EMPLOYMENT TRIBUNALS

Claimant: Mr D Hughes

Respondent: Mr Colin Rodgers t/a God Bless Hair

Heard at: Liverpool **On:** 18 June 2018

Before: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Mr C Millett, Solicitor
Respondent: In person

JUDGMENT having been sent to the parties on 13 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **The Issues**

In circumstances where the claimant says that he was employed as an apprentice barber by the respondent, and the respondent says that he was self-employed on the basis of an equal division of monies received from each customer, the Tribunal had to decide:

1.1 Whether the claimant was a worker or employee, or had some other status;

1.2 Whether the respondent made unauthorised deductions from monies due to the claimant during the period 23 March 2017 to 8 January 2018, both as regards basic pay and overtime;

1.3 Whether the claimant was entitled to accrued holiday pay on termination of employment and if so, how much;

1.4 Whether or not the claimant was entitled to receive a written statement of employment particulars from the respondent, and if so whether one was given, and if not, how much compensation ought he be paid;

1.5 Whether the respondent was obliged to, but failed to, follow an applicable ACAS Code of Practice, namely that in respect of grievances, and if he was obliged but failed to follow such a Code, how much uplift should be applied to any award made to the claimant.

2. **The Facts**

2.1 The parties were close personal friends for some years prior to the commencement of a formal working relationship between them. The respondent owns and manages a barber shop in Kensington, Liverpool, and frequently requested the claimant to work for him; for some years the claimant declined. The respondent had an arrangement with four or five other barbers whereby the proceeds of any fees paid by customers would be divided between the barber in question and the respondent on a 50/50 basis.

2.2 Having been made redundant from his employment in January 2017, the claimant decided upon a career as a barber and approached Liverpool City College in respect of training and the possibility of the college arranging an apprenticeship for him. Having received information from that college the claimant approached the respondent for a position as an apprentice barber. The parties agreed that the claimant would be employed by the respondent for 30 hours a week; he was to work in the barber shop for 24 hours each week and for 6 hours per week he was to attend college; they agreed that the claimant would be paid at the National Minimum Wage rate, and in all other respects in accordance with statutory minimum employment rights. He was never given a formal contract or a written statement of particulars or terms of employment or apprenticeship. The basic terms of this agreement were, however, set out in an Apprenticeship Interview Record Sheet. Those terms were agreed between the parties directly and sanctioned insofar as the academic part of the Apprenticeship Agreement was required by Helen Quinn of Liverpool City College.

2.3 The claimant commenced his employment with the respondent on 24 March 2017, following on from the meeting on 23 March 2017 when the said agreement was reached.

2.4 The claimant anticipated that upon completion of his apprenticeship and as a fully qualified barber the parties would amend the terms of their arrangements and that he too would be paid on a 50/50 basis as were the other qualified barbers. That point was never reached.

2.5 The respondent failed to pay the claimant wages that fell due and owing to him. The respondent failed to pay to the claimant any holiday pay. On termination of the claimant's employment the respondent failed to pay to

the claimant accrued holiday pay. The claimant took holiday from 3-18 September 2017.

2.6 The respondent had financial difficulties and debts, in particular rent that he owed to the landlord of his barber shop. The respondent also attempted to create a business partnership with a third party but was unsuccessful in doing so and the agreement between them was never formally effected. Until a date shortly before the claimant's holiday in September 2017 he, the claimant, had a second job working in construction via an agency. From his return from holiday on 18 September 2017, however, he concentrated on his work with the respondent. From this time, he secured a considerable number of overtime hours working many days from early morning until 11.00pm and also doing weekend work. The dates and details submitted by the claimant to the tribunal are an accurate record.

2.7 The arrangement made between the parties and with the college was that on Monday of each week the claimant would attend college. A practice became established that the claimant would, from September 2017 onwards, return to the barber shop after his attendance at college on a Monday, and he would work on for the afternoon and evening.

