



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106038/2019 & 4106039/2019

Held in Glasgow on 2 December 2019

Employment Judge M Kearns

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Mr S Auld

**First Claimant
In person**

Mrs D Auld

**Second Claimant
In person**

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The Numbers Group

**First Respondent
Not present and
not represented**

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CAD Leisure Ltd (in administration)

**Second Respondent
Not present &
not represented**

TNG 103 Ltd

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**Third Respondent
Not present &
not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was that:

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- (1) The second respondent is ordered to pay to the first claimant the sum of **£2,447 (Two Thousand, Four Hundred and Forty-Seven Pounds)** unlawfully deducted from the claimant's wages contrary to Section 13 of the Employment Rights Act 1996.

(2) The second claimant was an employee or worker of the second respondent as defined by section 230(3) Employment Rights Act 1996 from 22 December 2018 to 28 March 2019.

5 (3) The second respondent is ordered to pay to the second claimant the sum of **£6,125 (Six Thousand, One Hundred and Twenty-Five Pounds)** unlawfully deducted from her wages contrary to Section 13 of the Employment Rights Act 1996.

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REASONS

1. The claimants presented an application to the Employment Tribunal on 30 April 2019 in which they claimed arrears of pay and holiday pay. The case came before me on 2 December 2019 for a Hearing.

15 **Issues**

2. Preliminary issues arose in relation to the identity of the employer in this case and the employment status of the second claimant. The main issue was whether the relevant respondent was liable to the claimants for arrears of
20 pay.

Evidence

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3. The claimants produced a bundle of documents and referred to them by page number. The claimants gave evidence on their own behalf.

Findings in Fact

4. The following material facts were admitted or found to be proved:-

30 5. In or about October 2018 the second claimant was working for a company which supplied alcohol to the Kidron House Hotel. The hotel was owned and

operated by James Mill who was related to the second claimant's husband. The second claimant had a meeting with Mr Mill to discuss his drinks category and to pull together a wine list for the hotel. Mr Mill said he was also opening two other hotels; (the Uplawmoor Hotel and the Cothouse Inn, Sandbank, Dunoon) and he asked the second claimant if she would be interested in coming on board. The second claimant said she did not think Mr Mill could afford to employ her. He asked her to put a proposal to him. She did so in a spreadsheet attached to an email dated 22 October 2018 (C2). The second claimant set out in the spreadsheet what her employment package was with her then employer and what her employment expectations would be with Mr Mill. She asked for a salary of £49,400 to match her existing salary with her then employer. It was agreed that she would be employed as area manager for the three hotels.

6. Mr Mill did not reply to the email in writing. Instead he telephoned the second claimant and asked her to come back and see him. She did so and the interview took place in Mr Mill's company's former head office in Irvine on or about 10 November 2018. Mr Mill said he was happy with the package the second claimant was looking for. It was agreed that she would be employed as area manager for the three hotels at an annual salary of £49,400 and that she would have a company car. The second claimant went straight back from the interview with Mr Mill and handed in her 6 weeks' notice to her then employer. Shortly thereafter the second claimant's husband sent Mr Mill a text saying "*Jamie, I canny thanks you enough for offering Dawn this job, it's exactly what she needed...*" (C4).

7. The claimant started work in the new post on 22 December 2018. Mr Mill had assured the second claimant that her company car would be there for her on her start date. However, there was no sign of it. Instead, Mr Mill gave the second claimant the use of the two personal cars he had through the business.

8. Payday for all employees employed by the second respondent was 28th of each month. Payment was in respect of the period from 22nd of the previous

month to 21st of that month. So, for example, the claimants' pay for the period 22 December to 21 January was due on 28 January 2019.

9. The first claimant began work as Head Chef at the Kidron House Hotel on 2 January 2019. His gross annual salary was agreed as £25,000. He was employed by CAD Leisure Ltd, who paid his salary net of tax and National Insurance by BACS into his bank account (C12). The first claimant took two days' holiday in January 2019 (C11).
10. Shortly after the second claimant started work as area manager she received allegations from staff that Mr Mill had not been paying them properly. A number of employees complained to her that they had not been given pay slips and they requested these from her along with evidence that their pension contributions were being paid. Every time the second claimant approached Mr Mill about this he referred her to the 'Numbers' Group Head Office'. The second claimant visited the Numbers' Group Head Office. Two people were working as receptionists. There was also someone doing marketing and a person employed to deliver DIY maintenance to various rental properties owned by Mr Mill and a launderette next door to the office. All Mr Mill's businesses appeared to operate from that office.
11. The Numbers Group LLP is a limited liability partnership. The officers are Mr James Samuel Mill and Mr David Joseph Fleming. The accounts filed on 31 August 2018 state that it "*did not trade during the current year or prior year and has not made either a profit or loss*". A 'statement of financial position dated 31 August 2018' signed by Mr Mill and uploaded to Companies House for the year ended 31 August 2018 states: "*For the year ending 31 August 2018 the LLP was entitled to exemption from audit under section 480 of the Companies Act 2006 (as applied by the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008 relating to dormant LLPs*".
12. The Kidron House Hotel had been trading since August 2018 and a number of staff had been employed there since then. They were becoming increasingly concerned to have contracts of employment and pay slips and

