EMPLOYMENT TRIBUNALS

Claimant: Ms. T. Madeisa

Respondent: Slimmeria Limited

Heard at: **London South, Croydon**
On: **31 May – 1 June 2018**

Before: Employment Judge Sage sitting alone

Claimant: Mr. Khanna Consultant

Respondent: Mr. Fitzpartick of Counsel

REASONS

Requested by the Claimant.

1. By a claim form presented on the 22 September 2017 the Claimant claimed compensation for failure to allow rest breaks under the Working Time Regulations, failure to pay holiday pay, failure to pay National Minimum Wage (based on a 60 hour week) and unauthorised deduction from wages. If the Claimant was found to be an employee she claimed statutory notice and failure to provide written particulars. The Claimant's length of service was 20 February 2017 to 23 July 2017, she worked as an Administrative Assistant.

2. The Respondent defended the claim denying that the Claimant was or worker or an employee. They claimed that the Claimant was self employed and submitted invoices. The Respondent denied that the Claimant was paid under the National Minimum Wage (if it found to be an employee or worker). The Respondent counterclaimed for overpaid sums paid to the claimant of £1758.67.

The Issues

3. The issues were identified in the preliminary hearing before Judge Kurrein on the 10 January 2018 as:

a. What was the Claimant's employment status?
b. What hours did she work?
c. What pay was she entitled to?
d. Has she been underpaid? If so by how much?
e. Has she been overpaid, if so by how much?
f. Has she received holiday pay she is entitled to? If not what is she owed?
g. Was she entitled to notice pay? If so how much was she entitled to?

Preliminary Issues

4. At the start of the hearing it was apparent that the bundle had not been agreed, the Claimant and Respondent bringing separate bundles to the hearing.
5. At the commencement of the hearing it was conceded by the Respondent that the Claimant was a worker.

Witnesses

The Claimant
Ms. M McManus Consultant
Ms. G Grainger Sole Director and Shareholder.

Findings of fact

6. The respondent is a small business run by the sole Director and Shareholder Ms Grainger who gave evidence to the Tribunal. The business was described by Ms Grainger as a 'Well Being Centre' offering retreats to those who wished to lose weight, the retreat offered classes and nutrition advice and put on activities such as walking and exercise regimes. The business had retreats in Crowhurst and the respondent recently opened a second retreat in Devon. The Claimant was employed to work in the Devon retreat.

7. The evidence in relation to the size and structure of the business was provided by the Respondent; there were five employees on PAYE. Others working at the retreat (paragraph 15 of Ms Grainger's stament) included class teachers and coordinators, who were engaged either on a sessional basis or paid an hourly rate.

8. Ms. McManus, who gave evidence to the Tribunal stated that she was paid on an hourly rate for classes and she also worked in the office usually doing 3 hours for which she is paid £10 per hour.

9. Ms Grainger told the Tribunal that the facilities were not open all year round ~~and in~~. In 2017 they were only ~~occupied~~open for 40 weeks of the year. The number of guests varied from as few as 3 to a maximum of 10. This was not a large commercial concern.

10. There was almost no consensus between the Claimant and the Respondent as to the terms of the agreement. It was also unfortunate that that there were no documents that recorded the terms of the agreement between the parties, the duties assigned or the pay that had been agreed. There was also no agreement on documents (hence the need for the parties to produce two very different bundles). Each party relied upon texts, diary entries and the odd email to evidence the nature and the terms of the agreement. This made it extraordinarily difficult in the light of the very different evidence given by the Claimant and Respondent to determine the terms of the agreement between the parties. There was largely agreement however that either on the 20 or the 21 February 2017 the Claimant started working for the Respondent.

The Claimant's role

11. The Claimant alleged in her statement that she was employed as a PA and Administrative Assistant to Ms Grainger and this included "assisting in the day to day running of the retreat" and to replace Ms Grainger when she was not there (paragraph 3 and 6). This evidence was disputed in the strongest terms by Ms Grainger who said that the Claimant's role was to "oversee the running of the retreat, generally to answer the phone, offer forms to the guests on their arrival informing them of treatments". Ms Grainer denied emphatically that the Claimant was hired to deputise for her or to carry out any of her duties in her absence. Ms Grainger stated that the Claimant was employed as a Co-ordinator and she was being trained up to work at the new Spa in Devon.

