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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105349/2020

Hearing Held by Cloud Video Platform (CVP) on 9 August 2021

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Employment Judge - A Strain

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Ms W Wallace

**Claimant
Represented by
Ms Carol-Anne Wallace
Daughter**

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Mr A Gul

**Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that:

- (1) the Respondent was the employer of the Claimant;
- (2) The Tribunal makes a total monetary award of £4,778.64 in favour of the Claimant and orders the Respondent to pay her that amount;
- (3) The Tribunal dismisses the unfair dismissal claim.

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Background

1. The Claimant was represented by her daughter. She had presented claims of Unfair Dismissal under section 98 of the **Employment Rights**

Act 1996 (ERA 1996) and unlawful deductions in respect of pay, notice pay and holiday pay.

2. The Respondent represented himself.

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3. A Turkish interpreter was provided to translate for the Respondent.

4. The Claimant had lodged a Bundle of Documents with the Tribunal.

5. The Tribunal clarified with the Claimant at the outset that the only claims she was pursuing were underpayments of pay, notice and holiday pay.

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These were detailed in the Schedule of Loss that had been produced.

6. The Claimant gave evidence on her own behalf as did the Claimant's daughter.

7. The Respondent gave evidence on his behalf.

Findings in Fact

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8. Having heard the evidence of the Claimant, her daughter and the Respondent and considered the documentary evidence before it the Tribunal made the following findings in fact:

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5.1 The Respondent is an individual who owns and operates a café business called "No 1" at 1 Bernard Street, Edinburgh. He has done so since 20 November 2017 when he acquired the business from the previous owner.

5.2 The Respondent personally informed the Claimant that she was being kept on in the business after he acquired it.

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5.3 The Claimant was employed by the Respondent from 20 November 2017 as the Shop Manager. She was never provided with a contract of employment, statement of terms and conditions, P60 or any written confirmation of her employment with the Respondent.

- 5.4 The Claimant worked 40 hours per week and was paid £1,330.17 per month net of tax and national insurance.
- 5.5 The Claimant took instruction directly from the Respondent as to the performance of her duties, hours, rates of pay and holidays. When the Claimant paid suppliers she sought authorisation from the Respondent.
- 5.6 The Respondent paid the Claimant's wages through his personal bank account throughout the period of her employment.
- 5.7 The Claimant received payslips intermittently and many were missing through the course of her employment. Her payslip for the period ended 31 December 2019 designed her employer as Berno Limited. The Claimant did not receive any further payslips in respect of her employment.
- 5.8 On 23 March 2020 the café was shut due to lockdown and the onset of the pandemic. The Claimant received her last regular pay on 20 March 2020 in the net sum of £1,296.61. The Respondent made personal payments of £500 and £1000 to the Claimant on 12 and 28 May 2020 respectively.
- 5.9 The Claimant wrote to the Respondent seeking payslips and payment of wages outstanding on 19 June 2020.
- 5.10 The Claimant raised tribunal proceedings against Berno Limited on 3 July 2020 seeking recovery of underpaid wages due to this company name appearing on her last payslip.
- 5.11 The Claimant received no response to her letter of 19 June 2020 and wrote a further letter to the Respondent on 8 July 2020. Subsequent to sending that letter she received a letter dated 6 July 2020 from the Respondent on headed notepaper of a limited company called Redon Ltd. The Respondent signed this letter on behalf of Redon Ltd. In that letter the Respondent informed the Claimant that the company had not received any money from HMRC for furlough payments and that she

should contact HMRC direct. The letter was received by the Claimant on 18 July 2020. The Claimant's employment was terminated by that letter on 18 July 2020.

5.12 On 16 July 2020 the Claimant logged into her HMRC account to find that her employer was designed as Redon Limited and that she had been paid her pay in the period April to June 2020. The Claimant had never heard of the company Redon Limited and did not receive any pay from that company for the period April to June 2020.

5.13 The Respondent, Berno Limited and Redon Limited did not pay any tax or national insurance payments to HMRC in respect of the Claimant's employment from 20 November 2017 until the termination of her employment despite the deductions having been stated on her payslips and her receiving her pay net.

5.14 The Claimant has never received a P60 or P45 from the Respondent, Berno Limited or Redon Limited.

5.15 The Tribunal proceedings raised by the Claimant against Berno Limited were undefended. The Tribunal made an award in her favour on 26 August 2020. Subsequent to that the Claimant made enquiry and found out that the company, Berno Limited, had gone into liquidation on 7 January 2020. This was the first she had been aware of this.

5.16 The Claimant then raised the current proceedings against the Respondent on 2 October 2020.

5.17 The Claimant reconciled her payslips and her actual pay received for the period to end of March 2020 and discovered that she had been underpaid by the sum of £410.70. Furthermore she was underpaid £3,673.58 (net) for the period from 1 April 2020 to the termination of her employment.

