



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms N Mitchell

AND

The Boro Bottle Ltd
(First Respondent)

The Bottled Note Ltd
(Second Respondent)

The Bottled Note
(Third Respondent)

Nicholas Hadlett of The Boro
Bottle Ltd
(Fourth Respondent)

Brett Hartland of The Boro
Bottle Ltd
(Fifth Respondent)

REASONS OF THE EMPLOYMENT TRIBUNAL

Heard at: Middlesbrough

On 12 January 2018

Before: Employment Judge Shepherd

Appearances

For the Claimant: In person

For the Respondents: Mr Hadlett

Judgment in respect of the this claim having been given to the parties on 12 January 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 represented herself and the first respondent was represented by Mr Hadlett, Director.

2. I heard evidence from Nicola Mitchell, the claimant. Jack Harrison, the claimant's partner and Nick Hadlett, Director.

3. I had sight of a bundle of documents prepared by the claimant in a ring binder folder consisting of various documents set out in nine sections. I also had sight of further documents provided by Mr Hadlett. As the parties had not seen the documents which had been provided by the other party, I allowed time for them to consider the documents. Also, as Mr Hadlett had not seen the statements provided by the claimant and Jack Harrison offered to stand the case down for a short time in order to allow the opportunity for Mr Hadlett to take the time to go through those statements together with the documents provided by the claimant. Mr Hadlett indicated that he had considered the documents and was happy to continue.

4. The claims brought were in respect of unauthorised deduction from wages, outstanding holiday pay, failure to provide written particulars of employment and failure to provide an itemised pay statement in respect of the final month of employment.

5. The respondent has paid the sum claimed in respect of unauthorised deduction from wages and that claim is now dismissed. Mr Hadlett had provided the payment in respect of the outstanding wages together with a letter stating that it was in full and final settlement of the claim. The claimant had cashed the cheque. However, I am not satisfied that this was a settlement of the full claim. The claimant had indicated that she did not accept the payment as full and final settlement and she had accepted it as partial contribution to the amount claimed. I am satisfied that the claim in respect of outstanding holiday pay can continue.

6. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings I made from which I drew my conclusions.

6.1 the claimant's brother-in-law, Sam Harrison contacted Nick Hadlett on 2017 asking whether he was looking for any more bar staff as the claimant was looking for a job. The claimant attended an interview on 27 May 2017. The claimant accepted the job and her employment commenced on 27 May 2017.

6.2. The working hours were casual and varied. The claimant was placed on the staff rota and allocated shifts. She often worked at short notice to cover for other bar workers, particularly for the bar supervisor who was pregnant. The claimant was paid the minimum wage of £7.50 per hour. She was provided with a T-shirt with the respondent's name on it.

6.3. I had sight of numerous text messages with regard to arrangements for shifts. The claimant provided her National Insurance details and her bank details to the respondent. The claimant provided a letter from the student loan company to the respondent requesting payslips and details of her employment.

6.4. The claimant obtained another part-time job and indicated that she wanted to keep working with the respondent. She said that she could continue to work nights for the respondent as her new job was an afternoon job.

6.5. The claimant offered to carry out other work and it was agreed that she would carry out some decorating and other work. It was not indicated to her that she would carry out this work as a contractor. The claimant continued to be paid at £7.50 per hour and I am satisfied that this extra work was carried out as an employee. The situation was that of an employee carrying out the duties required by the respondent but I do not accept that this work was in addition her normal duties and hours of employment on bar shifts. The claimant was not in business in her own right and did not carry any financial risk in respect of the work.

6.6. The claimant left her employment with the respondent following a dispute on or around 28 August 2017.

7. The response filed on behalf of the first respondent indicated that the claimant was never employed by the first respondent and that she was a contractor.

8. There have been a number of tests put forward by courts and Tribunal's to establish the relationship of employee and employer. No single factor, by itself is conclusive and it is necessary to consider the relationship as a whole. A number of cases have referred to the irreducible minimum legal requirements of control and mutuality of obligation. The following factors are examples of factors which have been stated in a number of cases to be relevant:

- The contractual provisions.
- The degree of control exercised by the employer.
- The obligation of the employer to provide work.
- The obligation on the employee to do the work.
- The duty of personal service.
- The provision of tools, equipment, instruments etc.
- The arrangements made for tax, national insurance, VAT and statutory sick pay.
- The opportunity work for other employers.
- Other contractual provisions including holiday pay, sick pay, notice and fees.
- The degree of financial risk and responsibility for investment and management.
- Whether the relationship of being self employment or employment is a genuine one.
- The number of assignments and duration of the engagement and the risk of running bad debts.

9. The Employment Act 2002 provides:

S.38 Failure to give statement of employment particulars etc.

(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 5.

(2) If in the case of proceedings to which this section applies—

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

10. In this case, I am satisfied that the evidence I heard in respect of totality of the relationship means that this was a relationship of employer and employee. The claimant was placed on the rota to work shifts even though this could be at short notice. She wore a T-shirt with the respondent's name on it. The fact that she obtained other part-time employment did not affect her status as an employee. The extra decorating work that she carried out was still in her role as an employee. The claimant was not in business in her own right and did not carry the financial risk.

12. I am satisfied that the claimant was an employee and is entitled to payment for outstanding holidays pursuant to regulation 13, 13A and 16 of the Working Time Regulations 1998. She worked for three months. She was paid on average £131.25 per week, £26.25 per day. She is entitled to 6 days holiday pay in the sum of £157.50.

13. The respondent is a small employer who employs 3 or 4 employees. Mr Hadlett said that the company had been in business for approximately one year and he was unaware of the requirement to provide written particulars of employment. In the circumstances, I find it just and equitable to award the minimum amount of two weeks' pay pursuant to section 38 of the Employment Act 2002, £288.75.

**Employment Judge Shepherd
22 January 2018.**