they continued to voice these concerns to the second claimant. The second claimant had repeatedly asked Mr Mill and the staff at Head Office for payslips to be given to staff. However, these were not forthcoming and the second claimant began to worry that employees' tax and National Insurance (including her own) may not be being paid to HMRC. Furthermore, the claimant began to realise that gas and electric bills were not being paid either.

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13. When Mr Mill gave the claimant her email address on or about 22 December 2018 she was designated as dawn@thenumbersgroup.co.uk. The claimant had an agreed holiday entitlement of 32 days or 2.65 days a month. This was confirmed to her in an email dated 11 February 2019 from 'Patrycja' at Head Office (C4). Mr Mill held the claimant out as working on behalf of The Numbers Group and signed himself off as Managing Director of The Numbers Group. However, when the claimant asked about it, Mr Mill would tell her: "*The Numbers Group doesn't exist. It's just a name*". There were no bank accounts for the Group so far as the second claimant was aware. The staff, including the first and second claimants were paid by BACS by CAD Leisure Limited and understood that company to be their employer. Mr Mill is still running the Kidron House Hotel, now using a company called TNG 103 Ltd.

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14. The second claimant called HMRC and they told her they had no record of any employees at the hotel. Accordingly, the second claimant decided to register to pay her own tax and National Insurance through a limited company. She agreed with Mr Mill that she would nevertheless remain an employee with holiday and sick pay entitlement and other employment rights. The second claimant notified Mr Mill towards the end of February 2019 of the details for payment of her salary to her company.

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15. On 28 February 2019 the second claimant began to receive calls from staff to say that their wages had not been paid. The claimants' salaries were also not paid. Staff wages were staggered by Mr Mill and most were eventually paid. However, the second claimant's salary was not paid in full. Furthermore, her tax and National Insurance for January had not been paid to HMRC. The second claimant's salary remained several hundred pounds short. She

became alarmed as she had never been employed like this before. Accordingly she called her previous employer who offered her her old job back. She gave Mr Mill her notice and left on 28 March 2019, having used up her accrued holidays. The second claimant was at all times required to render her services to the second respondent personally. She had no right to send a substitute to work in her place.

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16. The second claimant was not paid her salary for March 2019. Other staff were also not paid who worked in the Kidron House Hotel and the Cothouse Inn. The second claimant learned that Mr Mill was closing the Cothouse Inn after one week's trading and that no staff had been paid at that stage.

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17. The first claimant was not paid his salary on 28 March 2019 and he left on that date. The sums still due and owing to the claimants by the second respondent are as follows:

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First claimant

Employment dates: 2 January to 28 March 2019; Gross salary: £25,000 per annum; (Employed for 12 weeks and one day; weekly gross pay: £480.77; daily gross pay: £96.15).

Gross pay for period of employment: $12 \times £480.77 = £5,769.24 + £96.15 = £5,865.39$.

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Less payments received:

28/1/19 £1,019.59

28/2/19 £1,699.24

April 2019 £700.00

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Total £3,418.83

Sum due to first claimant

£5,865.39-

£3,418.83

£2,446.56

(From which first claimant to account to HMRC for tax and National Insurance.)

Second claimant

Employment dates: 22 December 2018 to 28 March 2019; Gross salary
5 £49,400 per annum; (Employed for 14 weeks; weekly gross pay: £950).

Gross pay for period of employment: 14 x £950 = £13,300

Less payments received:

28/1/19 £2,987.49

1/3/19 £1,387.49

10 5/3/19 £1,000.00

7/3/19 £1,000.00

15/3/19 £100.00

1/4/19 £700.00

Total £7,174.98

15 **Sum due to second claimant**

£13,300.00-

£ 7,174.98

£ 6,125.02

20 (From which the second claimant is to account to HMRC for tax and National Insurance.)