5.18 The Claimant was entitled to 2 weeks statutory notice pay in the sum of £613.92.

5.19 The Claimant was entitled to 8 days accrued holiday pay in the sum of £491.14.

The Relevant Law

Identity of Employer

- 5 9. In ***Autoclenz Ltd v Belcher and others [2011] IRLR 820***, the Supreme Court held that the starting point for ascertaining the intention of the parties is usually the written contract. However, where the written document does not reflect the true intentions of the parties, or was a sham, it may become necessary to look beyond the written document to
- 10 the course of dealings between the parties and their subjective beliefs about the contractual arrangement.
10. Similarly, In ***Dynasystems for Trade and General Consulting Ltd and others v Moseley UKEAT/0091/17***, the EAT upheld an employment tribunal's decision that an employee was in fact employed by a UK
- 15 company rather than the Jordanian company stated to be his employer in his contract of employment. In considering whether the contract accurately reflected what had been initially agreed, the tribunal had been entitled to take into account later events.
11. Determining the correct employer was also considered in two earlier
- 20 cases: ***Clifford v Union of Democratic Mineworkers [1991] IRLR 518 and Secretary of State for Education and Employment v Bearman and others [1998] IRLR 431***. In Clifford, the Court of Appeal held that whether A is employed by B or by C is a question of law where the only relevant evidence is documentary. However, where the relevant
- 25 evidence is an amalgam of documents and facts, the question of law is a mixed question of law and fact. In Bearman, the EAT stressed the importance of starting with the written contractual arrangements, and then considering whether the position changed thereafter and, if so, how.

12. Most recently the identity of the employer has been considered by the EAT in ***Clark v Harney Westwood & Riegels and others*** ***UKEAT/0018/20/BA***.

Submissions

- 5 13. The Parties made submissions orally.
14. The Claimant's position was that she was actually employed by the Respondent, had always been paid by him, taken instruction from him and had never been informed of Berno Limited going into liquidation or a transfer of her employment to Redon Limited. She was due the sums
10 claimed from him as her employer.
15. The Respondent's position was that he had never personally employed the Claimant. She was employed through his companies. She knew that she was employed by Berno Limited. He accepted that he had never issued the Claimant with a contract of employment and that tax and
15 national insurance deductions had never been paid to HMRC in respect of the Claimant's employment. He accepted that he had not told her Berno Limited had gone into liquidation. He accepted he had made payments throughout her employment from his personal account as he had not set up a business account. The £1,500 payment made in May 2020 was from
20 him personally as he felt sorry for the Claimant.

Discussion and Decision

Identity of Employer

16. The Tribunal considered the evidence and followed the approach set out in ***Clifford v Union of Democratic Mineworkers [1991] IRLR 518*** and ***Secretary of State for Education and Employment v Bearman and others [1998] IRLR 431***. The Tribunal looked at the whole facts and circumstances surrounding the Claimant's employment since November 2017 until its termination, the documents (such as they were) and the Parties submissions and evidence.
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17. The Tribunal had no hesitation in finding the evidence of the Claimant and her daughter to be credible and reliable. Their evidence was corroborated to a significant extent by the evidence of the Respondent and the documentary evidence.
- 5 18. In particular it was clear that all of the Claimant's dealings, instructions and interactions were with the Respondent. The Respondent personally paid her wages throughout the duration of her employment. He accepted that. This was also confirmed by the entries in the Claimant's bank account.
- 10 19. The Respondent accepted that neither he nor the companies had issued any contract of employment or paid any tax or national insurance to the Revenue.
- 15 20. The fact that the Claimant had not been paid over the period April 2020 until the termination of her employment was also not in dispute. He did however accept that he had paid £1,500 personally to the Claimant.
- 20 21. The Tribunal did not accept the Respondent's evidence that the Claimant was aware of Berno Limited being her employer nor did it accept that the only reason he was paying her through his personal bank account was that he had not set up a business account for the company. The Respondent could not say specifically how the Claimant would have known that her employment had transferred to Redon Limited or that Berno Limited were insolvent. He said it happened suddenly and that she would have known that due to the company being on her payslip (even though he could not produce any such payslips). He thought he may have told her but wasn't sure. The Tribunal considered this evidence to be
25 vague, lacking in credibility and unreliable. The Tribunal preferred and accepted the Claimant's evidence.
22. There was no dispute as to the amounts sought by the Claimant. Liability was disputed.

23. On the basis of the evidence before it and considering the whole facts and circumstances the Tribunal accepted and found that the employer was the Respondent as an individual.

Underpayment of Wages

5 24. The Tribunal found that there had been an underpayment of £410.70 in the period to March 2020. Furthermore the Claimant was underpaid £3,673.58 (net) for the period from 1 April 2020 to the termination of her employment on 18 July 2020.

Notice

10 25. The Claimant's employment had been terminated without notice. Given her length of service she was entitled to a minimum of 2 weeks notice pay. The Claimant was entitled to 2 weeks statutory notice pay in the sum of £613.92.

Holiday Pay

15 26. The Claimant was entitled to 8 days accrued holiday pay in the sum of £491.14.

Employment Judge: Alan Strain
Date of Judgment: 20 August 2021
Entered in register: 17 September 2021

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