Case Number: 2304271/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms P Lewin**

Respondent: **Farzana Shakoor t/a The Shoe Store**

Heard at: **London South**

On: **08 July 2019**

Before: **Employment Judge Freer**

Representation
Claimant: Mr Lukomski, Advocate
Respondent: Mr K Shakoor

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant was both an employee and a worker of the Respondent;

2. The Claimant's claim of unauthorised deductions from wages and the National Living Wage are successful. The Respondent shall pay to the Claimant the sum of £3,312.20 gross;

3. The Claimant's claim for annual leave is successful. The Respondent shall pay to the Claimant the sum of £300 gross;

4. The Claimant's claim of unfair dismissal is unsuccessful;

5. The Claimant's claims for wrongful dismissal and the statutory minimum notice period are successful. The Respondent shall pay to the Claimant the sum of £266.22 net;

6. The Claimant's claim of a failure to provide written particulars of employment is successful. The Respondent shall pay to the Claimant the sum of £1,064.81.

REASONS

1. By a claim presented to the employment Tribunals on 29 November 2018 the Claimant claimed automatically unfair dismissal; unauthorised deduction from wages including a claim for the National Living Wage; annual leave pay; breach of contract; pay for the statutory minimum notice period; and failing to provide a written statement of terms and conditions of employment.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf together with Mr Martin Pietrusinki, former security guard for Red Support Services.

4. The Respondent gave evidence through Ms Farzana Shakoor.

5. The Tribunal was presented with bundle of documents from the Claimant comprising 14 pages.

The Issues

6. The issues for determination were discussed and agreed between the parties at the outset of the hearing. They are:

- Whether the Claimant was an employee or worker of the Respondent.

If a worker:

- Whether the Claimant on any occasion received wages less than that properly payable at the level of the National Living Wage. If not, what sums are due?

If an employee:

- Whether the Claimant was paid for periods of annual leave and accrued annual leave on termination of employment. If not, what sums are due?

- What was the reason, or principal reason for the Claimant's dismissal. Was it for asserting a statutory right to pay? If so, it was agreed that the Tribunal in the first instance will address liability and general unfair dismissal remedy issues where appropriate.

- Whether the Claimant committed a fundamental breach of contract such that the Respondent was entitled to dismiss without notice pay (wrongful dismissal). If so, what sum is payable?

- Whether the Respondent provided the Claimant with written particulars of employment. If not, what compensation is payable?

A brief statement of the relevant law

Employment status

7. An 'employee' is an individual who has entered into or works under (or, where employment has ceased, worked under) a contract of employment. A 'contract of employment' means a contract of service, whether express or implied, and (if it is express) whether oral or in writing (section 230(1)&(2) Employment Rights Act 1996).

8. A 'worker' is an individual who has entered into or works under (or, where employment has ceased, worked under) (a) a contract of employment or (b) any other contract whether express or implied and (if it 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 the individual (section 230(3) Employment Rights Act 1996).

9. The well-established case of **Ready-Mixed Concrete (South East) Ltd –v- Minister of Pensions and National Insurance** [1968] 1 All ER 433, HC) provides:

> "A contract of service exists if these three conditions are fulfilled: the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; the other provisions of the contract are consistent with it being a contract of service.

10. In respect of the first two conditions:

> "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."

11. If a worker is entitled to substitute personal service then that will, in itself, usually be enough to demonstrate that the contract is not a contract of service due to the absence of the 'irreducible minimum of obligation' (See **Express & Echo Publications Limited –v- Tanton** [1999] IRLR 367, CA). However, a lack of personal service is not necessarily conclusive.

12. Control is a separate factor and is no less important to the creation of a contract of employment than mutuality of obligations.

13. If personal service, mutuality of obligations and sufficiency of control are present, then the contract *may* be a contract of employment. The final step of the analysis is to consider whether the other provisions of the contract are consistent with it being a contract of service.

14. This requires an employment tribunal to consider the overall picture. The tribunal should not adopt a 'checklist' approach, but consider all aspects with no single factor being in itself conclusive and each of which may vary in weight and direction (**Hall (Inspector of Taxes) –v- Lorimer** [1994] ICR 218, CA).

Unfair dismissal

15. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

16. Section 104 of that Act provides:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

. . . alleged that the employer had infringed a right of his which is a relevant statutory right".

