Case No: 2200195/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs C. Nolan**

Respondent: **IELTS Medical Ltd**

Heard at: **London Central** **On:** **8 August 2019**
Before: **Employment Judge Goodman**

Representation
Claimant: in person
Respondent: Mr J. Bromige, counsel

RESERVED JUDGMENT

1. The respondent is ordered to pay the claimant £120 in unpaid wages

2. The respondent is ordered to pay the claimant £264 in outstanding holiday pay.

3. No order on the claim for notice of termination.

REASONS

1. On 18 January 2019 the claimant presented claims for unpaid wages, holiday pay, and notice arising from her employment by the respondent as an English tutor. The claims were defended.

2. In respect of the notice pay claim, it was asserted she was not an employee but a worker. This distinction is not relevant to the claims for unpaid wages or holiday pay.

3. It was conceded in the response filed on 10 June 2019 that the respondent owed her £1,436 for some of the unpaid wages claim and some of the holiday pay claim, although that amount was not paid to the claimant until a few days before this hearing.

Evidence

4. To decide the claims I heard evidence from the claimant, Caroline Nolan, and from Ms Nonny Nze, owner and sole director of the respondent company. I was provided with bundles of documents by both parties, including emails and the monthly payslips.

5. Unpaid wages claims are brought under section 23 of the Employment Rights Act. The tribunal must assess the shortfall between what was "properly payable" in any period, and what was actually paid (section 13). The dispute about wages is essentially factual, not about any principle of law, as is the holiday pay claim.

Findings of Fact

6. The respondent runs a training centre for medical professionals, such as nurses and dentists, who have qualified overseas and wish to pass additional tests required for practice in the UK. Some of this training is by individual tuition, some in group classes.

7. The claimant, according to the response, was "employed ..with a zero hours contract". There is no written agreement, not even an email, recording any terms.

8. From 4-21 June she worked for 15 sessions, that is, 18.75 hours at £16 per hour, which is £20 for a session lasting 75 minutes. No dispute arises from this period.

9. In September 2018 the claimant was offered 7 evening sessions of 75 minutes each for Academic Writing, and then OET classes from Friday to Monday, 10 a.m. to 3 p.m. (4 hours as a one hour break was unpaid), paid at £20 per hour. She did the work. There is no dispute about unpaid wages for work done in September, nor Octpber, where the only onfprmation available is that the claimant was paid for 61 "units" at £20 per unit. It is not clear if these were each of one hour paid at £20, or 75 minutes for £20, so £16 per hour, or a mix of the two.

10. The disoute starts in November, when the claimant says she worked 120 hours but was only paid for 44 hours in the November payroll. This is a shortage of 76 hours.

11. Then the claimant says in December (she ceased work on 10 December) she worked 46 hours, but was in fact paid for 62 hours. This was some recognition by the respondent that she was owed more for November - there was some correspondence between them at the end of November about particular students and hours.

12. If the claimant is correct, she worked 166 hours in these months, but was only paid for 106 hours, a shortfall of 60 hours, though this is not what she said in an email to the respondent on 7 January 2019 (after employment had ended), where she stated the shortage was 58 hours. In the hearing she confirmed that 58 hours was her correct claim.

13. In January the respondent disputed that the claimant had taught particular students for the hours claimed.

14. The evidence of when the claimant worked is not satisfactory. The claimant says she kept a diary on which her claim was based but had not disclosed it; she called it "messy". Ms Nze said she had a record of what students paid for tuition, but no list of which students did what sessions, or

any timetable to show which tutors were teaching them. It was suggested the claimant was at fault for not completing student feedback forms on the software system, but these forms were not disclosed either, and Ms Nze did not dispute the claimant's challenge that these feedback forms gave no detail of sessions taken by a student, and could not serve as timesheets.

15. The respondent has since agreed (June 2019) that the claimant was underpaid by 52 hours at £20 per hour. That narrows the dispute for unpaid wages to 6 hours.

16. From the emails this is likely to be about a student called Didem. The respondent does not recall if the claimant taught her or not, and she has not checked her paperwork for Didem's invoice or payments. The claimant had obtained invoices for other students. In resolving the dispute about 6 hours underpaid I note that in the emails exchanged at the end of November the claimant was straightforward and helpful about two students having doubled up in one class, and another having gone over his hours. Comparing this with the lack of information from the respondent, and Ms Nze's delay before admitting any underpayment, and further delay in making payment, I conclude that the claimant's account is to be preferred, as more likely to be accurate.

17. The claimant is owed £120 (6 hours at £20 per hour) in unpaid wages.

Notice Pay

18. The employment ended on 10 December, at a point when the claimant was upset at the November underpayment and been told no more. An email exchange between the claimant and a former employee, Shayne, about underpaid wages came to Ms Nze's attention (because it had been copied to an email address at the respondent company). It criticised Ms Nze for "chaos" in her administration and suggested that Shayne and others had left because of disputes about pay. The claimant agreed with Shayne that it was "chaos". This led to a conversation with Ms Nze, following which the claimant did not work. In evidence she says this decision was "kind of mutual". She was unhappy about payment being postponed and disputed, and reluctant to work any more, while the respondent was unhappy that the claimant had referred to her unflatteringly.

