



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr McCaulay Taylor and Mr McKenzie Taylor

**Respondent:** Daniel May t/a West Vale Deli

**Heard at:** Leeds via CVP

**On:** 13 September 2022

**Before:** Employment Judge Moxon

## Representation

Claimants: Mr Smith

Respondent: In person

**JUDGMENT** having been sent to the parties on 13 September 2022 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

These reasons are supplied at the request of the Respondent.

### Introduction

1. The Respondent is the owner of a café and a food van. The food van is stationary outside the café premises and only opens during warmer months. It closes each year in around September / October.
2. The Claimants are twin brothers. They were 16 years of age at the material time.

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3. McCaulay was employed by the Respondent from 22<sup>nd</sup> September 2021 to initially work in the van. He claims that he continued to work for the Respondent in October 2021, albeit in the café.
4. McKenzie was employed by the Respondent from 28<sup>th</sup> September 2021 to initially work in the van. He claims that he continued to work for the Respondent in October 2021, albeit in the café.
5. The Respondent contends that the Claimants' employment ceased when the van closed and that they were volunteers within the café during October 2021, so that they could be trained to cook a full English breakfast.
6. By a claim forms, the Claimants claimed that they were employed by the Respondent in October 2021 and are therefore owed wages for hours worked, which consists of 32 hours for McCaulay and 43 hours for McKenzie.
7. By order of Employment Judge Wade, dated 3<sup>rd</sup> February 2022, the claims were listed to be determined together.

The hearing

8. At the outset of the hearing I allowed the uncontested application to amend the name of the Respondent to 'Daniel May t/a West Vale Deli', pursuant to rule 34 of the procedure rules. The amendment caused no prejudice to either party.
9. The parties had agreed a 45-page bundle. The Claimants relied upon their witness statements and a witness statement from their mother, Ms Nicola Iredale. The Respondent relied upon a witness statement from Mr May and also a witness statement from Mr Aaron Sheehan, whose statement was limited to the issue of the Respondent's identity. I heard oral evidence from the Claimants, Ms Iredale and Mr May.
10. The hearing was conducted remotely via CVP. The technology worked without significant difficulty and no prejudice was caused to either party.

11. I gave my judgment and reasons orally to the parties on the day of the hearing.

Issues

12. The sole issue in dispute was whether the Claimants were employees, and therefore owed a wage for hours worked, during October 2021.

13. Mr May did not challenge that they were present in the café on the hours claimed. There was no dispute that if they were employees their hourly rate would have been £4.62 per hour, which was minimum wage for employees of their age at the material time.

14. Whilst the Claimants had made reference to being owed notice pay, they accepted that they had resigned without serving notice. Whilst there was reference to seeking loss of future earnings, there was no claim for unfair dismissal and, in any event, any employment would not have been of sufficient length to give rights to such a claim.

The law

15. The claim was for unauthorised deduction of wages.

16. The claim was therefore pursuant to section 23 of the Employment Rights Act 1996.

17. Section 24, as amended, provides the Employment Tribunal's powers:

*“(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—*

*(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,*

*(b) in the case of a complaint under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,*

*(c) in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and*

*(d) in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.*

*(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.”*

#### Factual background

18. The Claimants attend a dance studio which is also attended by the daughter of Ms Jenny Pepper, who at the material time worked in the Respondent's café. Ms Pepper recruited the Claimants, on behalf of the Respondent, and they commenced in September 2021 to work in the van. They were paid for the hours worked that month in the van.

19. Upon the van being closed at the beginning of October 2021, the Claimants worked in the café. When the Claimants were not paid, at the end of October 2021, they resigned from the Respondent without notice.

20. Both parties have relied upon electronic communications. Neither party relied upon any messages contemporaneous to agreements about the Claimants' work status.

21. The Claimants rely upon WhatsApp / text messages between their mother, Ms Iredale, and Ms Pepper. The messages commence towards the end of October 2021 and relate to the Claimants completing HMRC forms so that they could be

on the Respondent's "books". There was discussion between Ms Iredale and Ms Pepper as to whether this would affect the former's welfare benefits. On 24<sup>th</sup> October 2021 Ms Pepper shared with Ms Iredale a screenshot of a text conversation she had with Mr May in which she had told him that she thought that "...they would be same as me not on the books" to which Mr May had replied: "We can't have no one not on the books. It would look dodgy the café bringing in income but no one on the books".

