EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr G D Collier **v** Nuffield Garage Limited

Heard at: Watford by CVP **On**: 15 & 19 May 2021

Before: Employment Judge R Lewis (sitting alone)

Appearances

For the Claimant: Mr G Collier (his father)
For the Respondent: Ms M Sharp (Counsel)

JUDGMENT

1. The claimant was an employee of the respondent from 15 January 2018 until 15 April 2019.

2. The tribunal therefore has jurisdiction to hear the claims for notice pay, holiday pay and arrears due of the National Minimum Wage.

3. The claimant is in principle entitled to an award under s.38 Employment Act 2002 (failure to issue written particulars).

4. The claimant's claim of unfair dismissal is dismissed, as the claimant did not have two years' service.

REASONS

Procedure

1. The claimant's father asked for these written reasons. This was the hearing of a claim presented on 17 July 2019. A case management hearing took place at Reading before Employment Judge Anstis on 23 April 2020. This case was listed then for three days.

2. Due to resource problems, the first of those days could not be offered. As I was only available to hear a two day case, I asked the parties to agree that I would first hear and decide the questions of whether the claimant was a

worker or employee of the respondent. I was able to give judgment on that point on the second afternoon, and then deal with case management.

3. The remainder of the hearing has been listed to be heard before me on **10 and 11 August 2021** by CVP and a separate case management order has been sent to prepare for that hearing.

4. I have reminded the parties that the option of settling their differences by achieving compromise before the hearing remains open to them. They are encouraged to pursue that option. I have respectfully suggested to the claimant's parents that they seek the advice of a qualified professional with experience in employment law.

5. In preparation for this hearing, there was an agreed bundle of about 130 pages. The claimant's mother, Ms S Carter, gave evidence on behalf of the claimant and Mr W Nathanielsz, the proprietor of the respondent, was the only live witness for the respondent.

6. The claimant had served the witness statement of a former colleague, Mr Harmer. Mr Harmer did not attend the hearing (although it was arranged for him to be called at a fixed time at the start of the second day). I considered his written statement, bearing in mind that it had not been tested in cross-examination.

7. The claimant himself took no part in the hearing. I was told that he was off camera in the same room as his father, and could hear what was said. His father explained that he has Aspergers, and that it could be difficult for him to take part, remotely or in person. He did not think that adjourning to a hearing in person would make a difference.

Executive summary

8. I give a short executive summary of the case, because I think it will make the rest of this judgment easier to follow.

9. The respondent is a motor and garage business. Mr Nathanielsz has worked in the motor industry for many years, and has operated the respondent for many years.

10. The claimant was born in 1998. He has Aspergers. He completed three years of College training in motor mechanics. I was told that he is committed to working in the industry, although he may not present well at interview.

11. In short, in May 2017, Ms Carter asked Mr Nathanielsz to offer the claimant an apprenticeship. I find that the claimant worked for the respondent from about early June 2017 until 14 January 2018 as an unpaid work experience volunteer. I find that from 15 January 2018, he became an employee of the respondent, until his employment ended on 15 April 2019. He started new employment almost immediately.

12. It was agreed that the respondent did not pay the claimant at all until December 2017. He was then paid regularly from January 2018 until he left.

13. The first question for me to decide was whether the claimant was at any time an employee of the respondent. I decided that he was an employee after 15 January 2018 and therefore qualified to bring a claim for one week's notice pay. He cannot bring a claim for unfair dismissal as he did not have two years' service.

14. The claimant also brings claims for arrears of holiday pay and under the National Minimum Wage Act. I find that he is qualified to bring those claims for the period from 15 January 2018 onwards, because in the period after that date he was also in law a worker for the respondent.

15. Mr Nathanielsz agreed that the claimant was not issued with written particulars of employment. The claimant is therefore entitled in principle to an award of at least two weeks' pay and not more than four weeks' pay, (unless there are exceptional circumstances to the contrary), in accordance with s.38 Employment Act 2002.