17. The reason for dismissal is a set of facts known to, or beliefs held by, an employer at the time of dismissal, which causes that employer to dismiss the employee. The reason for dismissal does not have to be correctly labelled at the time of dismissal and the employer can rely upon different reasons before an employment tribunal (**Abernethy –v- Mott, Hay and Anderson** [1974] IRLR 213, CA).

Wrongful dismissal

18. Wrongful dismissal is based in common law: whether or not the Claimant committed a repudiatory breach of contract, which was accepted by the Respondent and entitled it to dismiss the Claimant without payment of notice pay. A repudiatory breach of contract is a deliberate flouting of the essential contractual conditions (see **Laws -v- London Chronicle (Indicator Newspapers) Ltd** [1959] 1 WLR 698.

Unauthorised deductions from wages

19. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

20. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Annual leave pay

21. Regulations 13 to 17 of the Working Time Regulations 1998 provide an entitlement to paid annual leave. Sections 221-224 of the Employment Rights Act 1996 apply for the purposes of determining the amount of a week's pay.

A failure to provide written particulars of employment

22. Section 38 of the Employment Act 2002 provides that where the Tribunal finds in favour of an employee in any claim listed in Schedule 5 of that Act and the employer has not complied with section 1 of the Employment Rights Act 1996 and provided the employee with written particulars of employment, the Tribunal shall make an award to the employee of a minimum of two weeks' pay and if just and equitable, four weeks' pay.

Facts and associated conclusions

23. This case was listed for one day. An interpreter was provided for the Respondent. There was oral evidence from three witnesses and very sparse documentary evidence produced. The Claimant produced a 14 page bundle of documents. The Respondent disclosed no documents in advance of the hearing and produced no witness statement.

24. A hearing in this matter had been postponed once before on 04 June 2019 and in respect of which detailed preparation orders had been given on 20 December 2018, including disclosure of documents and providing witness statements. The Respondent accepted that the written orders had been received.

25. It is on this basis that the reasons and decision of the Tribunal can also be conveyed in reasonably succinct terms.

26. On 11 December 2017 the Claimant commenced working for the Respondent as a Sales Assistant in its footwear store in the Trinity Centre, Hounslow.

27. The Claimant provided identification, bank account details and her National Insurance number. The hours of work and rate of pay were agreed. No particulars of employment were provided to the Claimant. It is the Respondent's contention that she wished to be self-employed. The Tribunal will return to that issue later.

28. The Tribunal finds as fact that during the period from 11 December 2017 to the end of February 2018 the Claimant worked 4 days a week for the Respondent.

29. That was the Claimant's evidence to the Tribunal. There was no documentary evidence produced by the Claimant in support. Her evidence was, however, corroborated by the evidence of Mr Pietrusinki. The evidence of Ms Shakoor for that period was inconsistent and it varied between three days a week as and when required, 3 to 4 days a week and 4 days a week. On balance,

having weighed all the relevant evidence, the Tribunal concludes that the Claimant worked for four days a week during this period.

30. With regard to hours worked, the Claimant's evidence was that she worked from Monday to Thursday from 9.30 am to 6.00 pm daily with a half an hour unpaid break resulting in an 8 hour day. The evidence of Ms Shakoor was the Claimant only worked from 11.00 am to 5.00 pm on the days that she worked.

31. Again, there was no documentary evidence is support of the hours worked by the Claimant during this period. However, the Claimant produced photographs of the Respondent's computer-based rota for a period in August, which confirmed a shift from 9.30 to 6.00. The other shift patterns on that rota were extra shifts and hours worked by the Claimant from March 2018. An 11.00 am to 5.00 pm shift only occurred on a Sunday, which was one of the additional shifts the Claimant worked after March 2018.

32. The Tribunal concludes on balance that the Claimant did work constant hours during this period of 9.30 am to 6.00 pm four days a week, giving total of 32 hours a week during this period.

33. With regard to rate of pay, it was not in dispute that the agreement between the parties at the outset of the working arrangement was that the Claimant would be paid the rate of the National Living Wage applicable at the time. As at December 2017 the rate was £7.50 per hour. The Claimant was paid in cash, one month in arrears with the pay date being between 19 and 22 of the month. No pay slips have been produced in evidence.

34. The Claimant argues that she was only paid £6.00 an hour. She argues that when this was raised with Ms Shakoor the Claimant was told that deductions had been made for tax and National Insurance. Ms Shakoor argues that the Claimant was paid and received £7.50 per hour.

35. Again, there was no documentary evidence produced relating to rate of pay for this period. The Claimant could have produced bank records that showed cash deposits in respect of wages as she did for July 2018.

