Case Number: 3330961/2018
3331006/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
(1) Miss Isabella Du Bignon (2) Miss Francesca Du Bignon	**v**	Hair Now (1982) Limited

Heard at: Norwich **On**: 15, 16 & 17 April 2019

Before: Employment Judge Postle

Appearances
For the Claimant: Miss Davenport, Solicitor
For the Respondent: Mr Cameron, Consultant

JUDGMENT

1. Both claimants were workers within the meaning of Section 230(3) of the Employment Rights Act 1996.

2. In the case of Francesca Du Bignon, the following Orders were made:

   2.1 The respondents were ordered to pay unpaid wages in respect of the claimant's last week of employment amounting to **£131.50;**

   2.2 The respondents were in breach of contract and the claimant is entitled to the sum of **£762.68;**

   2.3 The claimant had accrued holiday over the course of her employment and the respondents are ordered to pay the sum of **£6,382.78.**

3. In the case of Isabella Du Bignon, the following Orders were made:

   3.1 The respondents are ordered to pay the sum of **£89.60** in respect of the unpaid wages, the claimant's last week of employment:

   3.2 The claimant had accrued holiday pay and the respondents are ordered to pay the sum of **£1,107.93;**

3.3 The respondents were in breach of the National Minimum Wage during the course of the claimant's employment and they are ordered to pay the underpayment in the sum of **£2,165.45.**

REASONS

1. There are two claimants in these proceedings; there is a Francesca Du Bignon and Isabella Du Bignon.

2. The issues in this case start with the claimants' employment status as to whether they are truly self-employed as the respondents assert or whether they are workers or employees. There are then the issues in the case of, if they are not self-employed, Francesca which I believe is unpaid wages in respect of her last week's wages, holiday pay and notice pay and in the case of Isabella again unpaid wages in respect of the final week's pay, a claim under the National Minimum Wage and holiday pay.

3. In this Tribunal we have heard evidence from both claimants through prepared witness statements and for the respondents we heard evidence from Mrs Rose, again through a prepared witness statement. The Tribunal also had the benefit of a bundle of documents consisting of 336 pages.

4. The background to the respondents is they are a business which is a long standing family run hairdressers and beauty salon operating in Dereham, Norfolk. They commenced in 1982 and they incorporated in 2007 originally Mrs Rebecca Rose, a witness for the respondents, her parents were Directors of the respondents, Mrs Rose the daughter was the Manager of the respondent. Despite a preliminary hearing in these proceedings on 18 December 2018 before Employment Judge Warren, where I understand both Mrs Rose and her father attended, surprisingly they failed to inform the Tribunal that the respondents had allegedly ceased trading on 5 October 2018. This information, as I understand it, first came to light when the respondents witness statements were exchanged last week with the claimants, where the claimants were for the first time informed of this fact.

5. Although, I am informed that the respondent's company search reveals that company is still active and Mrs Rose's evidence before the Tribunal was and I quote, *"the company had no creditors",* Mr Le Roy resigned as a Director on 18 December 2018, although I understand Mrs Le Roy apparently remains as a Director of the respondents. I am also told a new company appears to have been formed called 'Beauty Now 2006 Ltd.' of which Mrs Rose is a Director operating from the same premises offering the same services.

6. I mention this in this Judgment and Reasons as they may become relevant in any enforcement action that may become necessary.

7. To be fair to the respondents there is a letter in the bundle at page 256 addressed to the Directors dated 16 November 2018 oddly suggesting the company cannot pay its debts and planned to be wound up despite the company being shown not only as active, but also Mrs Rose's evidence to this Tribunal that there were no creditors.

8. Dealing with Francesca Du Bignon first, it would appear following a course of beauty therapy at the City College, the claimant was taken on as a Beauty Therapist and trainee hairdresser at the respondents. At that stage the claimant would have had no experience in beauty therapy other than presumably those she practised on at City College and clearly was not in business at that stage on her own account. She started her apprenticeship in the hair side in September 2014 with the respondents, attending College one day a week. It would appear that apprenticeship finished sometime around May or June 2015.