12. It was the Claimant's evidence that she had been employed to "work alongside Shell McManus, Ellie McManus…". This evidence was not found to be credible. The Claimant stated that she was shadowing Ellie but there was no evidence that the Claimant was expecting to take over Ellie's additional duties in respect of responsibility for the Company credit card. There was also no evidence to suggest that the Claimant would be taking responsibility for the payment of wages, this being the responsibility of Ms M McManus. The evidence strongly suggested that the Claimant was not working alongside these named people but was being trained by them in carrying out certain limited tasks.

13. I find as a fact that the Claimant was therefore contracted to work, not as a PA and Assistant to Ms. Grainger but as an Administrative Assistant and coordinator. I conclude this from the evidence before me and this view was further corroborated by a copy of an invoice produced by the Claimant that appeared in the Respondent's bundle at page 6-7 where the Claimant adopted this description to describe the work that was carried out. This description of the role was also consistent with the description of the role used in the ET1. I conclude that on the balance of probabilities, this was an accurate description of the Claimant's role, that of Administrative Assistant and Coordinator.

The Terms of the Agreement

14. It was difficult to discerne with any degree of accuracy the terms of the agreement between the parties. Having found as a fact that the Claimant was

employed as an Administrative Assistant/ Coordinator it seemed to be agreed that the Claimant was provided with free board and lodgings either at Ms Grainger's flat or at the retreat. The Claimant also seems to have been provided with free meals. The Claimant invoiced and was paid £1000 per month; I have already made reference to the one invoice (see above at paragraph 13) that I was able to locate in the two bundles before me. The Claimant's evidence of the payments received were at paragraph 33 of her statement. She was paid by cheque each four week period.

15. Ms Grainger's evidence as to the terms of the agreement at paragraph 18 of her statement was that "I would pay £8 per hour for what she did so that she would have some cash". She stated that the money paid was dependent upon the hours she worked. Ms Grainer told the Tribunal that the Claimant could "expect to receive about £1000 per month". Ms Grainger denied that the Claimant had a contract and denied that there any obligation to provide her with work. The Respondent conceded at the start of the hearing that the Claimant was a worker and this concession appeared to be consistent with the evidence that the Claimant was required to perform the work personally when it was provided and there was no suggestion that she was in business on her own account

16. Having looked throughout both bundles of documents I was unable to locate any reference to the sum of £8 per hour being agreed or used to calculate the monies due to the Claimant for work carried out. Although the Respondent made reference to the diary and the need to record the hours worked, there appeared to be no consistent evidence to suggest that the Claimant recorded her hours on an accurate or consistent basis. Sometimes a number of hours was entered beside the Claimant's name and sometimes only a name appeared in the diary (for example on the dates of 12 and 14 May, 10 May, 5 May, 29-30 March). There was also no evidence that the number of hours worked were checked before the Claimant's pay was calculated.

17. Although I was taken to a document on page 490 which was a minute of a meeting on the 8 May 2017 where the staff and contractors were informed that they had to accurately record their hours in the diary as it stated "no marked hours/no pay"; it was the Claimant's evidence that this did not apply to her as she was on a different agreement. There was credible evidence that suggested that the Claimant was paid the same amount every month irrespective of the number of hours worked.

18. The Claimant also relied upon the exchange of text messages at page 486 dated the 20 July 2017 where she was sent a text by Ms McManus asking if she was getting the "usual £1000" and the Claimant replied with the words "usual please". This exchange appeared to be corroborate the Claimant's evidence that she would receive the same amount every month irrespective of the hours worked. The tribunal concluded that had the Claimant been paid £8 per hour as suggested by the Respondent, there would have been evidence in the bundle of the hours being provided in order to calculate the sums due. The Respondent has been unable to provide any evidence that they asked for the number of hours worked or that they were checked before the pay was

calculated. As there was no evidence of such an enquiry, the Tribunal concludes on the balance of probabilities that the Claimant's evidence is preferred on this point that she was paid a sum of £1,000, irrespective of the number of hours worked.

The Work carried out by the Claimant.

19. The only contemporaneous evidence of the work carried out by the Claimant before the Tribunal was in the form of the Respondent's work diary. This diary recorded that during the first few weeks of the Claimant's engagement she was marked as undergoing training in the Crowhurst retreat (on the 22-24 Feb, 2-3, 9-10, 15, 17 March). These entries reflected that the Claimant was being trained on those days (although exactly the nature and duration of the training given was not entirely clear).