36. The Claimant produced a bank statement that showed cash payments made into her bank account on 19 July 2018 totalling £1,020 that she argues was payment for a period of 170.5 hours for which she received £1,023 wages, thereby demonstrating a rate of pay of £6.00 per hour, which the Claimant claims she was paid during the whole of her working relationship with the Respondent.

37. The difficulty with this is that the Claimant has not produced any documentary proof that she did indeed work the 1705 hours alleged during that period. However, the proof of hours worked is in the control of the Respondent who did not produce any material before this hearing, either at the request of the Claimant or by the order for directions made by the Tribunal. The Respondent was fully aware of the nature of the Claimant's case and this evidence could

easily have been produced in advance of the hearing to disprove the Claimant's contention, but it was not.

38. Ms Shakoor accepted in evidence that the Claimant worked extra hours during June to cover absence due to bereavement. She later accepted in evidence that these extra shifts continued into August. Ms Shakoor's evidence was inconsistent on the hours worked by the Claimant during this period, stating that she worked 75-80 hours per week in June 2018, working 2 extra full days and some ½ days, then confirmed the Claimant worked 82-100 hours a week in June 2018. Ms Shakoor stated she had always said the Claimant had worked "60, 68, 74 hours" per week in August, but later changed that to 43 hours per week.

39. Therefore, on balance when weighing the competing evidence the Tribunal accepts that Claimant's witness evidence on hours worked during that pay period and that she was being paid at a rate of £6.00 per hour.

40. The Tribunal therefore further concludes that the Claimant was paid that rate during the whole period of her employment, as alleged, and in particular for the earlier period of January 2017 to March 2018.

41. Therefore, the Tribunal concludes that during the period from 11 December 2017 to 28 February 2018 the Claimant was paid £6.00 per hour for a 32-hour week as opposed to the £7.50 she should have been paid under the agreement entered into at the commencement of the working relationship.

42. Over the period of 11 weeks and three days, this gives a total period worked of (11 weeks x 32 hours) plus (3 x 8 hours) = 376 hours. The sum owed is £7.50 x 376 (£2,820) less the amount received of £6.00 x 376 (£2,256) = **£564 gross**.

43. From 01 March 2017 the Claimant worked more than four days a week. The Claimant produced photographs of the Respondent's computer rota for Monday 13 August 2018 to Friday 31 August 2018 (a 14 day period).

44. This showed repeated hours worked by the Claimant of two days of 9.30 am to 6.00 pm on Tuesday, Wednesday or Friday, a longer day on Thursday of 9.30 am to 7.00 pm and Saturday and Sunday working of 11.00 am to 6.00 pm and 11.00 am to 5.00 pm respectively, which totals 37 hours a week.

45. There was produced in evidence photographs of three handwritten rotas: one for sometime in May 2018 showing a five day week with hours worked on Friday of 12.00 pm to 6.00 pm, and two rotas that appear to relate to July 2018, that show a 5 day and 4½ day week. None of these rotas showed total hours worked.

46. As stated above, the Claimant produced bank details for 19 July 2018, but with no confirmation of hours worked and the Claimant argued that the two cash deposits were in respect of £1,023 paid for 170.5 hours at £6 per hour. This has been accepted as fact by the Tribunal.

47. Despite the inaccuracy over the precise hours, Ms Shakoor's evidence in fact corroborates the Claimant's account of the extra shifts worked and hours worked consistent with a figure increased from the period before March 2018.

48. On balance the Tribunal accepts the Claimant's account of hours and rate of pay for that period.

49. As stated above, on balance the Tribunal accepts that Claimant's evidence that she was paid at a rate of £6.00 per hour during her entire working period with the Respondent.

50. However, during the period from March onwards the Claimant clearly worked variable days per week. The three hand-written rotas show that the Claimant worked a different number of days per week: four, five and four and a half. Therefore, the Tribunal cannot calculate the a sum properly payable for the precise hours worked by the Claimant. The material is not available to do so.

51. It may be argued with force that the claim stops there because the Claimant has not proved the precise amount of her loss and the sum properly payable.

52. However, it is not in dispute that the Claimant worked for the Respondent during this period and that she worked a reasonably high amount of hours. On that basis it is not a reasonable conclusion that no sum of money is properly payable.

53. The Tribunal concludes that it is possible to make a finding on the *minimum* amount of hours that the Claimant worked each week.