9. There then appears in the bundle an unsigned contract of employment, undated at pages 61 – 64, citing Francesca as a self-employed Beautician and Trainee Gents and Ladies Barber. When you read that document, it does have many of the factors consistent with a contract of employment and it states it commenced at 22 July 2014. Then at page 65 there is a further 'Contract' as it is titled, commenced on 1 September 2014, unsigned by the claimant and it appears to be in identical terms to the previous one describing the claimant as a self-employed Beautician and Trainee Gents and Ladies Barber.

10. On 13 June there appears to be a further document, again citing and setting out similar terms and conditions of employment under the Employment Rights Act 1996, as in the previous documents. That is dated 13 June 2015, describing the claimant now as self-employed, but again terms akin to that of a contract of employment. It deals with the payment of 50:50, it was indeed signed by all parties.

11. There is another document in the bundle headed 'Agreement for Self-Employed Staff' dated 30 August 2016, pages 73 – 76, again signed by all parties and talks about payment 50:50, the hours the salon is open, the fact that the respondents must be informed with 10 days' notice of holiday and the fact they would receive no pay if they are absent from work without notifying the respondents. There is substitution clause, no notice requirements and there is a dress code in respect of the respondent's tunics that they are required to wear with the respondent's logo in the salon.

12. There is a further similar document in 2017, again describing Francesca this time as part time despite virtually full time working each week, that is similar to previous documents and found at page 72.

13. It is accepted the claimant, Francesca, has from time to time done beauty treatments for her family and friends in her own time. It is clear apart from a regular one day a week off, the claimant devoted each day to working in

the salon for the respondents' clients. It would appear the claimant was not offered a choice as to whether to become an employee after her apprenticeship finished, it was simply decided upon by the respondents that that was the way they were going to engage staff.

14. Apart from the owners and Mrs Rose, there appears only one other person employed as an employee, a Kirsty Allen, which apparently was done to assist with her Working Tax Credits. There were in addition to three apprentices another hair dresser working one day a week, Stephanie Anderson, who rented a chair but kept her earnings, which apparently is common in the hairdressing industry.

15. To recap, it is clear the claimant worked full time for the respondent, was integrated into the work force, if required to work for the respondent outside the salon hours she would not refuse, the claimant was required to work personally and could not send a substitute in her place and there was no such clause in any of the agreements the respondent had produced. The claimant was required to wear the respondents' tunic with the company logo on it at work and attended staff meetings. If she was not engaged with a client, she would be required to assist in the salon either shampooing hair, tidying up, reception duties, answering the phone, taking bookings or generally looking after clients as they arrived at the premises. The claimant was not in a position to pick and choose her work and clients and would be required to see effectively anybody who came in, walk-ins or who was pre-booked. The claimant was also expected to be available for pamper parties and weddings outside the salon hours if requested by the respondent.

16. The respondent would appear to provide the equipment with which the claimant worked and the hair products. The only products that this claimant provided was make-up which she preferred to that provided by the respondent.

17. It is also clear on two occasions whilst Mrs Rose was on maternity leave, the claimant was performing the role of de facto salon Manager for the periods of those maternity absence.

18. On Monday 12 February, Mrs Rose required the claimant to go to the local accountancy firm to give massages to staff. Monday was the claimant's normal day off and Mrs Rose had said it would be only from 9am until 1pm. The claimant agreed to do this on that basis, however, on arrival it became clear that was not the understanding of the clients of the firm and she was shown an email in which it suggested from the accountancy firm and Mrs Rose that it was an all day job. The claimant was, not surprisingly, not best pleased at being misled, the rate of pay appeared to have been agreed between the firm and Mrs Rose.