20. The Claimant also included in her statement that she dealt with mole hills at the retreat but conceded in cross examination that this was something she only occasionally did. It was the Respondent's evidence that this was dealt with by the gardeners. The Tribunal conclude that this was an exaggeration in the Claimant's evidence.

21. The Claimant stated that she "was responsible for designing a logo to be used on staff uniforms..". This evidence was found to be unreliable for a number of reasons; firstly the Respondent's evidence was that they held a competition with the staff to design a logo; although some designs were submitted no design was chosen. There was no evidence to suggest that this was a task assigned to the Claimant by the Respondent as part of her duties, it was a competition open to all those working at the retreat, including employees and sessional self employed contractors. The Claimant's evidence was felt to be unreliable and the Respondent's evidence is preferred. The Tribunal concluded that had the Respondent assigned the Claimant the task of designing a logo as part of her duties, there would have been some evidence of this matter being referred to in emails or text messages. In the absence of any corroborative evidence on this matter the Tribunal conclude that this was not a task assigned to or undertaken by the Claimant as part of her duties.

22. The Claimant also stated that her duties included filming promotional videos to populate Facebook and Twitter pages on social media. It was seen in the bundle that the Respondent hired a PR consultant (Debbie) who undertook this task; the only task undertaken by the Claimant was to take pictures (which was a task undertaken by all coordinators from time to time). The Claimant's evidence was again felt to be exaggerated and unreliable. If any tasks were carried out in relation to providing pictures for the PR consultant, it would have been occasional and would only have taken a few minutes. There was no evidence to suggest that the Claimant provided any copy for any online platform and in any event the Claimant did not have access to the Respondent's IT system or email account and would not have been able to upload copies of videos on to the Respondent's website.

23. The Claimant's evidence was that she would give contractors instructions when they attended the retreat to carry out work, but this was inconsistent with Ms Grainger's evidence who said that Ellie was the more experienced member of staff "who was the first port of call for maintenance and ordering things. Ellie also held the company credit card". Although the Claimant would have been on duty on occasions when maintenance was being carried out, the Claimant did not have primary authority for supervising this work. Again, if the Claimant carried out tasks in relation to maintenance this would have been within the normal course of the working day duties and would have formed part of her shadowing of Ellie and others when she was in training.

24. The Claimant in her statement stated that she was the "leader and supervisor of walks" (paragraph 8 of her statement) and she stated that she carried out this task daily. However, the Claimant conceded when she was taken to the evidence in the bundle that she had been shadowing others on a great number of the walks. This evidence strongly suggested that she did not lead or supervise on this task when she was working at Crowhurst. The Claimant also suggested that she took the walk "most" days, again this was not corroborated by the evidence in the Respondent's bundle and it was felt to be another exaggeration about the nature and extent of the duties carried out.

25. Having found that the Claimant's evidence in relation to the tasks assigned to her in her role to be exaggerated, the Tribunal conclude on the balance of probabilities that her duties included undertaking administrative tasks when residents were at the retreat. Her role included taking the residents out for walks, informing them of treatments and taking measurements. There was also consistent evidence to show that she took messages and passed them on to others. There was also consistent evidence that the Claimant went with another employee to buy shopping for the retreat. These tasks were consistent with the job description of administration and coordination.

Findings in relation to the number of hours worked.

26. The next issue for the Tribunal is to determine the number of hours worked by the Claimant. The Claimant stated that she worked 10-hours a day every day. The Respondent's evidence was that the hours of a Co-ordinator was 8.00 until 2 or 3 pm (6 hours day). Again unfortunately there were very few records that provided an accurate breakdown of the hours the Claimant worked or of the duties she carried out. The evidence before the Tribunal was presented in a comprehensive table produced by the Claimant's representative which formed part of the Claimant's skeleton argument. The table recorded that on most days the Claimant worked 10 hours day every day (and sometimes more). The Respondent's counter schedule showed a very different pattern of work, with the Claimant working a maximum of 4 hours a day in the first three weeks of her engagement when she was training and then working a maximum of a 7 hour day. The Respondent's table also showed that the Claimant did not work 7 days a week and had taken a considerable amount of time off (about 17 days).

27. The Claimant's evidence on the number of hours work was found to be exaggerated and not credible. The Claimant relied upon a number of tasks referred to in her statement to justify her claim that she worked 10 hours a day. One example was that the Claimant stated that she "would be expected to care" for Ms Grainger's mother when she stayed at her flat, however the Tribunal heard that there were two carers employed to care for Ms Grainger's mother. When it was put to the Claimant in cross examination that she was exaggerating her evidence in relation to this point, she clarified that when she was at the flat "I made sure she was OK" and was "expected to see how she was". The tribunal conclude that checking on a person is not to be equated to providing care. There was no credible evidence to suggest that the Claimant provided care to Ms Grainger's mother.

