



EMPLOYMENT TRIBUNALS

Claimant: Miss J Sutherland

Respondent: (1) Mr Dan May
(2) Leeds Rebound Gymnastics Club Limited (company no. 10254921)
(3) West Vale Deli Limited

Heard at: Leeds **On:** 11 December 2020

Before: Employment Judge Maidment

Representation

Claimant: In person

Respondent: Did not attend

JUDGMENT

JUDGMENT having been sent to the parties dated 11 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant's complaint is one seeking unpaid wages, accrued but untaken holiday entitlement as at the termination of her employment and seeking damages for breach of contract (notice pay).
2. The first respondent denies that the claimant was ever an employee and maintains that her status was that of a self-employed person. The claimant has named Mr Dan May as an individual respondent as well as 2 companies in which he is interested. If the claimant was an employee, there is a dispute

and issue to resolve in terms of the correct identity of the claimant's employer.

3. The claimant gave evidence before the tribunal with reference to her typed witness statement. The tribunal also considered, as evidence, the typed statement of Mr Daniel May dated 1 December 2020. The tribunal asked the claimant questions for clarification and by way of putting Mr May's case to her.
4. Mr May did not attend the hearing, nor anyone indeed on behalf of the second or third respondent. Mr May had telephoned the tribunal on 10 December 2020 to say that he would not be able to attend the hearing as he was in Birmingham and regulations relating to the coronavirus pandemic meant that he wasn't allowed to travel. The tribunal has seen a note made by member of the tribunal's administrative staff to the effect that it was explained to Mr May that parties to legal proceedings are allowed to travel to attend hearings. Mr May asked for written confirmation in case he was questioned regarding his reason for travel, in response to which he was sent a link to relevant government guidance. Mr May has, however, not attended today's hearing and the tribunal has heard nothing further regarding his attendance today.
5. The third respondent was dissolved on 17 December 2019. The claimant said that she only added the third respondent when she was told by Mr May that, if she did so, she would be paid the money owed to her. The claimant has no knowledge of the third respondent and certainly did not work for or provide services at any business known as West Vale Deli.
6. The claimant stated that she had been employed from 20 August 2019 to 21 October 2019 and that she was owed the sum of £1050.88 in unpaid wages plus additional sums in respect of unpaid holidays, notice pay and to reflect the fact that she had not been provided with a written contract.
7. Mr May's evidence is that the claimant responded to an internet advert on a job site for a position as a contractor at West Vale Deli. She then provided services and submitted invoices for hours worked. Due to lack of funds in the company's bank account she was paid through a different company bank account, not through any of the named respondents. The claimant was subsequently told that her services were no longer required. Mr May said that he had intended to pay "the full amount stated on the claimant's schedule of loss" but that no payment had been made in the absence of a response from the claimant on his seeking her bank details. His statement went on to say that a point in time he was unavailable to attend a hearing on due to being out of the country on a pre-booked family holiday. He requested, therefore, that the statement was used in his absence.

8. The claimant's evidence was that she had attended an interview to work as a cafe assistant at the Leeds Gymnastics Club. Mr May's primary activity was in providing gymnastics coaching – the café was an additional facility on site for the use of visitors. She was interviewed there by Mr May who offered her employment and showed her around the cafe facility, including how to operate some of the electrical equipment. Another individual was asked to show the claimant how to operate the coffee machine. Mr May showed the claimant how to use the till and explained some of the pricings. Her employment was subject to a trial day after which she said she worked set hours of 4pm to 8pm, Monday to Friday and 9am to 5pm on Saturday and Sunday. This constituted a 36 hour week. She was paid at the rate of £8.21 per hour. The claimant was clear that there was no reference to her being self-employed when she was interviewed by Mr May. She had never submitted invoices or been asked to.

9. The claimant gave her evidence in a detailed and convincing manner. Her evidence is accepted as a much more credible basis upon which she was engaged at the cafe. The tribunal concludes that the claimant was plainly engaged as an employee. There was an agreement that she would provide personal services – there is no suggestion that she could ever send a substitute. There was mutuality of obligation. There was an agreement that she would work for the respondent the set hours already referred to. There was a requirement that she worked those hours and an obligation on the respondent to allow her to do so and pay her accordingly. There was a significant degree of control in this arrangement. Again, the claimant worked set hours, using the equipment provided by the respondent in the manner required her to do so, serving and selling the products it selected and at the price it determined. The claimant had no opportunity to earn any form of profit and was at no risk if sales were poor. As referred to below, there is evidence of her taking paid holidays and of her being told that she would be provided with a wage slip. There was reference to the provision of a P45 by Mr May when her services were terminated. If the claimant had not been an employee, then she was certainly a worker contracted to provide personal services and who was not in business on her own account. This position was the claimant sole source of income and no sense was she providing services to a client.

10. The claimant's position was that she always understood that she was being engaged by the second respondent. As already stated, the name of the third respondent meant nothing to her. She assumed that she was being employed by whichever entity operated the gymnastics club and not by Mr May personally, albeit she was never told of the exact name of any employer. On the evidence the tribunal concludes that the claimant was employed by the second respondent.

11. During her period of employment, the claimant received a single payment by bank transfer in the sum of £984.76 with a payment reference of "City of Leeds", after, she said, repeatedly chasing Mr May for her wages. She asked for a wage slip but was told that she would not get one until she had signed her contract. No written contract was ever provided however.
12. The amount of wages owed to the claimant of £1050.88 has not been disputed. This is the shortfall of wages the claimant has calculated is due to her for the period she worked.
13. This payment would cover also her wages in respect of 4 days of holiday she took from Thursday 3 October to Sunday 6 October 2019. That period of leave would encompass 2 shifts of 4 hours and a 2 shifts of 8 hours giving a total of 24 hours of paid holiday. As at the date her employment terminated, her pro rata entitlement would have been to 33.56 hours giving a shortfall of accrued but untaken holiday payable at termination of 9.56 hours. That represents an entitlement in respect of holiday pay of £78.47.
14. There were issues of dispute between the claimant and Mr May which were evidenced by the claimant. On 22 October the claimant noted that she had not received the wages then due to her, which caused her to text Mr May. The claimant messaged that she was unable to come into work if she did not get paid. She told the tribunal that she could not afford the travel costs. Mr May then replied: "no worries, just don't ever come back then". Thereafter Mr May asked the claimant for an address so that he could send her P45 and cheque. The claimant did not understand this request as he already had her address from the CV she submitted prior to her interview. The claimant was dismissed without notice in circumstances where there is no evidence before the tribunal that she committed any act of gross misconduct. Her statutory minimum notice entitlement was to 1 week which, at 36 hours per week, gives a sum due to the claimant of £295.56.
15. Pursuant to Section 1 of the Employment Rights Act 1996, the second respondent was under an obligation to provide the claimant with a written statement of the particulars of her employment given that this had endured beyond a period of 2 months (as was required at that time). No written statement was ever provided to the claimant. In such circumstances, pursuant to Section 38 of the Employment Act 2002, the tribunal must make a further award of compensation of a minimum of 2 weeks' pay or a higher amount of 4 weeks' pay. In circumstances where no statement at all was provided, with no reasons advanced as to why, it is appropriate to make an award in the claimant's favour of 4 weeks' pay giving a further sum ordered to be paid to her of £1182.24.

Case No: 1800356/2020

Employment Judge Maidment

Date 25 January 2021