16. The main factual question to be decided at the next hearing will be the number of hours per week for which the claimant was entitled to be paid the NMW. The answer to that question will enable the tribunal to decide (1) the amount of any arrears of pay due to the claimant; and (2) the amount of a week's pay, as any calculation of notice, holiday pay, and s.38 award will be based on a week's pay. The legal framework for these questions is complex and technical.

General approach

17. I preface my reasons with points of general approach. In this case, as in many others, evidence referred to a wide range of issues. If I do not mention a point which was referred to; or if I do so, but not to the depth of detail to which the parties did, that is not oversight or omission. It reflects the extent to which the point was truly of assistance.

18. The tribunal is familiar with the difficulties which a non-lawyer faces in presenting a case. I accept that this was unfamiliar territory for the claimant's parents. I make no criticism of either of them, commenting that their unfamiliarity with the procedure was clear. In particular, they were not aware perhaps of the difficulties which they accepted in wearing a number of hats at this hearing. They presented first as caring parents, who were used to fighting their corner for a vulnerable son. Mr Collier was also the representative in this hearing. In addition, each of Mr Collier and Ms Carter was also potentially or actually a witness of fact. Each also gave hearsay evidence of what others, notably the claimant, had told them. Each also offered opinion and submission throughout the case. Each, in different ways, showed the emotion which the case evoked.

19. I understand that there were many reasons why the claimant took no part in the case. I was not asked to manage his absence as a reasonable adjustment. I did ask Mr Collier if the hearing would be easier if it were to proceed in person (he said that it would not). I simply say that the claimant's absence did not make the tasks of either representative or the tribunal any easier.

20. On the respondent's side, I was struck by the absence of work-related paperwork or records. Within the bundle, the two most useful items were a list of the cheques given to the claimant (50-52) and an accountant's report of June 2019 (91a to 91c) which reflected the accountant's analysis of the instructions given to her by Mr Nathanielsz. Where the report contained statements of fact (eg about the claimant being absent) I have understood the accountant to repeat her instructions, and not to write from first-hand knowledge.

Findings

21. I make limited findings of fact. The respondent is a long established garage business. In late May 2017, the respondent was not fully operational. It was awaiting relocation to new premises following a fire. However, it was obviously recruiting, as Mr Harmer's statement indicated that he joined it at around that time.

22. The claimant had by then completed three years College training in motor mechanics. He needed practical experience. Ms Carter understood from the College website that the respondent was recruiting apprentices. Mr Nathanielsz was adamant in evidence that at that time he had no need for recruiting an apprentice, and in particular would not recruit again through Abingdon College, where Ms Carter had seen the advertisement.

23. Ms Carter went to the garage premises to hand in a letter on the claimant's behalf requesting an apprenticeship. The letter introduced the claimant, and said that he had Aspergers, and would not perform well in interview. There was dispute as to whether Mr Nathanielsz had seen the letter, but it was common ground that he met Ms Carter on around 22 May 2017.

24. On the basis of the conflicting evidence which both gave about their conversation and meeting, I find that there was a mismatch of understanding and expectation between the two sides. Mr Nathanielsz in the event agreed that the claimant could start working at the garage in its new premises, which opened at the end of that month or early in June.

25. I find that Ms Carter genuinely thought that what was being offered was employment which would lead up to the offer of an apprenticeship. I find that Mr Nathanielsz had no apprenticeship to offer, but agreed to offer a practical opportunity to a vulnerable young man.

26. Mr Nathanielsz' evidence was that he offered the claimant an opportunity as, essentially, an act of altruism and charity (although he did not use either of those words). I accept that Mr Nathanielsz understood that the claimant

was vulnerable, and had studied motor mechanics at college but needed practical experience. I accept that Mr Nathanielsz wanted to offer the claimant practical experience in a garage setting.

27. There was no discussion or agreement between Mr Nathanielsz and the claimant or his mother about the claimant's role or duties, or pay or hours, or how long the arrangement was to last. It is no matter of hindsight to say that a short e-mail written at the time by Mr Nathanielsz, simply saying what the arrangement was, would have avoided a great deal of dispute.