28. Although the Claimant stated that she worked 10 hours a day this was not supported by any credible evidence in the bundle. It was put to the Claimant in cross examination that there was a disparity between the number of hours worked on the 21 and 22 February where the Respondent stated the Claimant worked for 2 hours and the Claimant said she worked for 10 hours. The Claimant was unable to provide any evidence of the work undertaken that would have taken 10 hours. It was put to the Claimant in cross examination that on the 23-24 February she was in training and she accepted she was shadowing but did not say who she had shadowed and what tasks had been observed. The Claimant could provide no evidence to suggest that she was working 10 hours on those days, the Respondent's evidence is preferred on the hours of work on the days of the 21-24 February 2017, that on those days the Claimant was training and had only worked 2 hours a day.

29. It was then put to the Claimant in cross examination that on the 25 February she worked 10 hours, but the Respondent's diary had her down as not working; the Claimant again said she was shadowing "a coordinator" but no other details were provided. It was then put to the Claimant that Coordinators only worked 8-3 she then added "No but if Ms. Grainger was present I would shadow". The Claimant could produce no consistent or credible evidence to suggest that she worked a 10 hour day on the 25 February. Faced with contradictory evidence of the Claimant suggesting that she worked 10 hours that day but no evidence of what she had done and the Respondent saying the Claimant had a day off, on the balance of probabilities the Respondent's evidence is preferred due to the lack of evidence that suggested that on that day the Claimant was present and working 10 hours.

30. There was no credible evidence before the Tribunal to suggest that the Claimant shadowed Ms Grainger. The Claimant's evidence was not found to be credible because she was not given access to the Respondent's computer system or to the office; the Claimant had no access to any on-line documents. The Tribunal find as a fact that the Claimant was not involved in any managerial functions nor was she being trained to carry out any managerial duties. The Claimant was not (as put in cross examination) a go-between for Ms Grainger. The Claimant's evidence on the hours worked per day and on

the duties carried out was not felt to be credible. The Tribunal find as a fact that the total number of hours worked on any day did not exceed 7 hours.

31. The Claimant relied on texts received from her colleagues as evidence that she was present at work and carrying out the duties assigned to her by the Respondent. It was her evidence that her and her colleagues "only discussed work matters". Having seen the many hundreds of texts in the bundle (which will not be replicated in this decision) many are social in nature, some relate to staff keeping in touch and confirming arrangements, as an example one is from a member of staff who flagged up that she had left her computer and charger at work (page 10). The Tribunal noted that the texts were part of everyday interaction between colleagues and was not evidence to support the Claimant's claim that she had been assigned duties that required her to work a 10 hour day. The fact that a text was sent to the Claimant outside of working hours to or from a work colleague did not suggest that the Claimant was working. There was no evidence that any of the texts the Claimant referred to in her evidence required her to perform any duties outside of her normal hours of work which the tribunal has concluded would be 8-3.

32. Part of the Claimant's role was to take messages and pass them on to Ms Grainger, an example of a message was on page 11 of the Claimant's bundle dated the 8 March 2017. The Claimant claimed that on the 8 March 2017 she worked a 10 hour day "taking messages all day". The Respondent's evidence was that on that day the Claimant worked for three hours. It was put to the Claimant in cross examination that the telephones lines were only open from 11-6, she then changed her evidence and said that this was only one task she had to perform that day. The tribunal saw no evidence of the other tasks assigned to her to justify her claim that she had worked for 10 hour that day. Again, the Claimant's evidence of the hours of worked was found to be unreliable and exaggerated. If the Claimant had been engaged on tasks and under the direction of the Respondent on the 8 March 2017 for 10 hours taking messages there would have been documentary evidence to support this (as the Claimant had no access to the Respondent's email system all communications had to emanate from the Claimant's lap top or phone) however the existence of one message was insufficient to support this claim, the Respondent's evidence on the number of hours worked on the 8 March is preferred.

33. The tribunal find as a fact and on the balance of probabilities that the Claimant was hired to work between the hours of 8-3 which equated to 6 (or a maximum of 7 hours) a day. Although it was put to the tribunal in closing submissions that the Claimant was 'on-call' there was no evidence to suggest that this was the case, the Tribunal having concluded that the text messages between staff did not suggest that the Claimant was on call and working.