19. So far as it is relevant, the claimant did not stay all day, but the claimant decided to use the common vernacular this was in her mind the final straw, in saying that I accept this is not a constructive dismissal case, and

decided she was going to leave and set up her own business which she had been thinking about previously and had discussed with her sister. She did indeed discuss this with her sister who at the time was on holiday and agreed they would leave together and set up after giving notice.

20. Before giving notice, Mrs Rose questioned the claimant as to whether she was leaving, when the claimant responded Mrs Rose interrupted and no doubt in some form of industrial language asked both Isabella and Francesca to leave immediately. The respondents terminated both claimants' contracts by letter (at page 85), making various deductions from pay which were not authorised in any of the agreements which I have seen or have been produced at this Tribunal. The letter being sent to the claimants' old address. When the claimants wrote requesting their wages on 5 March (page 87), no response was ever received.

21. Dealing with Isabella Du Bignon, much of what I will say now is largely replicated with Francesca. Isabella left school in 2015, she began a two year course at Norwich City College in September 2015. She was working on an interim period as a Saturday girl at the respondents and in the first year she was at college, worked Thursdays at the respondents, in the second year she appears to work on Fridays and Saturdays. She was not happy at college and left and after a meeting with the respondents on 1 February 2017, it was agreed that she would be taken on, on a full time basis. The respondents would pay for her course fees so she could complete training in waxing, lashes and massage and they would deduct 10% from her earnings until it was paid off. Again, the meeting appears to have been with Mr Le Roy and there appears to have been no choice given as to how Isabella was to be engaged by the respondents.

22. It is important to note, at the time the claimant would have been aged 18 and Mr Le Roy would have been an experienced business man. We see a note of that meeting at page 55 and the split of pay was to be 60% to the respondents and 40% to the claimant to account for the course fees until they were paid.

23. Isabella started work full time at the beginning of February 2017, Tuesday was her regular day off, she worked Saturdays and again had similar agreements to that which I have already referred to in the case of Francesca, reciting this claimant was a self-employed hair dresser which this claimant clearly was not as she only did beauty treatment. There is a second agreement which does refer again to her being a self-employed hairdresser (at page 57 – 60) and again similar clauses if not the same to be found as that of her sister.

24. It would appear there was an expectation by the respondents that they would be in the salon between 9am and 5.30pm each day and 8.30am to 4pm on Saturdays, even if there were no clients booked in. It was accepted in the early months that this claimant's earnings were low but she clearly had no control of what came into the business and was again required to see the respondents' clients as booked in or whether they were

walk-ins as they were called. Again, if there were no clients, the claimant was expected to help out in the hair salon, shampooing, cleaning, answering the telephone, booking clients in and she was also required to attend staff meetings, wear company tunics with the company logo. Again, this claimant had no power to send someone in her place if she could not attend work and did not work on account for herself or for anyone else.

25. To repeat, what in effect was the position with her sister, reflects the position Isabella was in.

26. On 23 February, again Isabella went with other colleagues to Francesca's room to celebrate her birthday which was forthcoming and during the course of that Mrs Rose asked to speak to them and asked again if they were leaving, interrupted Francesca and her response was in terms of industrial language no doubt asking them to leave immediately.

The Law

27. What really is important in this case is the law and the facts.

28. In contrast to the limited statutory definitions of an employee, a worker is more thoroughly defined in the Employment Rights Act 1996. It is a creation of statute reflecting the view that some basic employment rights such as the right not to suffer deduction from wages, national minimum wage and paid annual leave should not be confined only to those working under what we call a 'Contract of Employment'.

29. Section 230 sub-section 3 of the Employment Rights Act 1996 defines a worker as an individual who has entered into, or works under, or where the contract has ended, 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 that individual.

