Mr Roman told the Tribunal in clear terms that the email from the Claimant told him:

    You fired me from the company…

    The Claimant told the Tribunal that the correct translation should be:

    You told me to leave…

    Mr Roman's position was that the Claimant no longer worked for the Respondent. His evidence before the Tribunal was that he believed he had

no requirement to terminate the Claimant's engagement because she was self-employed and that she was simply no longer required.

29. The Claimant sought legal advice and her solicitors wrote to the Respondent on 7 March 2016 asserting the Claimant's continued employment status under the contract of employment, demanding statutory sick pay, that arrangements be made by the end of the month for payment of overtime pay in the sum of £65,175 for the period 1 February 2015 to 30 December 2015, and payment of outstanding holiday pay. The Respondent did not reply to this letter.

30. By letter dated 22 July 2016, the Claimant informed the Respondent:

> *I am writing to confirm that in accordance of the advice received from my solicitors whose letter to you is attached. I intend to resign my position under the contract dated 1 February 2015 by reason of your conduct towards me as a result of which I claim constructive dismissal. My last day of employment will be the 31 July 2016*

31. The Claimant contacted ACAS on 7 June 2016 and again on 1 August 2016, early conciliation certificates being issued on 7 July 2016 and 1 August 2016 respectively. The Claimant presented her claim to the Tribunal on 3 August 2016.

Applicable law

32. By Section 23(2) of the Employment Rights Act 1996 a Tribunal shall not consider a complaint that an employer has made an unlawful deduction from wages unless it is presented to a Tribunal before the end of the period of 3 months beginning with the date of payment of the wages from which the deduction was made.

33. By section 23(3) where a complaint is brought in respect of a series of deductions the references to the deduction or payment in subsection (2) are to the last deduction or payment in the series.

34. By Section (23) where a Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

35. These time limits are extended in accordance with the early conciliation provisions contained in section 207B.

36. In Group 4 Nightspeed Ltd v Gilbert [1997] the Employment Appeal Tribunal held that it is only when an employer fails to pay a sum due by way of remuneration at the appropriate time, ie at the contractual time for payment, that a claim for unlawful deduction can arise. Time for claiming might not fall from the date of termination; see: Arora v Rockwell Automation Ltd UKEAT/0097/06.

37. A dismissal may be by word or deed and the words or deeds in question may not always be entirely unambiguous; the test is how they would be understood by the objective observer. Further, as the case law shows, an

employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee (Klirklees), by the issuing of a P45 (Kelly) or by the ending of the employee's present job and the offer of a new position (Hogg). The question is: given the facts found by the employment tribunal, given what was known to the employee and to the relevant circumstances of the case, what is the conclusion to be drawn. Has the employer communicated its unequivocal intention to terminate the contract? See Sandle v Adecco UK Ltd [2016] IRLR 941.

Conclusion and further findings of fact

38. Unless the Claimant has presented her claim within the statutory time limit, the Tribunal has no jurisdiction to consider it. The Tribunal therefore considers this issue in advance of any other.

39. Given the overlap between the time limit issue and the other issues in the case, the Tribunal shall assume for the purposes of this consideration only, and without reaching any conclusion, that the Claimant was employed under the contract of employment as she alleges.

40. The Tribunal finds on the balance of probabilities that there was no binding agreement reached that overtime would be paid at the end of the financial year such that it would vary the contract of employment as to overtime payments. The reasons for this finding are as follows.

40.1. Mr Roman was a wholly credible witness. It was notable that he did not seek to obfuscate during cross examination when he answered questions directly and clearly.

40.2. In contrast, the Claimant's evidence was vague in parts; for example, she was unable to state with any clarity when the alleged agreement was reached that she would be paid overtime at the end of the financial year or when there was a discussion about it.

40.3. The Tribunal was provided with no clear evidence as to how the Claimant obtained what she maintained was the Company Remuneration Policy save that it was on an email from the company (the Tribunal was told that it was printed on 6 February 2016 which was after the alleged agreement had been reached). The Tribunal was provided with no credible explanation as how Claimant calculated her hours of overtime for which she invoiced; the invoice itself does not suggest that it was prepared by reference to the purported Company Remuneration Policy since the hourly rate charged was the basic rate only. A lack of clarity ran through the Claimant's evidence.