34. After the Claimant had completed her training she went down to the retreat in Devon on the 7 July where she worked for another 12 days. The hours of work were kept by Ms. Grainger. Again there was a significant dispute as to the hours worked. On the schedule of hours produced in the Claimant's skeleton argument it stated that even on the day of travel to Devon she

claimed that she worked a 10 hour day. The Respondent's evidence was that the Claimant did not work on the 7 or 8 July. The Claimant's schedule then recorded that she worked a10 hour day every day whilst in Devon but the Respondent countered this by suggesting that on the days the Claimant was on duty she worked a 6 hours day. The Respondent in their schedule stated that the Claimant did not work on the 8, 9 or 16 July and worked 4 hours on the 15 July and three hours on the 22 July.

35. The Claimant's evidence again appeared to be exaggerated; it was not credible to suggest that she had worked a 10 hour day when travelling. It was also noted that the Claimant could provide no documentation to show what work had been assigned to her in Devon that would have required her to work 10 hours each day. As there was again a dispute on the evidence, the Respondent's description of the hours worked and duties carried out is preferred as this appeared to be consistent with the variable nature of the work and the limited role that the Claimant played in the retreat.

The termination of the relationship.

36. The evidence in relation to the termination of the relationship was again disputed. The Claimant's evidence appeared in her statement at paragraph 43-4 and she alleged that Ms Grainger said she was Bad Karma and was thinking of whether they should part company; she then stated that Ms Grainger told her that 'she should leave'. Ms Grainger's evidence was that on the 23 July 2017 the Claimant resigned and said she was "going to London and did not wish to do any further work for me".

37. The Claimant was taken in cross examination to page 5 of the Respondent's bundle which was a text to Bethany asking for her advice on job hunting as "it seems after 4 months [the respondent] and I are parting ways". It was put to the Claimant that this was sent 13 days before she left and it was put to her that this was evidence to suggest that she was deciding to leave, which she denied. The Claimant was then taken to page 10 of the Respondent's bundle which was a text (which unfortunately was undated) confirming that she had resigned but the Claimant said that she said this because she didn't want to get the recipient of the email involved. The Claimant did not deny that she had a job lined up when she resigned.

38. On the balance of probabilities, it is concluded that the Claimant resigned. The Claimant's conduct and the email evidence referred to above was consistent and corroborated that she was job hunting and the subsequent text were entirely consistent with the Respondent's evidence that the Claimant resigned in order to start another job. Although the Claimant had received her pay for the last four week period that had been worked, the Respondent stopped the cheque after receiving the Claimant's resignation.

The Law
Employment Rights Act 1996

13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless--

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

86 Rights of employer and employee to minimum notice

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more--

(a) is not less than one week's notice if his period of continuous employment is less than two years,
(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.

92 Right to written statement of reasons for dismissal

(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal--

(a) if the employee is given by the employer notice of termination of his contract of employment,
(b) if the employee's contract of employment is terminated by the employer without notice, or
[(c) if the employee is employed under a limited-term contract and the contract terminates by virtue of the limiting event without being renewed under the same contract].

230 Employees, workers etc

(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 express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting 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;

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

Working Time Regulations 1998

Regulation 2

> "working time", in relation to a worker, means--
>
> > (a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,
> > (b) any period during which he is receiving relevant training, and
> > (c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement;
>
> and "work" shall be construed accordingly;

13 Entitlement to annual leave

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(2) ...

(3) A worker's leave year, for the purposes of this regulation, begins--

> (a) on such date during the calendar year as may be provided for in a relevant agreement; or
> (b) where there are no provisions of a relevant agreement which apply--
>
> > (i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or
> > (ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

Trade Union Labour Relations (Consolidation) Act 1992
207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that--

> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> (b) the employer has failed to comply with that Code in relation to that matter, and
> (c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that--

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employee has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

Closing Submissions of the Respondent

39. In oral submissions, the respondent first dealt with the issue of status. It was stated that whether the claimant was a worker or an employee was multifactorial test and is well defined. Counsel referred to the case of Byrne Brothers (Formwork) Ltd v Baird and others [2002] ICR 667 it dealt with the issues of the degree of control, exclusivity of engagement, a method of payment in order to decide whether one is a worker. Counsel referred to his written submissions at paragraph 2(a) and he stated that in this case, the claimant met some of the aspects of control and not others, which therefore pushes her away from the definition of an employee. The Claimant had control over how she carried out tasks she could refuse work or go on a break. In relation to exclusivity, it remains the case while working for the respondent, she worked for others as a translator.

