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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss D Beech  
**Respondent:** Sophie Antonia Scott Ltd  
**Heard at:** East London Hearing Centre  
**On:** 25<sup>th</sup> February 2019  
**Before:** Employment Judge Reid

## Representation

**Claimant:** Mr J Beech (the Claimant's father)  
**Respondent:** In person – Miss SA Scott

# RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was an employee of the Respondent and was wrongfully dismissed by the Respondent. She was entitled to one month's notice and is therefore entitled to one month's net salary payable by the Respondent as damages for breach of contract.
2. The Claimant is entitled to payment by the Respondent for 4 days accrued but untaken holiday under Regulation 14 of the Working time Regulations 1998.
3. The Claimant is entitled to an additional award under s38 Employment Act 2002 for a failure to provide her with written particulars of her employment under s1 Employment Rights Act 1996. The additional award is 2 weeks' pay (gross) totalling £807.69.
4. The Claimant's claim for unfair dismissal is dismissed as she does not have the required period of two years continuous employment to bring such a claim.

# REASONS

## Background

1 The Claimant brought a claim for notice pay and for accrued holiday pay on a claim form presented on 26<sup>th</sup> November 2018. She also said she had not been issued with a written statement of the particulars of her employment. She had originally also included a claim for unfair dismissal but accepted that she could not bring that claim because she had insufficient continuity of employment.

2 The Claimant applied to amend her claim at the beginning of the hearing to also include a claim for one day's pay for 21<sup>st</sup> June 2018. I refused that application and gave oral reasons at the hearing.

3 I identified the issues with the parties as being firstly the Claimant's legal status, the Claimant saying she was an employee and the Respondent saying she was a freelance self-employed person. The second issue was what rights she had, depending on her status. The third issue was then what if anything had been agreed between the parties as regards her notice period if she was an employee.

4 The parties had exchanged relevant documents which were provided to me and the Claimant also provided documents 1-3 which were her statements about her claim. Two further documents were produced at the hearing namely invoice no 2 and emails dated 22<sup>nd</sup> April 2018. I heard oral evidence from the Claimant and from Miss Scott and heard oral submissions on both sides.

## Findings of fact

5 I find that the Claimant responded to the Respondent's advertisement (C doc 5) and that they met to discuss it (C doc 6). I find that the Respondent then sent a text confirming that the Claimant had the job (C doc 6) though from the content of that text I find that they had already discussed terms it was just that Miss Scott was finally confirming the agreement by text. It was agreed that the Claimant would initially work part-time because at that time she had two other jobs (waitressing and in a shop) which she had to finish, the plan being that she would then go full-time (C doc 7). The Claimant notified the Respondent of the part-time hours she could initially do (email 22 April 2018). She went to full time on 11<sup>th</sup> June 2018 (invoice 2 dated 24<sup>th</sup> June 2018). No written terms were entered into and they did not orally agree a notice period or terms about holiday entitlement. Their contract was an oral one.

6 I find that the Claimant was an employee of the Respondent (from the outset) taking into account the following findings.

7 The Claimant was obliged to work personally for the Respondent. She was not marketing herself as a freelance, offering media and marketing services to anyone else, but worked solely for the Respondent (apart from the initial part-time period when her other jobs did not involve media and marketing services for other clients). In return for her work the Respondent was obliged to pay her the rate they had agreed namely £10 per

hour, equating to a full-time salary of £21,000 pa (rounded up) ( C doc 9).

8 I find that there was a degree of control consistent with employment status because the Claimant had fixed hours (40 hours per week working around 9.30 to 5.30 once she went full-time) working largely at the Respondent's premises though with the odd day working at home with Miss Scott's permission. They attended some photoshoots together but Miss Scott also asked the Claimant to attend some on her own. Miss Scott determined when the Claimant could take holiday (C doc 13, 14) including turning down a request for particular dates as it was too short notice (email dated 1<sup>st</sup> July 2018) and gave permission for working at home if the Claimant requested it (emails dated 25<sup>th</sup> June 2018) or said it had to be taken as holiday. Miss Scott left the Claimant in charge when she was away on holiday (C doc 15). Miss Scott decided where the Claimant worked, how she worked and when she worked. The fact that the Claimant was sometimes allowed to work at home does not mean she was not an employee in circumstances where the Claimant had to ask for permission to do so.

9 The Claimant had a work email address. Although she provided her own laptop she otherwise used equipment/services/premises of the Respondent and she claimed expenses (email 21 May 2018). She was paid for holiday. The job description (C doc 5) was consistent with employee status. There was no economic risk on the Claimant as regards the success of the Respondent's business (although it might affect any bonus she got in addition to her salary). Although she submitted invoices on the freelance basis proposed by the Respondent (C doc 7,9) because the Respondent had not yet set up PAYE and the Claimant intended to declare her income as a self- employed person in her tax return, the tax treatment of the pay is not conclusive. Looking at the overall picture therefore most of these terms were consistent with it being an employment contract.

10 I therefore find taking into account the above findings that the Claimant was an employee of the Respondent from the outset and was not a self-employed freelancer, even if that is the way the parties operated the pay arrangements and even if they thought that is what it was, thought the Claimant had some concerns about the tax situation (C doc 11).