54. The Tribunal concludes from the evidence before it that each week that from 01 March 2018 the Claimant worked a minimum of a Saturday and Sunday from 11.00 am to 6.00 pm and 11.00 am to 5.00 pm respectively. She also worked two days in the week from 9.30 am to 6.00 pm and one half-day of 12.00 to 6.00. A total of 34 hours per week. The Tribunal finds as fact from the evidence that these are the minimum hours worked weekly by the Claimant from 01 March through to the 19 September 2019 and therefore to that extent payments for those hours are certainly properly payable.

55. The Tribunal concludes that this is a sensible approach in circumstances where the Respondent is in control of all the documentary evidence relating to the days and hours worked by the Claimant and the Respondent has not produced that material to the Claimant despite being ordered and requested to do so, and being under statutory duties to maintain such records. The Claimant was disadvantages in having no material on hours worked apart from the few photographs of rotas referred to above.

56. An alternative route for the Tribunal could have been to adjourn the hearing for the Claimant to consider any documentary material produced by the Respondent either at or after the hearing and to confirm those hours by at least checking against her bank details or other records. For a case that has had detailed orders made for directions, has been adjourned once already and

given the long wait involved in relisting within this Region, it was not in accordance with the overriding objective to do so and would prejudice the Claimant.

57. The Claimant argued that she was not paid at all with regard to the period from 13 August to 19 September, which was not disputed by the Respondent.

58. Therefore, from 01 March 2018 to 31 March 2018 the Claimant worked 4 weeks and 2½ days (Saturday, Sunday and one half day) or 154 hours. The sum owed is £7.50 x 154 (£1,155) less the amount received of £6.00 x 154 (£924) = **£231 gross**.

59. For the period from 01 April 2018 to 12 August 2018 the Claimant worked 19 weeks or 646 hours. The sum owed is £7.83 x 646 (£5,058.18) less the amount received of £6.00 x 646 (£3,876) = **£1,182.18 gross**.

60. For the period from 13 August 2018 to 19 September 2018 the Claimant worked for 5 weeks and ½ days (one half day) or 170.5 hours. The sum owed is £7.83 x 170.5 (no sums were received) = **£1,335.02 gross.**

61. This gives an overall sum payable of **£3,312.20 gross**.

62. The Claimant also makes a number of claims (unfair dismissal, annual leave pay, breach of contract, statutory minimum notice and particulars of employment) which the Respondent resists on the ground that the Claimant was self-employed.

63. Consistent with this case, there was very little evidence on the matter. The Tribunal concludes that the Claimant was contracted to work personally for the Respondent in return for remuneration. There is no suggestion that she could have provided a substitute. The Claimant was under the control of the Respondent consistent with an employer/employee relationship. She was told where to work, when to work and how to do the essential elements of her work. The remaining factors, such as they are, are all consistent with employee status. There was no evidence that the Claimant produced invoices, or paid her own tax and National Insurance, produced her own accounts, worked for anyone else or did anything else that suggested self-employed status. The only evidence was that of Ms Shakoor who argued that the Claimant, new to this country from Poland, requested to be self-employed. That was not argued in the Respondent's Response form or letters to the employment tribunal explaining the nature of the Respondent's defence, but which expressly stated the contrary that the Claimant was "employed". Of course labels are not determinative and on the evidence produced to the Tribunal the factors point towards employment status. The nature of the work was typical for the role of a Sales Assistant.

64. Therefore, the Tribunal concludes that the Claimant was both a 'worker' and an 'employee' for the purposes of her claims.

65. The Claimant did not address annual leave pay in her witness statement. The Claimant's oral evidence was that she took annual leave but was not paid for the periods of 5 unspecified days in March, 9 to 13 May, which she stated amounted to 4 days and 23 to 28 July 2018, which she says amounted to 4 or 5 days. Ms Shakoor accepted that the Claimant took annual leave in March, May and July (although could not confirm the periods) and that this was not paid, which Ms Shakoor stated was due to consideration that the Claimant was self-employed. The Claimant also claims accrued annual leave on termination of employment.

66. The Tribunal concludes that due to the lack of evidence the claim for annual leave is even more difficult to calculate than the unauthorised deduction from wages claim. The best that can be established from the facts is that the Claimant's annual leave year commenced on 11 December 2017. From 11 December 2017 to 28 February 2018 the accrued annual leave was 11/52 x 5.6 weeks = 1.18 weeks at a four-day week = 5 days annual leave (at 8 hours a day). No annual leave is claimed to have been taken during this time and the leave alleged to have been taken during the remaining part of the annual leave year after 01 March 2018 does not reduce this period of accrued leave. Therefore, this period remains owed as accrued to the Claimant on termination of employment in the sum of **£300 gross** (5 x 8 x £7.50).