40. While the respondent has conceded that the claimant is a worker, it is still a matter to be determined by the tribunal and she was not fully integrated into the workforce. With regard to equipment claimant was not fully integrated as she was not allowed access to the IT system or emails and she was also not allowed into the study, where these were located unlike Ms McManus. In relation to personal service (where the respondent again referred back his written submission), it is accepted that the claimant was required to personally perform the tasks and that is admitted. The respondent stated that weighing up all the factors, while the claimant met lower pass mark and has protection of worker status, it is not sufficient for an employee.

41. The Respondent's counsel and referred to paragraph 4 of his written submission in relation to the terms of the contract. He stated it was for the claimant to prove her hours of work if they went beyond those admitted by the respondent. The work diary was not perfect, but on the whole it is accurate. It is the only contemporaneous document in relation to the hours to be worked and in accord with days worked and not worked. We say it ought to be preferred by the tribunal to the claimant's schedule, which was prepared 11 months after employment and the schedule did not refer to prior documentation. The respondent stated that the claimant hours of work are unsubstantiated.

42. It was stated that the issue is one of fact and not law and it goes to the credibility of the parties. If you find the respondent to be credible and a fair employer. The Respondent referred to a note where the claimant's representative responded to a document where it was said that the respondent was overstaffed. Counsel referred to paragraph 6 and stated that the claimant well aware of the need to record her times in the diary. The evidence on hours contained exaggerations which the respondent stated made the claimant unreliable. The respondent referred to their paragraph 7, stating that the work diary is the best evidence before the tribunal and it was an accurate record. The Respondent stated it was the best method of establishing the hours worked. It was accepted that it was unfortunate that the documentary and was not as they wished. The claimant's name is in the diary with no hours, the walk lasted two hours. I have used ordinary working hours of six.

43. The Respondent then addressed the issue of what amounted to working hours under the regulation 2. He stated that receiving messages from colleagues where some were responded to and some not, does not amount to working hours under regulation 2(a) the claimant was not at the disposal of the employer. There are no instructions carry out any tasks. If you are not with me on this point, should they be work they should not have the effect of extending the working day.

44. The Claimant stated it would take seconds to send or read a text, if this is viewed as work, it is believed that this should add 30 minutes a day, although this is an arbitrary figure it would be fair and would generously reflect any work done during this period.

45. In relation to additional hours, counsel took the tribunal to the schedule of hours worked and stated that he had marked where half an hour had been allowed where text messages were sent and this added up to 332.67 hours. Counsel said the Claimant was paid £8 per hour, this would be a total of £2661.37. If the tribunal believe this did not represent working hours, it would amount to £2381.36.

46. In relation to holiday pay, as the claimant is not full-time, counsel used 13 weeks and included the additional half an hour and the figure came to £426.37 (without the half hour it was £345).

47. The tribunal were minded to find the claimant was owed £1000, she was cross-examined on this point, and there is an email about an amount to be paid of £714.29. The claimant was paid £1000 in April, she took 17 days off. Any holiday would have been taken.

48. In relation to the counterclaim, the claimant is found to be an employee and if the half hour pay should be given, the claimant received £4000 and if she was paid 8 pounds an hour, she should have been paid £2661.36; therefore received an overpayment of £1338.46. If you do not include the additional half an hour, the overpayment is £1618.64.

The Claimant's closing submissions

49. On the issue of status, it was stated that it would be inherently unlikely that the claimant would accept a zero hours contract. The Claimant took up residence and she was on call and very much integrated into the business and under the control of the respondent. It is conceded the claimant is worker, however it is highly likely that she was an employee.

50. The second issue with regard to the hours of work, the claimant says she was a resident, but the respondent said she worked 12 hours a week. The Claimant said she worked more than that. It is highly likely she was paid £1000 per month. He would not have taken the post without minimum pay. The respondent's case is that the £1000 was paid on trust and this is the basis of a counterclaim. This is far-fetched. The claimant is being paid for work and she worked for more hours with no clear provision of finding out what those hours were. It is likely that the £1000 per month represents the national minimum wage of £7.50 per hour. This would mean that the claimant could only have been working for 31 hours per week and it is likely, the claimant worked a lot more than this.

51. The Claimant has been under paid by non-payment of £1000. In addition to her entitlement under the national minimum wage, she has not been overpaid.

