EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms C Germana		Sole Beauty Salons Ltd

Heard at: London Central **On**: 6 March 2020

Before: Employment Judge Stout

Representations
For the claimant: In person
For the respondent: Mr Da Silva (by telephone for part of the hearing only)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for unpaid wages for the month June 2019 is well-founded.

2. The Claimant's claim for notice pay is not well-founded and is dismissed.

3. The Claimant's claim for holiday pay is well-founded. The Claimant was entitled on termination of employment on 1 July 2019 to pay in lieu of 7.3 days' holiday pay.

4. Within 14 days of this judgment being sent to the parties, the Respondent is to pay the Claimant a total of £1,765.49 in respect of pay in lieu of accrued but untaken holiday pay and unpaid wages. This figure is calculated net of tax.

REASONS

Introduction

1. The Claimant was employed by the Respondent salon as a beautician from 28 March 2019 to 1 July 2019.

2. By a claim received on 25 September 2019 the Claimant ticked the boxes indicating that she was bringing claims for notice pay, holiday pay, arrears of pay and other payments. Specifically, she contended she was entitled to salary for June 2019 of £1,580, plus holiday pay and notice pay.

3. The Respondent's Response of 3 January 2020 denied that the Claimant was entitled to holiday pay on the basis that she was self-employed. The Respondent accepted her dates of employment were correct. The Respondent said the Claimant was not entitled to notice as she left 'voluntarily'. The Respondent accepted that the Claimant was entitled to payment for her hours in June 2019.

The issues

4. The issues for me to determine were accordingly:

   a. Whether the Claimant was entitled to notice pay;
   b. Whether the Claimant was entitled to holiday pay.

The hearing

5. The hearing was listed at 2pm for two hours. The Claimant, who is Italian, attended, accompanied by a court-appointed interpreter, Ms G Castagno.

6. The Respondent was not present. A phonecall was made. The clerk spoke to Lema da Silva, the manager at the Respondent. He said that he had understood that he was not required to attend the hearing because he had received a letter to that effect following his 'accepting liability'.

7. With the parties' agreement, I started the hearing with Mr da Silva on the telephone (on speakerphone) and the Claimant and interpreter present in the room. I confirmed that everybody could hear each other.

8. I then questioned Mr da Silva as to why he had not attended and he repeated what he had told the clerk previously. I explained to the parties that I could not hear evidence from Mr da Silva on the telephone but that I would hear any application he wished to make for the adjournment of the hearing to enable him to attend. Mr da Silva said he had meant no disrespect to the

Tribunal and that he would wish to have an adjournment to permit him to present his defence on the holiday pay and notice pay claims. The Claimant objected to an adjournment as she had taken the day off work to be here and considered Mr da Silva was not acting reasonably.

9. I decided that it was in the interests of justice and in accordance with the over-riding objective to proceed without Mr da Silva in attendance because:

    a. I was satisfied that he had had notice of the hearing and that he had not received any letter from the Tribunal that could have given him the impression that his attendance was not required;
    b. Most of the claim is admitted. Only a relatively small element of the claim is in dispute. It is not proportionate to adjourn given that the Claimant has attended and an interpreter has been paid for by the Tribunal Service;
    c. Adjournment would prejudice the Claimant who would have to take further time off work if the hearing were adjourned.

10. I gave Mr da Silva the option of continuing to ‘listen in’ on the telephone but he elected not to on the understanding that I would provide a written record of my decision. Although I announced my judgment at the hearing, these are accordingly my written reasons.

11. I heard evidence on oath from the Claimant, interpreted by Ms Castagno who also swore the interpreter’s oath.

12. I found the following facts to be material to my decision. My findings of fact are made on the balance of probabilities.

The facts

13. The Claimant was not issued by the Respondent with a contract of employment.

14. The Claimant provided me with an email from Mr da Silva which confirmed that she would commence work with the Respondent on 29 March 2019. This followed an initial trial in which her personal skills were assessed. Further emails that I was shown show Mr da Silva providing direction to the Claimant as to dress code, hours and location of work. Later, he also takes up with the Claimant that customers have not been happy with her work and that he has had to give refunds to customers in respect of her work.

15. The Claimant did not receive payslips during employment. She worked 5 days per week and about 8 hours per day (40 hours per week). In the last month she worked one more hour. She was paid by hours worked, monthly in arrears, but she had to chase each month she was there for payment.

16. The Claimant said that the Respondent did not pay tax on her wages and she considered it should have done as she regarded herself as an employee. She

had hoped I might in these proceedings have been able to order the Respondent to pay taxes on all her wages. I indicated that was outside my jurisdiction.

17. The Claimant had no other jobs during her time with the Respondent. She was working for another employer previously (Waxpot). She has never been self-employed and is not registered as self-employed.

18. Towards the end of June 2019 the Claimant was offered a College placement and told the Respondent she would henceforth only be able to work 1 day per week (Sunday).

19. The Claimant provided me with copies of messages exchanged between her and Mr da Silva on 5 July 2019. In those, the Claimant refers to having given notice of reducing to 1 day per week 'two weeks ago' and in the 5 July 2019 message she makes clear she is resigning and that was accepted by Mr da Silva on 6 July 2019. Her last day of actual work was, however, 25 June 2019. In her claim form she identified 1 July 2019 as her last day of employment and I am content to accept that is the relevant date.

20. The Claimant was not paid for her last month of work (up to 25 June 2019).

21. The Claimant went on holiday while employed by the Respondent (in particular from 18 April until 9 May 2019), i.e. about 15 days. She was not paid for that time and an email of 3 April 2019 from her to Mr Da Silva states *"I don't want to pay for my holiday, I just started working"*. She did not send any substitute into work in her place.