2.8 The claimant frequently raised, both informally and formally at meetings with the respondent, that he was not being paid as agreed or at all. This was naturally a cause of considerable concern to him because of his own financial commitments and bearing in mind the amount of time and effort he was putting into his endeavours. The college coordinator refused to intervene on the claimant’s behalf. Assessments of his work continued in accordance with the Apprenticeship Agreement. The assessments carried out by Helen Quinn, however, were somewhat hindered by the respondent’s lack of cooperation.

2.9 Owing to the continued non-payment and the claimant's frustration he took, with the respondent’s consent, £120 from the shop till towards his wages. He did not receive any other monies from the respondent.

2.10 The claimant left his employment with the respondent on 8 January 2018 because of the continued non-payment of wages and holiday pay. He had raised this matter as a grievance, albeit an oral one. The respondent did not call the claimant to a grievance meeting or deal with the grievance at all, but made excuses, avoided the subject and failed to make any proper payment to the claimant.

2.11 During the initial week of the claimant's employment he worked for 12 hours at £3.40 an hour and was owed £40.80. In his second week of employment commencing on 27 March 2017 he worked for 30 hours and ought to have been paid at the rate of £3.40 per hour such that he was owed £102. For each successive other week of the claimant's employment he worked basic hours of 30 per week at the rate of £3.50 per hour such that his weekly pay should have been £105, and that was the situation for the 38 of the weeks that he worked until 8 January 2018.

2.12 The claimant was on leave for the week commencing 11 September 2017 and the week commencing 18 September 2017; he took one day's annual leave on 25 December 2017 and another on 1 January 2018. The claimant was entitled, therefore, to £4,447.80 in respect of hours worked of which he received only £120, which was the money that he took from the till by agreement with the respondent.

2.13 The claimant worked 36 additional hours per week by way of overtime over a 17-week period commencing on 18 September 2017. The overtime rate was £3.50 per hour. The claimant was entitled to be paid but was not paid £2,142 in respect of those hours.

2.14 Between 23 March 2017 and 18 September 2017, the claimant accrued 82.3 hours' holidays, and during the period from 19 September 2017 to the effective date of termination of employment he accrued 113.7 hours' holiday. The claimant took in total 90 hours' holidays (66 hours between 23 March 2017 and 18 September 2017 and 24 hours between 19 September 2017 and the effective date of termination of employment). The claimant has not been paid holiday pay that had accrued and was due to him in the sum of £371.

2.15 The claimant did not complete his apprenticeship owing to the difficulties encountered with the respondent. He resigned his employment with the respondent. The college was unable to place him with an alternative employer.

3. **The Law**

3.1 Section 230 Employment Rights Act 1996 ("ERA") defines an employee as an individual who has entered into or works under a contract of employment, and such a contract shall include a contract of service or apprenticeship whether express or implied and (if it is express) whether it is oral or in writing. Whilst an employee usually works under the control of an employer the basic minimum requirement for a contract of employment is a mutuality of obligation whereby the employer must provide work and pay for it and the employee must provide his service subject to the employer's reasonable control. A "worker" will include somebody working under a contract of employment.

3.2 Section 13 ERA provides that a worker, therefore including an employee, has a right not to suffer an unauthorised deduction from wages. An employer shall not make a deduction from the wages of a worker unless required or authorised to do so by law or where the worker has previously signified in writing his agreement or consent to the making of the deduction.

3.3 Regulation 13 Working Time Regulations 1998 ("WTR") gives a worker an entitlement to four weeks' annual leave in each leave year. Regulation 13A gives a worker an entitlement to additional leave in certain circumstances such that the aggregate entitlement to annual leave is subject to a maximum of 28 days. Regulations 13,13A and 14 WTR also

provide for the pro rata apportionment of entitlement to leave where a worker's engagement or employment terminates partway through a leave year.