11 I find that the Claimant initiated discussions about a written contract with Miss Scott by sending her a draft (C doc 8, 8A). At that stage the Claimant inserted a start date for the written terms of 5<sup>th</sup> June 2018 on the basis that Miss Scott had said that it was only the part-time period which would be freelance (C doc 7). Miss Scott responded with some changes to the draft (C doc 9-10) saying that in fact the written terms would not apply till 1<sup>st</sup> August 2018 when the payroll was going to be set up. Miss Scott changed three matters in the draft: firstly, the hours in the remuneration clause to require a core period to be working in the office, secondly to remove the bonus scheme clause and thirdly to increase the period of notice required to take holiday. At this stage there was therefore not consensus between the parties on the terms of the written contract because these matters had not been agreed. Just because Miss Scott had not said that the notice period needed changing does not mean that she is deemed to have contractually accepted that term because that was just one term in the draft and Miss Scott had not agreed certain other terms meaning that consensus overall had not been reached. The whole contract had to be agreed and if overall the terms remained unagreed the Claimant could not pick and choose the ones Miss Scott had not sought to change, because it was still not overall an agreed written contract. Although Miss Scott referred to sick pay (C doc 12) not being in

the contract, making it sound as if the contract was already agreed, the written contract had not already been agreed and she was merely telling the Claimant that she would not get contractual sick pay going forward either, even once the terms were agreed.

12 The Claimant then summarised where they were apart on the written contract in an email to Miss Scott (C doc 15) noting that there were three unresolved issues on the draft written terms namely in relation to holiday booking and sickness pay (the Claimant arguing for full pay rather than just SSP) and the Claimant asking for a compassionate leave policy.

13 I therefore find that the written terms discussed between them were not orally agreed before the Claimant left the Respondent (because they never reached consensus) and the written contract had not been entered into. The Claimant's notice period had therefore not been agreed to be the one month in the draft contract because it was only one term in the draft and there were still outstanding issues on the draft meaning that overall consensus on the written terms had not been reached either orally or in writing.

14 Because no notice period was agreed the employment contract was terminable on reasonable notice. I find this to be a month taking into account the Claimant's role, the fact she was paid monthly and the fact that Miss Scott did not voice any objection to the one month notice proposed in the Claimant's draft which is indicative of one month therefore being the norm in the field in which the Claimant was working. The Claimant was dismissed on 30<sup>th</sup> July 2018 (C doc 16) without that notice being given, in breach of contract. She is therefore entitled to damages to represent what she would in fact have earned (ie net, not gross) for that one month. The Claimant found a new job on 8<sup>th</sup> October 2018 and it was not suggested that she had failed to mitigate her losses in the first month after she was dismissed such that the one month's payment should be reduced. She cannot seek compensation beyond the end of the notice period because she does not have an unfair dismissal claim.

15 The written terms relating to holiday had not been finally agreed (see findings above) but the Claimant is entitled under the Working Time Regulations 1998 to be paid for an untaken holiday which had accrued but was untaken when her employment terminated. Miss Scott confirmed at the hearing that the number of days claimed in the Claimant's statement (4 days in total) was not disputed though the principle that it was payable was disputed. The Claimant is therefore entitled to four days' holiday pay.

16 The Claimant did not receive written particulars of her employment from the Respondent within two months after the beginning of her employment on 24<sup>th</sup> April 2018. Miss Scott clearly did not realise that what had arisen was an employment contract whatever she labelled it but I accept it had been her intention to enter into a written employment contract with effect from 1<sup>st</sup> August 2018 when the PAYE arrangements were in place.

## Relevant law

17 An employee is defined in s230(1) Employment Rights Act as someone who has entered into or works under a contract of employment. I considered the tests for employment status set out in *Ready Mixed Concrete and Minister of Pensions [1968] 1 All*

*ER 433* namely, mutuality of obligation, control and whether the other terms were consistent with employment status.

18 Where no notice is agreed, a contract of employment is terminable on reasonable notice. This must be at least the statutory minimum notice set out in s86 Employment Rights Act 1996 (in the Claimant's case therefore at least one week) but can be more than that. An employee can bring a claim for breach of contract under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994.

19 Under Regulation 14 of the Working Time Regulations 1998, an employee is entitled to be paid on termination for holiday which is accrued but untaken at the termination date.

20 Under s1 Employment Rights Act 1996 an employee is entitled to be issued with a written statement of their terms of employment within two months of the beginning of the employment. Under s38 Employment Act 2002, an additional award can be made when an employee wins certain claims and they have not been issued with that written statement. These claims include a claim for breach of contract and the Claimant has succeeded in her breach of contract (wrongful dismissal) claim. The additional award is between two and four weeks' pay. If there are exceptional circumstances meaning no award or the lower award should be made because it would be unjust or inequitable, the Tribunal can make no award or decide to make the lower award.

## **Reasons**

21 Based on the findings of fact set out above the Claimant was an employee of the Respondent because the necessary elements were in place for employment status namely mutuality of obligation and control and the other terms were consistent with employment status. The label attached to the arrangement or what the parties thought it was does not determine employment status which is a legal test.

22 The Claimant was dismissed in breach of contract as the proper notice was not given, in her case reasonable notice being one month. She is therefore entitled to damages representing what she would have earned in that one month, being her net loss of earnings. She is not entitled to her gross earnings for that month as she is compensated for her actual loss ie what she would in fact have received after accounting for tax and NICs. The Claimant has claimed the gross amount but the Respondent is not obliged to pay the gross amount.

23 Based on the findings of fact set out above the Claimant is entitled to holiday pay for four days accrued but untaken holiday.

24 Based on the findings of fact set out above I make an additional award of two weeks' pay. I do not make the higher award because it would be inequitable to do so where there were ongoing discussions about a written contract which Miss Scott had engaged with and which she had intended to enter into.

25 The Claimant's statement (doc 3) also referred to a claim under s8 Employment Rights Act 1996 regarding a failure to be issued with itemised pay statements. This was

not a claim brought in the Claimant's claim form and in any event, does not result in payment of compensation by virtue of s 12 Employment Rights Act 1996 which only provides for a declaration as a remedy.

Employment Judge Reid

4 March 2019