22. There are messages between Ms Iredale and Ms Pepper on 22<sup>nd</sup> October 2021, in which Ms Iredale asks if the Claimants would be paid that day, to which Ms Pepper replied:

*"Yes it is pay day today but I haven't had mine yet...They will get paid before end of today he [sic] just until midnight to do it x"*

23. On 24<sup>th</sup> October 2022 Ms Iredale again queried whether the Claimants were to be paid and Ms Pepper replied:

*"He will pay them. I will speak to him as soon as I can and they will get thier [sic] money x"*

24. The Respondent relied upon messages between Mr May and Ms Pepper.

25. There is a message from Ms Pepper to Mr May, which is undated but appears to be from the end of October, in which she states:

*"I have spoke to the twins mum she has your number ro [sic] speak to you regarding twins and tilly getting paid as we all though as you wanted em the books they would be paid. So the staff we now have in the café are myself and abb"*

26. On 3<sup>rd</sup> November 2022 there is a screenshot of handwritten notes which Mr May told me during his oral evidence had been taken during a meeting that day with Ms Pepper. They include the following notes:

*"If Boys want to go in for a couple of hours only for training they can but it will not be paid"*

*"All monies owed for previous hours and hours that where [sic] vauntry [sic] will be paid on the 22<sup>nd</sup> November"*

27. In response, Ms Pepper said that she "Agreed" with the contents and also messaged:

*"I wouldn't worry about it You've done nothing wrong She came to you and asked for the [sic] to volunteer and then has changed her tune....It's only the boys were volunteering"*

28. Ms Pepper sent him a screenshot of the hours claimed by McCaulay, to which Mr May replied, on 22<sup>nd</sup> November 2021:

*"No can you clarify what hours they worked I am uninterested in the voluntary hours"*

29. There are references within the messages to Mr May only wanting one member of staff working at a time in the café,

30. Also provided were HMRC forms, signed by the Claimants on 25<sup>th</sup> October 2021.

31. In oral evidence, the Claimants both said that they believed themselves to be paid employees. Whilst they could not cook a full English breakfast, which was required when working in the café, they were trained by others in the café to do so and were already able to cook and serve hot drinks and hot sandwiches. They were required to wear a company t-shirt when they attended. McCauley did not see Mr May in the café during October and McKenzie only saw him once, during which Mr May had told him to stand up. McKenzie stated that if he did not attend a shift he would expect to be dismissed.

32. Ms Iredale stated that she was approached by Ms Pepper on 20<sup>th</sup> September 2021 and asked if the Claimants wished to work in the café. They started that month but did not sign HMRC forms until 25<sup>th</sup> October 2021. Her communication had been with Ms Pepper. She denied that the Claimants had been working as volunteers or would have been willing to do so. Whilst there had been talk of them volunteering, this did not happen and upon closure of the van, their employment continued in the café.

33. Mr May stated that the Claimants were employed on a temporary basis in the van and that the employment ended when the van closed. They were given the opportunity to volunteer in the café to train so that they could commence work when other staff left at the end of October. They needed training as they did not know how to cook a full English breakfast, which is a significant part of the role within the café. He does not know what hours they attended. He never needed more than one person in the café as the turnover was only approximately £150 per day.

34. Mr May was asked about the messages between Ms Pepper and Ms Iredale, in which it appears that Ms Pepper believed that the Claimants would be paid. He replied that Ms Pepper and Ms Iredale were friends and that Ms Pepper did not want to fall out with Ms Iredale. In relation to the notes of 3<sup>rd</sup> November 2021, he said that he had been prepared to pay the Claimants for the work they had volunteered so that they would remain working in the café, otherwise he would have insufficient staff. He said that Ms Pepper no longer works for him.

### Conclusions

35. It was not in dispute that the Claimants were employed by the Respondent towards the end of September 2021, and that they initially worked in the van. The Claimants assert that upon the van closing in the beginning of October, they continued their employment with the Respondent and worked in the café. McCauley states that he worked 32 hours, McKenzie states that he worked 43 hours. The Respondent contends that the employment was only ever temporary and ended upon the closure of the van and that any work within the café was on a voluntary basis to be

trained, as neither Claimant knew how to cook a full English breakfast. Mr May does not know how many hours they volunteered.

36. I have stood back and considered all of the evidence in the round. Having done so, am satisfied, upon the balance of probabilities, that the Claimants were employees as claimed and I thereover find in their favour.