Conclusions

Notice pay

22. I find that the Claimant resigned and was not dismissed (or constructively dismissed). I find that she gave notice on or around 22 June 2019 and thus in substance worked a notice period up until the end of June 2019. As such, even if she were an employee (which I have not determined) and thus entitled (or required to give) a minimum 1 week's notice by s 86 of the Employment Rights Act 1996 (ERA 1996), she in fact worked that notice period. While she is, as is agreed by the Respondent, entitled to wages for June 2019 of £1,580 (gross), she is not entitled to an additional amount for notice pay.

Holiday pay

23. This requires me first to consider whether the Claimant was a 'worker' within the meaning of reg 1(2) of the Working Time Regulations 1998 (WRA 1998) and s 230(3) of the Employment Rights Act 1996 (ERA 1996).

24. This issue could be said to have been conceded by the Respondent since it has accepted that the Claimant is entitled to wages for June 2018, which is a claim under ss 13-27 of the ERA 1996 that can only be brought by a ‘worker’, but since the Respondent has also suggested the Claimant was ‘self-employed’, I have determined whether she fits the statutory definition of ‘worker’.

25. The legislative provisions define ‘worker’ as an individual who has entered into or works under (or, where the employment has ceased, worked under): a contract of employment (‘limb (a)’), or any other contract, whether express or implied and (if 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 (‘limb (b)’).

26. The last clause of limb (b) of the statutory definition makes it clear that if a person renders services or performs work on the basis that the person to or for whom he or she does so is a customer or client of his or her business or profession, he or she is not a ‘worker’. In *Byrne Brothers (Formwork) Ltd v Baird and ors* [2002] ICR 667*,* EAT, the EAT observed ‘the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm’s-length and independent position to be treated as being able to look after themselves’.

27. The EAT explained that drawing this distinction in any particular case will involve all or most of the same considerations as when distinguishing between a contract of employment and a contract for services (see ‘Employees’ above) but with the boundary pushed further in the individual’s favour — the basic effect of limb (b) is to ‘lower the pass mark’, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless reach that necessary to qualify for protection as workers. Factors to consider could include the degree of control exercised by the ‘employer’, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the ‘worker’ supplied and the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to HM Revenue and Customs, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied on to support the view that he or she is running a business and that the person for whom the work is performed is a customer of that business.

28. In this case the Claimant was providing personal service to the Respondent. The Respondent was not her client or customer and she was not in business on her own account. It is apparent that the Respondent exercised significant control over the Claimant, determining hours and place of work and uniform and setting standards. Although the Claimant indicated she did not expect to be paid for the extended holiday she took shortly after starting with the

Respondent, I find that was not because she did not consider that she was not entitled to paid holidays, but because of the length of that particular holiday coming so close to the start of the engagement. I find that she was a 'worker' and accordingly entitled to paid annual leave under reg 14 of the WTR 1998.

29. The Claimant whilst engaged by the Respondent had no paid holiday. It follows that on termination she was entitled to pay in lieu of accrued but untaken holiday. From 29 March 2019 to 1 July 2019 is 95 days, which is 26% of a year. 26% of the 28-day statutory entitlement is 7.3 days. Her daily rate was £80, so total pay due was £583.01 (gross).

Public policy

30. In the light of the fact that tax was not paid during the Claimant's engagement, and thus that there has been a potential fraud on the revenue, I have considered the principles in *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889. In that case, the majority of the Supreme Court held (para 42) that it is necessary where there may be an illegality defence to proceedings to ask, first, what is the aspect of public policy that founds the defence and, second, whether there is another aspect of public policy to which application of the defence would run counter. The Supreme Court indicated that the following questions would be relevant (para 44):
    a. Would the award of compensation allow the individual to profit from wrongful conduct in entering into the contract?
    b. Would the award of compensation permit evasion of a penalty prescribed by the criminal law?
    c. Would the award of compensation compromise the integrity of the legal system by appearing to encourage those in similar situations to enter into illegal contracts?
    d. Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in similar situations to enter into illegal contracts of employment? (For example, in that case, by engendering a belief among employers that they could discriminate with impunity against illegal workers.)

31. I am satisfied that awarding compensation to the Claimant does not allow her to profit from any wrongful conduct on her part. Although I have not had to determine for the purposes of these proceedings whether she was an employee or not, it is possible that she was and that it was the Respondent who ought to have taken responsibility for tax payments. In any event, I am satisfied that the Claimant genuinely believed that was where the responsibility lay. Awarding compensation does not permit her to evade any criminal penalty, nor does it compromise the integrity of the legal system. The Claimant has, by the Respondent's admission, been left out of pocket as a result of the Respondent getting into financial difficulties and failing to pay wages due. Not awarding compensation would merely encourage small

employers such as this to take advantage of workers in similar situations and avoid paying wages owed for work done.

32. The Claimant is not, however, entitled to her award in these proceedings gross as tax is owed on those sums. The award is accordingly made net of tax (calculated on the assumption that the Claimant earned at the same rate for June 2019 as she did for the rest of the tax year).

Overall conclusion

33. For all these reasons I find as follows:-

    1. The Claimant's claim for unpaid wages for the month June 2019 (which is admitted by the Respondent) is well-founded.

    2. The Claimant's claim for notice pay is not well-founded and is dismissed.

    3. The Claimant's claim for holiday pay is well-founded. The Claimant was entitled on termination of employment on 1 July 2019 to pay in lieu of 7.3 days' holiday pay.

    4. Within 14 days of this judgment being sent to the parties, the Respondent is to pay the Claimant a total of £1,765.49 in respect of pay in lieu of accrued but untaken holiday pay and unpaid wages. This figure is calculated net of tax.

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Employment Judge Stout

Date 10 March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 March 2020

FOR THE TRIBUNAL OFFICE