67. However, from 01 March 2018 to 19 September 2018 the periods during which the Claimant stated in evidence that she was on annual leave does not precisely correspond on the facts as now found to the days that she worked. For example, the period of 9 to 13 May 2018 is 5 days not 4 and the period from 23 to 28 July 2018 is 6 days not 4 or 5, if they are inclusive date periods. If they are not inclusive date periods, it has not been established on which days the Claimant took annual leave. Even within the dates stated by the Claimant there is no evidence to demonstrate that they were all working days and if not, which dates were working days. The Tribunal concludes that it is not possible reasonably to approach this matter on minimum periods the Claimant would have worked. That may be possible with regard to a full working week, but not with regard to days of holiday over imprecise periods.

68. It follows that if the periods of annual leave taken cannot be assessed, then neither can the period accrued annual leave for the same period. Therefore, the annual leave claim is restricted to accrued annual leave for the period up to 01 March 2018.

69. With regard to the unfair dismissal complaint, the Claimant did not have two years of continuous employment at the effective date of termination. She relies upon the automatically unfair dismissal category of asserting a statutory right, which does not require have any continuous service period.

70. The circumstances surrounding the end of the Claimant's employment are that two pairs of shoes were sold by the Claimant to a customer. The Claimant accepts that she gave the customer a hand-written receipt for £55. The Claimant said the shop wi-fi was down and so could not use the till. The Claimant said this was not an unusual situation and in those circumstances a

paper receipt should be provided to the customer. The Respondent says that a carbon copy receipt should have been produced, but was not, and there did not appear to be any subsequent entry on the system. Had the customer not returned the shoes the sale would have gone undocumented.

71. The Claimant argues that she was expressly dismissed over the matter by Ms Shakoor after refusing to sign a letter saying that she was resigning. Ms Shakoor says that the Claimant got upset, considered that she was being accused of theft, said that she could not work for the Respondent anymore and walked out.

72. It was the Claimant's evidence that she complained to Ms Shakoor at the end of her first month at work that she had not received the correct pay and raised the issue every pay date thereafter. The Claimant had been employed by the Respondent for ten months at the time of the termination of her employment. The Respondent could have dismissed the Claimant at anytime on a week's notice (or no notice in the first two months). The Tribunal concludes that in all the circumstances any dismissal, express or constructive, was not for the reason that the Claimant asserted her statutory right to pay.

73. The Tribunal concludes that an issue had arisen over the return of the shoes and the accompanying paperwork. The Tribunal concludes that Ms Shakoor genuinely considered an issue had arisen over the payment.

74. The Respondent's Response stated that the Claimant had said her boyfriend, Mr Pietrusinki, had been sacked due to the Respondent making his employer aware of his regular trips the Respondent's storeroom. The Tribunal accepts the evidence of Mr Pietrusinki that this comment is not correct. He was not the Claimant's boyfriend and was also not sacked from his job.

75. The Tribunal has seen an email from the alleged customer dated 27 May 2019, some eight months after the event. The Tribunal considers that the content of that e-mail appears unlikely and contrived where it is stated that Ms Shakoor confirmed to the customer when she returned the shoes that there were no issues with till system on the date of purchase.

76. Although a difficult decision on the evidence available the Tribunal concludes on balance that words were said to the Claimant by Ms Shakoor that amounted to a dismissal.

77. The Tribunal concludes, as stated above, that the reason for dismissal was not the Claimant asserting a statutory right, but due to issues and disagreement arising over the paperwork for the shoe purchase.

78. With regard to the statutory minimum notice claim, the Tribunal has concluded that the Claimant was dismissed. No corroborative evidence has been provided regarding the receipt for the purchased shoes and confirmation that it had not been logged onto the system. Accordingly, there is no evidence to show that the Claimant committed a repudiatory breach of contract and her

claim for a week's notice is successful and is owed 34 hours at £7.83 per hour, giving **£266.22**. Given the low sum, this equates to the appropriate net figure.

79. As the Claimant has been successful on some of her claims she is also entitled compensation pursuant to section 38 of the Employment Act 2002. The Tribunal considers that in the circumstances as set out above it is just and equitable to award four weeks' pay giving a total of **£1,064.88**.

80. The Claimant shall account to the HM Revenue & Customs as appropriate with regard to any sums awarded.

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Employment Judge Freer
Date: 20 December 2019