18. The second respondent failed to pay the second claimant the sums due to her. She accordingly sent them an invoice dated 18 April 2019 from her
25 company set up in February 2019 to receive her salary and pay her tax and National insurance after the second respondent failed to make these payments. The invoice was addressed to David Fleming at CAD Leisure Ltd. It did not include all the tax and NI payments the second respondent ought to have paid to HMRC in the earlier months. It remains unpaid.

30 19. Michelle Elliot and Stuart Robb of Leonard Curtis were appointed administrators to CAD Leisure Ltd, the second respondent on 14 May 2019.

By email to the Employment Tribunal dated 24 July 2019 from Jenna Cooper on behalf of Mr Robb, they consented to the claimants' cases continuing.

Observations on the evidence

- 5 20. Both claimants gave evidence. They were careful and credible witnesses who gave evidence in a measured way and made appropriate concessions. Their evidence was supported by and consistent with a number of documentary records they produced including contemporaneous texts and emails.

Applicable law

Employment status

- 10 21. The claimants claim unpaid salary due under their contracts with the second respondent. There was no issue with the first claimant's employment status, but some confusion about which of the respondents employed him (see below).
- 15 22. An issue arose in relation to the second claimant's employment status. In her ET1 she referred to her possible self-employment for the final month of her engagement with the second respondent. For the purposes of her claim to arrears of pay, the second claimant need only show that she was, and remained a worker as defined below for the duration of the contract. Section 230 of ERA is in the following terms:-

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"230 Employees, workers etc

(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

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(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

(3) *In this Act “worker”means an individual who has entered into or works under (or, where the employment has ceased, worked under) -*

(a) a contract of employment, or

5 *(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*
10 *customer of any profession or business undertaking carried on by the individual;*

and any reference to a worker’s contract shall be construed accordingly.”

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Unauthorised Deductions from Wages

23. Section 13 Employment Rights Act 1996 (“ERA”) deals with unauthorised deductions from wages and protects both workers and employees. Section 23 gives workers the right to complain to an Employment Tribunal to recover
20 what is due.

Discussion and Decision

The second claimant’s employment status

25 24. The second claimant makes a claim for arrears of pay. The claim is available both to employees and to “workers” as defined in section 230(3) ERA. The issue of the second claimant’s employment status arises from her description of herself in her ET1 as ‘self-employed’ for the last month or so of the contract and from the ET3 submitted by Mr Mill in which he argued that she was “never

an employee...". The question is whether she was a self-employed contractor. The test to be applied is whether the claimant was working under a contract, whether express or implied and 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*".

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25. I concluded that the claimant had met this test. The claimant was required to render personal service to the other contracting party at all times. She clearly
10 had no right to send in a substitute to work in her place. At all relevant times, she worked only for the other contracting party. She kept normal hours, had use of a company car and was entitled to holiday pay and sick pay if appropriate. Although she was self-employed for the purposes of tax and National Insurance, that came about because of her anxiety about the second
15 respondent not paying the tax and NI deducted from her to HMRC in accordance with their legal obligations. In any event, it is only one among a number of considerations. The claimant produced the final invoice dated 18 April 2019 attached to the second respondent's ET3 because the other contracting party had not paid her. She was not a person marketing her
20 services to other companies or clients.

Identity of contracting parties

26. In this case, there was some confusion about the identity of the other contracting party/employer. Mr Mill, in the ET3 he submitted on behalf of the
25 second respondent on 5 June 2019 stated in terms: "*Mr Auld, as well as Mrs Auld were both working with CAD Leisure Ltd.*" Both claimants were paid by CAD Leisure Ltd. Although both Mr Mill and the second claimant used email addresses and signatures with the name "The Numbers Group" the LLP of that name was dormant and not trading. Furthermore, Mr Mill told the second
30 claimant that "*The Numbers Group doesn't exist. It's just a name*". I concluded that the claimants were employed or engaged by CAD Leisure Ltd at all relevant times and that 'The Numbers Group' was used as a trading name. I

did wonder whether a TUPE transfer might have taken place to the third respondent, but there was insufficient evidence before me to that effect.

The first claimant's claim

27. The first claimant's claim is straightforward. He was employed by the second
5 respondent as the head chef at the Kidron House hotel and he is entitled to
arrears of pay in the sum of £2,446.56 or £2,447 rounded to the nearest whole
pound as set out in the findings in fact above.

The second claimant's claim

28. The second claimant is owed the sum of £6,125 by the second respondent
10 rounded to the nearest whole pound as set out in the findings in fact above.
Both claimants require to account to HMRC for any unpaid tax and NI as
appropriate.

Employment Judge:

M Kearns

15 Date of Judgement:

06 December 2019

Entered in Register,

Copied to Parties:

11 December 2019

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