30. It is clear from Section 230(3)(a), that all employees are workers. However, the second limb of the definition is much wider scope and includes some people who are not nominally self-employed. Therefore, for an individual to lay claim to worker status, he or she must first show there is some form of contract or agreement with the employer. To be a worker an individual must do, perform personally, the work or services required under the contract. Again, to qualify as a worker the other party of the contract must not be a client or customer of any professional business undertaking carried on by an individual. A worker is an intermediate class of protected worker made up of individuals who were not employed, but equally could not be regarded as carrying on business as self-employed. The Tribunal reminds itself we are not bound by the label the parties attach to the relationship put on the agreement. The parties cannot, by

agreement, fix the status of their relationship. This is an objective matter to be determined by an assessment of all the relevant facts, it is the totality of all of the evidence. What is the reality of the true picture? And if the relationship is not actively reflected in those documents that purport to recite the relationship as self-employed then the Tribunal is entitled to interpret the relationship is that of a worker. One should also consider whether there is a disparity in bargaining powers of the parties.

The Conclusions

31. It is clear there was a large degree of control over the claimants by the respondents as to how they work. They were expected to come in each day to the salon regardless of whether they had clients. One accepts there is some flexibility but if they did not have clients they were expected to do other tasks in the salon which I have already referred to. They had to notify the respondents if they were not to attend the premises that day. They had to seek the approval, it is quite clear, for holiday. The respondents could and did on occasions refuse holiday. The claimants were required to attend staff meetings, they were required to wear company tunics with the respondents' logo on it, they were expected to provide a personal service. They could not substitute and send someone in their place. There was no clause to that effect in the agreements that I have seen. There clearly was an agreement with the respondents to work in their salon and to help out when not seeing clients that had been provided by the respondents. They could not pick and choose clients unless in normal day to day life a client, or the claimant had issues with a particular person, which from time to time happens. The respondents were not clients or customers of the claimants. The claimants were clearly not in business on their own account, they worked five days a week for the respondents and that was what the expectation was and that they would provide their services to the respondents on each day working in the salon. The respondents clearly provided the equipment, premises and the products to work with, with the exception of Francesca providing her own make-up because she preferred that to the one provided by the respondents.

32. All those factors point undoubtedly to the relationship between the claimants and the respondents to that of a worker status.

33. In the conclusion of the Judgment, the Tribunal then dealt with remedy.

Remedy

34. In the case of Francesca, it was agreed by Mr Cameron on behalf of the respondent in the absence of any evidence for payment in respect of a wedding of £100 produced by the respondent, this claimant's claim for unpaid wages of £131.50 must be well founded.

35. It was agreed that the claimant's average weekly pay, based on the last 12 weeks was £381.34. Therefore, it was also agreed that this claimant was entitled to notice pay of £762.68.

36. In relation to holiday pay, Mr Cameron argued that the claimants' claim could only go back two years based on the wording of Section 23(4)(a) of the Employment Rights Act 1996.

37. Whereas Ms Davenport for the claimants, argued that the authority of Sach Windows entitled the claimants to go back throughout their employment.

38. Mr Cameron believed that the Judgment of the Fifth Chamber, namely the European Court, was only persuasive and that I should be bound by the terms of the Employment Rights Act 1996.

39. I took the view, the Judgment the Fifth Chamber on 29 November 2017, for the European Courts in Sach Windows Workshop Ltd. v King should be followed and that was of the view,

"…article 7 of directive 2003 – 88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave."

40. That being so, the parties were then able to agree, albeit Mr Cameron did not agree with the principle, holiday pay calculation on that basis was £6,382.78.

41. In relation to Isabella, it was agreed her unpaid wages amounted to £89.60 and holiday pay of £1,107.93 in effect of the ruling did not apply to this claimant given a much shorter period of service.

42. It was then left that Mr Cameron and Miss Davenport would try and work out the exact figure in respect of the underpayment of national minimum wage. Upon returning the Tribunal was informed that they had agreed the claimant's wage of £187.15 per week and the sum outstanding was also agreed as £2,165.45.

Employment Judge Postle

Date: ……28/6/19

Sent to the parties on: .....28/6/19..

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For the Tribunal Office