3.4 Section 1 ERA requires an employer to provide an employee with a written statement of employment particulars within eight weeks of commencement of employment, and section 1 ERA sets out the basic requirements of that statement. Where an employer fails to provide the said written particulars a Tribunal may award a claimant two or four weeks' pay by way compensation (section 38 Employment Act 2002).

3.5 ACAS has issued a Code of Practice in respect of the handling of disciplinary and grievance matters. It is a relevant Code of Practice for our purposes. By virtue of section 207A Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") a Tribunal may, if it considers it just and equitable, increase or reduce an award by up to 25% according to any non-compliance by either party in respect of a relevant Code of Practice. By virtue of section 207A TULRCA where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002 (see above) the adjustment under section 207A TULRCA shall be made before the adjustment under section 38 EA 2002.

4. **Application of Law to Facts**

4.1 The claimant was employed by the respondent from 23 March 2017 until his resignation on 8 January 2018. Their contractual agreement was that he would be paid at the National Minimum Wage rate for each hour worked, and that he would be entitled to statutory minimum employment rights including in respect of holidays, pay and the provision of a written statement of employment particulars. The claimant was to work a basic 24-hour week and attend college for 6 hours per week in addition to which he was available for overtime hours. There was the required mutuality of obligation

4.2 The claimant worked for the respondent as agreed and accrued overtime in respect of which he was entitled to be paid again at the National Minimum Wage rate. He was not so paid.

4.3 The claimant accrued holidays and took some holidays during the period of his employment but he was not paid for them. He was not paid in respect of accrued holidays on termination of employment.

4.4 In November or December 2017, the claimant raised a grievance with the respondent to which the respondent did not reply save briefly to dismiss it orally. He did not investigate the grievance, call a meeting or provide the claimant either with an outcome or an opportunity to appeal the dismissive outcome.

4.5 In the event, and having heard evidence from both parties, I accepted the evidence of the claimant. His evidence was given clearly, credibly and consistently. The respondent's evidence was inconsistent and unreliable.

4.6 I found that the claimant was unpaid wages due to him in the sum of £4,327.80 in respect of basic hours which he completed during 23 March 2017 and 18 January 2018. In addition to those hours he worked some 36 hours' overtime over a 17-week period for which he was entitled to the sum of £2,142; that sum was not paid to him.

4.7 The claimant had accrued holiday pay as at the date of his resignation and was entitled to holiday pay of £371 which was not paid to him.

4.8 The agreement between the parties was clear but the respondent has tried to muddy the waters by claiming that the claimant, albeit an apprentice working under terms agreed and co-partied by Liverpool City College, was self-employed; he was not. The claimant was committed to work for the respondent as agreed; he was not running his own business and could not send a substitute to do his work. He worked under the control of the respondent. The claimant frequently raised the issue of basic pay, holiday pay and overtime pay. All of these matters could have been resolved had the respondent complied with his duty to provide a written statement of employment particulars. Had they been prepared at the outset it is likely that even the respondent would have realised the nature and extent of all of his responsibilities and it would have been less likely that he could have attempted to avoid them in the way that he did. In any event they would probably have been resolved more quickly before reaching the tribunal or even at the hearing today. For those reasons I consider that the respondent's failure to issue a written statement of employment particulars was serious and that it would be just and equitable to award the claimant four weeks' pay

4.9 These matters could have been resolved had the respondent complied with his duty to deal with the claimant's grievance properly and conscientiously. Had he done so it is likely that even the respondent would have realised the nature and extent of all his responsibilities and it would have been less likely that he could have attempted to avoid them in the way that he did. In any event they would probably have been resolved more quickly before reaching the tribunal or even at the hearing today. For those reasons I consider that the respondent's failure to follow the ACAS Code was serious and that it would be just and equitable to apply a 25% uplift to the claimant's award.

Employment Judge T Vincent Ryan

Date: 13.08.18
REASONS SENT TO THE PARTIES ON

31 August 2018
FOR THE TRIBUNAL OFFICE