52. With regard status, the only thing the respondent can point to is registration with HMRC, however, this factor is not determinative. Claimant's representative took the tribunal to page 489 bundle which were the accounts. Stated that the claimant was not self-employed in her own right and the registration or no practical relation to her engagement.

53. The respondent has been unable to produce a written agreement say that the claimant is self-employed. The Claimant's representative referred Ready Mix Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497 which states that the person must be paid, must agree to carry out work personally, the employer must exercise some control over the employee. This is a case that turns on the facts, the facts show that respondent control the claimant in work carried out, the respondent repeatedly monitored the claimant conducting the day today running of the site, no keys were given to the office.

54. The tribunal heard evidence yesterday that mention integration, the claimant sat in the kitchen taking calls, bookings and liaising with customers. One example is at page 500 of the bundle, it is a thank you note. In relation to mutuality, there is a continuing obligation to be provided with work and the claimant had to do it. The Claimant covered staff shortages and she had an array of tasks. In her evidence the Respondent said she was entitled to give the claimant jobs to do. The claimant's representative took the Tribunal to page 62 of the Respondent's bundle. The claimant has statement, that she was engaged in a vast array of duties which was unchallenged in cross examination. There were two examples of a close relationship, the claimant care of granny (page 369) and she paid for shopping when the payment on the card did not go through (page 311), this conversation is as plain as day.

55. You have to look at the agreement, the respondent intended £8 per hour. The claimant said this was never stated. If we use £8 per hour, how many hours has the claimant asserted she worked (50 hours). If the claimant abandoned this assertion what would both parties had intended, possibly a 40 hour shift which is possibly what the parties would agree. That comes to £320 per week, this is more in line with what the parties would have intended.

56. With regard to the underpayment, the claimant worked from 20 February to 23 July, one day short of 22 weeks, that comes to a total of £7040.if one deducts £4000 from the sum, the balance is £3040. I submit that this represents a payment deducted and payment below the minimum wage.

57. In relation to the claim for failing to provide written particulars, failing to pay notice I say, the claimant is only one week's notice and four weeks' pay. At comes to a total of £1600.

58. Lastly, the claimant's representative dealt with the issue of holiday pay, he stated that the claimant worked for 22 weeks and took 14 days off. He stated was no way of telling what days the Claimant took off and what days she worked. The claimant said she worked seven days a week and only took 14 days off. He stated that 12.04% should be added to gross earnings in respect of holiday pay.

59. The Claimant's representative referred to an uplift under Section 207A.

Decision

60. The respondent has conceded that the Claimant has worker status and the Tribunal accept that on the evidence the Claimant was required to perform the work personally and was not in business on her own account, therefore the evidence was entirely consistent with that of worker status.

61. The Respondent does not concede the issue of employment status. In order to determine whether the Claimant is an employee one has to has to look at the entire factual matrix of the relationship. Firstly on the issue of control, the Claimant was required to carry out certain tasks when residents were present for example taking residents on walks and handing out leaflets and dealing with administrative tasks. The Claimant was also required to take calls and to pass messages on to Ms Grainger, there was no evidence as to how many calls came in and how many messages were taken in a day. The Claimant therefore was expected to perform the work personally and was expected to carry out the work when it was provided to her. She was therefore subject to control in the day to day allocation and in the performance of her duties.

62. The Claimant was paid on the production of an invoice every month. The method of payment did not assist in determining the status of the relationship, although it was a factor to be taken into account. It was notable that the Claimant was paid a fixed sum while undergoing training, this same rate of

pay continued after she started work at the Devon retreat. There was no evidence that the monthly pay changed when the Claimant took leave.

63. The most relevant issue for the Tribunal was the issue of whether the Claimant's work was integrated into the business and whether the Respondent provided equipment. The Claimant used her own computer and she had no access to the Respondent's IT system. The Claimant was also not assigned an email address and all her communications with the Respondent were from her mobile or lap top. The Claimant was therefore entirely separate from the Respondent's internet and email system, she was not integrated into the organization in the way that other employees and workers were (for example Ms McManus).