40.4. In any event, the document before the Tribunal is not headed "Company Remuneration Policy".

40.5. The Tribunal thinks it highly unlikely that Mr Roman would have reached agreement with his wife to pay her overtime at the end of the financial year given the sums in question. The overtime element would be nearly three times the Claimant's basic wage and provide an overall income in excess of £100,000. The Tribunal heard evidence to the

effect that such a payment would negate the Respondent's annual profit. Such an agreement would have made no commercial sense.

40.6. In the Tribunal's view, had such an agreement been reached, with the potential for such sums of money to be paid, it is more likely than not that it would have been reduced to writing which it was not.

41. The Tribunal prefers Mr Roman's evidence that the wages paid to the Claimant were intended to include her dealing with out of hours telephone calls and that there was no Company Remuneration Policy despite reference to it in the template contract of employment he had obtained from the internet. It is clear that, at least at the time, Mr Roman was not a sophisticated employer; this view is reinforced by Mr Roman's belief that an individual can simply choose whether to be employed or act as a self-employed contractor and that the employer should simply comply with the individual's choice.

42. In any event, even if there had been a conversation, at some unspecified time, during which Mr Roman told his wife that if profits allowed at the end of the financial year, there might be some overtime pay for her, in the circumstances of this case it would not, in the Tribunal's view, constitute a binding legal agreement in the Claimant's favour. The Claimants evidence was that it would be "family money, not my money" and any such arrangement would be appear to be no more than a device to keep profits within the family. Thus, not only because the Claimant would not be the sole beneficiary of any such arrangement, but because it would fall squarely in the domestic arena, it would not be an agreement intended to create legal relations. Further, the Claimant's evidence strongly suggested that the alleged promise to pay overtime would be conditional upon profits and for that reason it is likely that any agreement would fail for lack of certainty.

43. Still proceeding on the assumption that the Claimant was employed under a contract of employment, but without reaching any conclusion as to the Claimant's true employment status, the Tribunal concludes that Mr Roman's communication with the Claimant was sufficiently unambiguous to end the employment relationship, regardless of Mr Roman's belief as to the Claimant's employment status being that of a self-employed contractor. In the Tribunal's view, an objective observer would understand the following factors to lead to the firm conclusion that Mr Roman unequivocally had terminated the Claimant's employment had she been an employee:

43.1. The content of Mr Romans' text message of 28 December 2015;

43.2. The Claimant's text message to Mr Roman on 7 January 2016 in which she asks for the reasons for her dismissal together with her email of the same date;

43.3. The content of the Claimant's email to Mr Roman on 23 January 2016;

43.4. The fact that Claimant did not return to work after the end of December 2015 and she was no longer paid wages.

44. The fact that the Claimant thereafter asserted that she remained employed ,and that her employment only ended upon her resignation in July 2016, does

not persuade the Tribunal that an objective observer would take a different view of prior communications.

45. In the absence of an agreement that overtime would be paid at the end of the financial year, any overtime payable under the contract of employment would fall due for payment under the contract of employment, as stated, on the 24th or last Friday of each month. The claim for overtime pay in this case, properly categorised, would comprise a series of deductions, the last of which would therefore fall on 24 December 2016 or the last Friday of December 2016 (30 December 2016), the Claimant's assumed employment ending on 31 December 2015.

46. Mr Foster conceded that if the Tribunal were to conclude that the Claimant's claim was presented outside the primary time limit, there could be no argument that it would not have been reasonably practicable for it to have been presented in time. This was a sensible concession, not least because the Claimant gave no evidence to support such an argument.

47. The Tribunal concludes that the Claimant presented her claim outside the statutory time limit and the Tribunal has no jurisdiction to consider it.

48. The remaining issues listed above, and those set out in paragraph 1 of Mr Kirk's skeleton argument, as adopted by Mr Foster during submissions, do not fall for consideration.

Employment Judge Pritchard
Date: 16 August 2017