19. In the notice claim, the issue is whether the claimant was employed under a contract of employment. In law, an employee works under a contract of service, a worker under a contract for services - section 230 Employment Rights Act. What is a contract of service was considered in **Ready Mixed Concrete (South East) Ltd v MPNI (1968) 2QB 497**, as requiring the fulfilment of three conditions – the servant agreed to provide his own work and skill in the performance of some service for his master in consideration of a wage or other remuneration, second, he agreed that in the performance of that service he was subject to the other's control "in a sufficient degree to make that other his master" and thirdly that the provisions of the contract were consistent with its being a contract of service. In **Carmichael v National Power plc (2000) IRLR 43**, where it was held there was an umbrella contract within which the worker was able

to choose whether or not to take work when offered, the parties to the contract must be under legal obligation to each other to work and pay for work for the whole period for it to be a contract of employment.

20. There is no evidence of what the agreement was other than an incomplete set of emails. The claimant stated in evidence she was not obliged to take the hours offered to her by the respondent, though in fact she accepted what was offered.

21. I conclude that there was, as in **Carmichael**, a contract of employment while the claimant was working an agreed set of hours. There seems to have been an understanding that another tutor could cover if she was unavailable. This might suggest that the claimant was under no obligation to work the hours she had accepted, indicating no contract requiring notice, but this is more likely to be an agreement to work certain hours as agreed from time to time on the terms of an umbrella contract. There was no obligation on either side once an agreed work pattern had been accomplished, and before more hours had been offered and accepted. There are no emails at all about what work was offered and accepted for November and December. I conclude that as of 10 December there is no evidence the claimant was working under a contract of employment, rather than working hours agreed from time to time, with no evidence of when any hours were agreed. If at any time she was working a set number of hours, the is not enough evidence of whether it had lasted the one month necessary to give rise to the statutory right to one week's notice of termination.

22. If there was a contract of employment of more than one month's duration, it is in any case not clear that it was terminated other than by mutual agreement, which would not give rise to a right to notice. If the claimant ended it, there is no right to notice in any case.

23. The claim for notice does not succeed.

Holiday Pay

24. Under the Working Time Regulations a worker is entitled to 5.6 weeks paid holiday per annum, and to be paid for any leave not taken on termination of employment.

25. Both sides calculated leave by using the government online calculator, which states holiday pay accrues as 0.125% of the hours worked, but the claimant had misread this as 0.123% which formed the basis of her calculation, and in the hearing conceded her error.

26. The claimant said she had worked 203 hours. The respondent calculated holiday on the basis of 205 hours worked, which yields an entitlement to 24 hours 45 minutes paid holiday outstanding.

27. It was not stated how the total of 205 was arrived at. In an effort to understand this I can see from the payslips in the bundle that 2015 is in fact the total of the *units* paid in June, September, October, November and December 2018. It does not include the 52 hours later conceded, nor the 6 hours awarded for unpaid wages. That gives a total of 263 hours, if

the units are taken as hours (as the respondent's calculation asserts). Applying 0.125% that gives a total for holiday pay of 32 hours 52 minutes, rounded up to 33 hours.

28. Applying the rate of £20 (and there is no real way of assessing how many of the units are hours at £20 or at £16), that makes holiday pay due of £660. It is less than clear at what rate this should be paid. It seems most of the work done from September was at £20 per hour, though some in September was at £16 per hour.

29. Where, as here, there are no normal working hours, a week's pay is to be calculated by taking the average remuneration over the last 12 weeks (Employment Rights Act 1996 section 224). Totalling the amounts shown on the payslips and the additional 58 hours at £20 per hour, the claimant worked 12 weeks from 17 September to termination. So the average pay per week is £294.83 per week. The average hours worked in that time however is not recorded as the pay statements show £20 per unit or class, and a class could be £16 or £20 per hour, so it is difficult to establish how many hours were worked in a week to earn the money. The 12 weeks worked is 12/52 of the annual entitlement to 5.6 weeks, so pro rata the holiday due is 1.3 weeks. This does not include anything for the work done in June, when she was paid £300 at £16 per hour, so 187.5 hours.

30. I resolve the difficulty by adopting the parties' assessment at a fraction of the hours apparently worked to show the hours of holiday due for which payment should be made, and then applying £20 per hour, resolving any ambiguity in the claimant's favour, as it is the respondent which asserts a rate without specifying (except in June) whether it is for one hour or 75 minutes on any occasion.

31. This means the holiday pay outstanding on termination is 33 hours at £20 per hour, so £660. Of this, the respondent paid the claimant £396 last week. That leaves £264 outstanding.

Employment Judge Goodman

Date 20 August 2019

JUDGMENT SENT TO THE PARTIES ON

20 August 2019

FOR THE TRIBUNAL OFFICE

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