64. The Claimant's evidence on integration was at paragraph 51 of her statement and the evidence she relied upon was working on the logo and she stated that this was evidence that she was 'part and parcel of the company.' The Tribunal has made findings of fact about this matter and have found that the logo design was a competition open to those working at the retreat and was open to all employees and self employed contractors. This did not show that the Claimant was integrated into the company as the Tribunal has found as a fact that this task was a one off initiative and was not assigned to the Claimant as part of her duties and responsibilities in her role. Although the Claimant was required to provide personal service, I conclude that the lack of integration of the Claimant's work into the business, the requirement that she provide her own equipment and the fact that she invoiced the Respondent for work carried out on a monthly basis reflected that the Claimant was a worker and not an employee.

65. As I have found as a fact that the Claimant is a worker (as conceded by the Respondent) and not an employee, the Claimant's claim for compensation for failure to provide written terms and conditions of employment is dismissed. The Claimant's claim for breach of contract is also dismissed as is the respondent's counter claim.

66. On the issue of the hours worked by the Claimant I have concluded that her hours of work were limited to 6 (or a maximum of 7 hours a day) and during her training period she worked significantly less hours. Having found the Claimant's evidence as to the hours she worked were exaggerated and overstated, I have preferred the respondent's evidence to that of the Claimant as their description of the hours worked and the duties performed was consistent with the size and nature of the business and the fluctuating nature of the work. The Claimant's evidence in relation to 10 hour days was not credible and the text messages provided little support for the Claimant's case that she was somehow 'on call', this lacked credibility. Had the Claimant been taking calls all day the Tribunal would have seen some evidence to corroborate this, however there was not.

67. Although I was grateful for the considerable detailed work carried out by the Claimant's representative when producing the schedule of hours in their skeleton argument, the hours included did not stand up to scrutiny when

compared with the Respondent's evidence. Having gone through a comparison of the hours worked in taking the Claimant through cross examination, I concluded that the most accurate analysis was provided by the Respondent's representative who amended the schedule with errors that had been identified in the course of cross examination and had added time credited for the Claimant to deal with text messages; this was felt to be the most accurate analysis of the hours worked by the Claimant and was more realistic representation of the work performed.

68. It was agreed that the Claimant worked for 22 weeks and 2 days. Taking the pay periods in the absence of any details as to pay periods (which appeared from the evidence to run from the 20th of the month for a period of 4 weeks) the evidence showed that during these four-week periods the maximum number of hours worked was 66 hours (when the Claimant started her role in Devon). As I have found that the agreed pay was £1000 per four-week period and this sum was paid irrespective of the hours worked during each pay period, based on 66 hours per four week period, the hourly rate would have been over £15, this is considerably over the National Minimum Wage. I conclude that the rate per hour for her working hours did not fall below the NMW.

69. Although the Respondent has suggested that the Claimant has been overpaid and they seek to clawback some of the monies paid to the Claimant, this claim is rejected as it was based on the premise that the parties had agreed the sum of £8 per hour. The Tribunal rejected that evidence on the ground that there was no evidence to suggest that this was a term of the agreement or that the parties had agreed to an hourly rate.

70. On the issue of holiday pay the tribunal has seen little evidence to support this claim from the Claimant. However, having concluded that the Claimant is a worker, she had accrued 11.76 days annual leave over 22 weeks, the Claimant had taken either 14 or 17 days leave depending upon whether the Claimant's or Respondent's evidence is preferred.

71. It was noted by the Tribunal that when the Claimant took leave she received the same monthly pay that had been agreed between the parties. It is concluded therefore that the Claimant has taken over and above the leave accrued and during the leave period she was paid her monthly income of £1000, there was no evidence to suggest that the Claimant had accrued leave which was untaken at the date of termination. In the absence of any credible evidence to support this head of claim, the Claimant's claim for holiday pay is dismissed.

72. Although the Claimant in their submission suggested that an uplift should be applied under Section 207A, no evidence was advanced to support this claim. The Claimant did not refer to which relevant Code of Practice was relied upon and the failure that made it just and equitable in this case to award an uplift, taking into account the findings of fact made in this case. As no evidence or submissions were advanced, I conclude that there is no evidence to justify an uplift in this case.

73. Turning lastly to the stopped cheque the Claimant was entitled to be paid the sum for the final four week period worked. As the Tribunal has found as a fact that the terms of the agreement reflected that the Claimant would be paid £1000 per month, irrespective of the number of hours worked, it appeared that the Claimant was entitled to receive this sum on termination of the contract. The Respondent's decision to stop the cheque for 'the usual sum' appeared to be an unlawful deduction from wages due pursuant to the agreement between the parties. I therefore conclude that £1000 was unlawfully deducted. An award is made for £1000.

Employment Judge **Sage**

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Date: 20 August 2018