28. All seems to have gone well for the first few months. The claimant was then living with his mother. He went to the garage throughout the full working week. Mr Nathanliesz was present, and he was in charge, but he did not work in the workshop. There were only a few employees. The claimant was happy to have practical experience. He did a combination of menial tasks (eg seeping and cleaning); tasks which were ancillary to the motor business (eg delivering vehicles); and some mechanical tasks, which he did as part of a team or under supervision. He worked with his colleagues, and reported to Mr Nathanielsz.

29. Both Mr Collier and Ms Carter had serious health issues in the second half of 2017. That may be part of the explanation as to why it was not until about October or November that either of them questioned why the claimant was not being paid by the respondent. However, I also find that the absence of any question before then is some evidence that the claimant and his parents understood that the opportunity was unpaid work experience. They all felt that practical experience was the priority for the claimant.

30. In any event, in late November 2017, the claimant's parents both attended a meeting with Mr Nathanielsz. There was discussion about the claimant's position. There was no note or record of the meeting or its outcome. It was agreed at the meeting that the arrangement for the claimant's work would continue, and that payment would be made.

31. In December 2017, the claimant received two cheques totalling £175. He was also provided with "new starter" paperwork by the respondent's accountant which he signed off on 1 December 2017. (I attach no weight to the fact that the paperwork gave 5 October 2017 as his start date, as that may have been a cut and paste mistake, or a device to record a start date on the exact midpoint of the financial year).

32. The claimant was placed on the respondent's formal payroll with effect from 15 January 2018. Thereafter, he was paid twice a month by cheque. I accept the records of the amounts of payment and dates as accurate (50-52). The claimant took each cheque home, and his mother banked them. That is an important detail, which indicates that the modest rate of pay which they recorded was known to, and not challenged by, Ms Carter.

33. The claimant's pay was below the threshold for deducting tax and national insurance. It was paid regularly and properly recorded and processed. It was supported by payslips. (The payslips in the bundle seemed to me no

more than computerised records of payments, not copies of the actual paper slips given to the claimant: this did not seem to me an important point).

34. The change of arrangements after the November meeting was a second missed opportunity for the respondent to put on paper what the working understanding was. There was therefore no contract of employment, or other agreement, or even note or letter confirming the parties' understanding. By that time, Mr Nathanielsz had worked with the claimant for several months. His evidence was that he has always issued written contracts of employment to all his employees. It did not seem to occur to him that written record keeping might be particularly important in the case of a vulnerable individual.

35. My conclusion about the period between June 2017 and 15 January 2018 is that in the absence of any agreement to the above effect, and in light of events over the first months of his work, I find that the claimant took up post by early June 2017 as a work experience volunteer for an indefinite period.

36. In the absence of cogent evidence, I make no finding about the December cheque payments. I find that by committing to systematic and regular payment through PAYE, the respondent made significant change to the nature of its relationship with the claimant. I find that the respondent's commitment to regular payment indicates the creation of an obligation on the claimant to do something in return for something. I find that the obligation on the claimant was to be present at the garage and undertake the tasks he was given. They included menial tasks, such as sweeping the workshop. They included some tasks related to motor matters, such as driving the respondent's vehicles or customer's vehicles; and they included some supervised mechanical tasks.

37. In return, the respondent committed to a rate of pay set, seemingly arbitrarily, by Mr Nathanielsz, but which appears to have been set on a basis of 30 hours work per week at what he understood was then the apprentice NMW rate of £3.50 per hour, a weekly total therefore of £105. While that approach was of course not wholly consistent with Mr Nathanielsz' refusal to offer an apprenticeship, it was nonetheless the basis on which he set the rate of pay.

38. The bundle contained an accountant's report written for the purpose of these proceedings in June 2019 (91A-91C). I approached it in two strands. I make no comment on the purely mathematical strand, which was made up of calculations relating to pay, deductions and the NMW. There was no evidence to challenge their mathematical accuracy.