37. I find that their version of events is more likely than the Respondent's for the following reasons:

1. It is accepted that the Claimants commenced employment with the Respondent towards the end of September 2021. They were both paid for hours worked in the van in September 2021;
2. Mr May's assertion during his oral evidence that the employment was temporary is inconsistent with his witness statement and ET1 in which he said it was "*casual*". He did not state, until his oral evidence, that there was an agreement that the employment would end upon the van closing. He has never given a date in which the employment ended. There has been no contract provided to show that the employment was temporary nor anything to indicate that the employment had been terminated;
3. It would have been unreasonable, and therefore unlikely, for the Respondent to have terminated the Claimants' contract and expected them to attend voluntarily to be trained before being re-employed. It was not challenged that, save for cooking a full English breakfast, they were capable of undertaking the tasks required;
4. I accept that the Claimants attended the café on the dates and times claimed. The dates and times have been consistent throughout and never challenged. It is not plausible that the Claimants would be willing to work 32 and 43 hours respectively with no expectation of pay or that such lengthy time would be required to learn to cook a full English breakfast. I accept



their evidence that they were already capable of making hot drinks and hot sandwiches;

5. The evidence of working hours is consistent with employed shifts rather than coming in to volunteer. McCaulay had attended between 9am and 5pm on 2<sup>nd</sup>, 9<sup>th</sup>, 17<sup>th</sup> and 30<sup>th</sup> October 2021. McKenzie attended between 9am and 5pm on 3<sup>rd</sup>, 10<sup>th</sup>, 16<sup>th</sup>, 23<sup>rd</sup> and 31<sup>st</sup> October 2021, and between 4pm and 7pm on 5<sup>th</sup> October 2021;
  6. It was not challenged that the Claimants were required to wear a company t-shirt. That is indicative of employment. McKenzie stated, and I accept as compelling, that he knew that if he did not attend a shift he would be dismissed. That is again indicative of an employment relationship;
  7. The account of employment has been consistent between both Claimants and their mother; and
  8. The account of employment is corroborated within messages between Ms Iredale and Ms Pepper. The messages clearly show that Ms Pepper believed the claimants to be employees within the café. There are text messages on 22<sup>nd</sup> and 24<sup>th</sup> October 2021 in which she says that they will be paid and on 25<sup>th</sup> October 2021 she apologised to Ms Iredale for the fact that they had not been paid. It is clear from reading those messages that both Ms Iredale and Ms Pepper considered the Claimants to be employees who were owed a wage. Whilst Ms Pepper is described by Mr May as a “*café assistant*”, she clearly had some management responsibilities as it was her that had recruited the Claimants and was responsible for communication with their mother and the distribution of formal forms.
38. I do not consider that the completion of the HMRC forms in late October indicates that the Claimants were not employed before that, as Mr May himself accepted that they were employees in September. He was therefore clearly willing to employ and pay them before formal forms were completed.

39. I do not consider that the communications between Mr May and Ms Pepper to be compelling as they are dated some time after events. The notes of a meeting between himself and Ms Pepper were created after the purported employment and was completed after it was known that the Claimants were seeking to claim.

40. The first message provided by Mr May where he refers to the Claimants as volunteers is on 1<sup>st</sup> November 2021 and so after the issue had arisen. There are no messages between him or anyone else before October or in early October, nor are there any meeting notes from that earlier time, in which the Claimants are said to be volunteers.

41. I reject Mr May's assertion that he only ever needed one member of staff at a time in the café. He argued that the turnover was too small to justify two members of staff, but was inconsistent about the turnover, stating it was £100 per day in his ET1 and £150 per day in his oral evidence. There would be merit in requiring two members of staff: one to cook and clean and one to serve. Further, the Claimants were not expensive as they were only paid minimum wage of £4.62 per hour.

42. There has been no dispute as to the number of hours worked and so I am satisfied that Macauley is owed for 32 hours and McKenzie is owed for 43 hours. McCauley is therefore owed £147.84 and McKenzie is owed £198.66 for unauthorised deduction from wages, namely the non-payment of 32 and 43 hours respectively.

43. They resigned, without serving notice, and are therefore unable to recover any notice pay. In a case such as this, there is no legal entitlement to future loss of earnings.

Employment Judge **Moxon**

Date: 16<sup>th</sup> September 2022