39. In the main strand of the report the accountant set out her understanding of the factual setting. I understood that that strand was entirely based on what Mr Nathanielsz had told the accountant. As I understood it, his instructions analysed these events through a number of steps:

    (1) He set a monthly gross figure as a budget to be paid to the claimant;

(2) That figure was divided by the hourly NMW rate which applied to the claimant at the time;

(3) That division produced the number of hours in that month for which the claimant was to be paid. If the monthly budget for example were £600, and the NMW were £5.00 per hour, the claimant was paid to work 120 hours per month;

(4) As the NMW rate increased, the calculation was re-done. If, in the above example, the NMW rate went up to £6.00 per hour, the claimant was then paid to work 100 hours per month;

(5) Each re-calculation was discussed with, and agreed by, the claimant. According to the accountant's report, this happened five times: in January, April and August 2018, and in January and April 2019;

(6) It was understood and agreed that while the claimant was free to be at the workplace for more hours than he was paid for, he would only be paid for the number of hours calculated by the above procedure.

40. This was an unusual procedure in any workplace, because it was cumbersome, it required repeated changes, it generated avoidable management work, and it left unclear the boundaries of responsibility around the claimant's attendance. Apart from the accountant's report, there appeared to be no evidence of any of these steps on any occasion, either in paper records in the bundle, or in the oral evidence of any witness.

41. This arrangement continued until 15 April 2019. It was common ground that the claimant resigned on that day; the reasons and circumstances may not matter for this case. It was agreed that the claimant did not work out one week's notice, and was not paid in lieu of it. The respondent's case is that there was a mutual agreement to the effect that employment would end that day without payment in lieu. This agreement was not recorded in writing.

Conclusion

42. I have considered first the definition found in s.230(1) and 230(2) Employment Rights Act 1996, which provides,

> ' ..Employee means an individual who has entered into or works under .. a contract of employment .. [which] means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.'

43. I agree that there was no contract of apprenticeship. In my judgment, the above facts show that in the period 15 January 2018 to 15 April 2019 inclusive, the claimant entered into an obligation with the respondent, which was that he would attend the workplace, and undertake such tasks as he was allocated in consideration of the respondent paying him a salary set by Mr Nathanielsz.

44. I find that there was offer, acceptance and consideration. I find that the claimant agreed in exchange for remuneration to attend the respondent's premises and undertake work. When he did so, he was a member of the small workforce and within the management of Mr Nathanielsz. I find that he was an employee for that period and therefore also a worker for statutory purposes.

Other issues

45. I comment on the issues which now arise between the parties. I do so in order to clarify the area of dispute. I have made no findings of fact about any of these points, all of which are to be decided at the adjourned hearing.

46. The claimant had a statutory entitlement to one week's notice. He was not required to work it and he was not paid in lieu. The respondent's case to the tribunal has been that there was mutual agreement to waive it. The respondent's accountant's report however records a different reason for non-payment, which Ms Sharp did not rely on as part of the respondent's case before the tribunal.

47. There were no relevant holiday records in the bundle. I find that the claimant was entitled to holiday pay for the 15 month period in question. It was not disputed that he took all bank holidays. On the face of it, he therefore accrued 25 days for which he was entitled to be paid. In his schedule of loss, he said that he had taken 10 days; the accountant's report referred to payment in respect of all untaken holiday without setting out a breakdown. If there remains a net balance untaken after 25 days, it appears that the claimant is entitled to be paid in lieu of it.

48. If the tribunal makes any award, s.38, Employment Act 2002 will come into play. That in turn would require the tribunal to decided what was the level of a week's pay, as at 15 April 2019. That question takes me to the major difficulty in the case, which is the NMW.

49. Reading the accountant's report as a whole, it seems that Mr Nathanielsz' instructions to the accountant were to the effect that he had set a gross monthly figure for the claimant's pay, and then gradually reduced the claimant's hours as the NMW rate increased. The accountant's report recorded that each such change had been discussed and agreed with the claimant, and indicated that the claimant understood that he was not entitled to be paid for any hours in excess of those which had been discussed and agreed.

50. There was no evidence from either side (in statements, or recorded in the bundle) of how this system operated, and I anticipate that it will be the major area of dispute at the next stage, which the tribunal will have to resolve in accordance with the National Minimum Wage Act and the National Minimum Wage Regulations.

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Employment Judge R Lewis

Date: 1/6/2021

Sent to the parties on: .....

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For the Tribunal Office