EMPLOYMENT TRIBUNALS

Claimant: **Ms J Alexander-Stewart**

Respondent: **Hays Specialist Recruitment Ltd**

Heard at: **London Central (CVP)** **On: Monday 24 October 2022**

Before: **Employment Judge A Matthews**

Representation:
Claimant: **In Person**

Respondent: **Mr R Oulton of Counsel**

RESERVED JUDGMENT

Ms Alexander-Stewart's claim is dismissed.

REASONS

INTRODUCTION

1. Ms Jahdene Alexander-Stewart claims that the Company owes her two weeks' pay referable to a notice period.

2. The Company defends the claim. Apart from saying that, on the facts, no sum is owing to Ms Alexander-Stewart, the Company made two arguments concerning the jurisdiction of the employment tribunals to hear the claim. First, the Company said that the claim was out of time. On the Tribunal's calculations, it appeared that the claim was in time when the time limit for lodging the claim was extended to allow for conciliation. Mr Oulton provisionally agreed and, having taken instructions, the point was conceded on behalf of the Respondent. Second, the Company said that the employment tribunals have no jurisdiction to hear the claim because Ms Alexander-Stewart was a "worker" rather than an "employee" and not, therefore, entitled to

bring a contract claim in the employment tribunals. The issue remained, however, as to whether or not the claim could be brought as a "wages" claim. This is revisited below.

3. Ms Naomi Hamilton (Senior Business Manager) gave evidence on behalf of the Company supported by a written statement. Ms Alexander-Stewart did not produce a written statement but gave formal verbal evidence.

4. There was a more or less agreed electronic bundle of documentation. All references to pages are to pages in the bundle unless otherwise specified (omitting the "A" prefix used in the bundle). It seems that Mr Oulton had sent written argument to the London Central office of the tribunals but this has not been seen by the Tribunal. In any event, Mr Oulton addressed the Tribunal on the subject.

5. The Hearing was a remote hearing using the Cloud Video Platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way. The Tribunal reserved judgment to better consider, in particular, the evidence.

6. The Tribunal's findings of fact are on the balance of probability taking account of the evidence as a whole.

FACTS

7. As far as Ms Alexander-Stewart's work was concerned, the Company acted as an employment business rather than an employment agency. That is to say that Ms Alexander-Stewart's contractual relationship to provide services was with the Company. The contract is in the bundle and Ms Alexander-Stewart was a "worker" for the Company, rather than an "employee". The Company had a separate contract with the client to which Ms Alexander-Stewart was assigned.

8. On 18 October 2021 Ms Alexander-Stewart was assigned to the University of Arts London ("UAL") as an HR Systems Officer for a period to expire on 18 April 2022.

9. It is not in dispute between the parties that at the relevant time for the purposes of these findings (February 2022) Ms Alexander-Stewart was, absent any agreement to the contrary, contractually entitled to four weeks' notice from the Company.

10. On 8 February 2022 Ms Hamilton contacted Mr Clive Holden of UAL asking if UAL wanted to extend Ms Alexander-Stewart's assignment (45). Mr Holden replied the same day to say UAL would not be extending the assignment (45). Mr Holden mentioned issues with Ms

Alexander-Stewart's performance. Ms Alexander-Stewart's evidence is that there was no factual basis for these. Whether there was or not, is not a question the Tribunal needs to decide.

11. In a further e-mail on the same day Mr Holden asked if UAL was bound by the month notice provision (45). This obligation had presumably been passed on to UAL by the Company as part of the contractual relationship between the two. Ms Hamilton confirmed that UAL was bound by this provision unless there was a reason for *"immediate dismissal"* (44).

12. From an email sent by Mr Holden to Ms Hamilton on 15 February, it seems they met that day, sometime after 1400 (44). Whatever was said at that meeting resulted in Ms Hamilton having a telephone conversation with Ms Alexander-Stewart sometime before 1617 on that 15 February. This is clear because, timed at 1617, Ms Hamilton sent Mr Holden an e-mail (46). It included:

> *"I have spoken with Jahdene and her notice period will be 2 weeks paid.*
>
> *I have re-laid why she is being terminated and she understands this. End date of her contract is today 15th February and she will log off the system. You are able to close this down today as and when you like. She will come back to me to confirm when she is free for a courier to collect the laptop from her too.*
>
> *In terms of timesheets, she will submit for the two weeks weekly and this will be paid to her but last day of her notice will be Tuesday 01st March."*

13. There is a dispute about one aspect of what had happened during the telephone conversation between Ms Hamilton and Ms Alexander-Stewart that took place sometime between 1400 and 1617 on 15 February. There is no note of that conversation. Ms Hamilton says this (WS 10):

> *"That same day, I called Jahdene to explain that UAL wished to terminate her assignment immediately due to her poor performance. Jahdene asked about her four-week notice period and I explained that, due to the performance issues, UAL did not want to pay four weeks' notice. I explained that I had agreed to speak to her about negotiating a reduced notice period. I told Jahdene that UAL would agree to pay Jahdene two weeks' notice on the basis that she would not be physically working her notice period and would finish in*

> *her assignment that day.* ***By the end of the phone call, Jahdene had agreed to accept two weeks' notice instead of four.*** *She accepted that her assignment would end on 1 March 2022 at the end of the two-week notice period."*

14. The emphasis in bold in the preceding paragraph is the Tribunal's. It highlights that part of Ms Hamilton's evidence that Ms Alexander-Stewart does not agree with. In short, Ms Alexander-Stewart does not accept that she did so agree. Neither has a clear recollection of exactly what was said on the subject. In particular, Ms Hamilton cannot recollect what it was that Ms Alexander-Stewart said to indicate her agreement.

15. Timed at 1627 on 15 February, Ms Hamilton made this entry in the Company's phone log concerning her conversation with Ms Alexander-Stewart (47):

> *"Spoken to Candidate Notes: Served her notice to be 2 weeks paid - she has accepted this – following up with email to her"*

16. The email in question is at 48. Timed at 1632 on the 15 February it included (48):

> *"Thanks for your time on the phone. As discussed, UAL have terminated your contract and are serving you notice of 2 weeks paid notice period effective as of today and ending on 01st March at your current rate. They do not expect you to work your notice period and as of today you will no longer be able to access UALs systems.*
>
> *As discussed they are serving notice due to poor performance in a number of areas."*

17. The Tribunal notes that this email does not assert an agreement between Ms Hamilton and Ms Alexander-Stewart. Rather, it records the fact.

18. On 7 March 2022 Ms Hamilton sent an e-mail to Ms Alexander-Stewart including (49):

> *"Your contract ended on 01st March so your final payment will be this Friday"* [that is 11 March] *"as it is always 1 week in arrears for payment."*

19. On the same day Ms Alexander-Stewart sent an e-mail to payroll, copied to Ms Hamilton amongst others (49):

> *"Please update my hays portal to:*
>
> *Current contract ends: 1st March 2022*
>
> *My last payment will be 11th March 2022, please issue me with my P45 for that date."*

20. The P45 and pay slips give a leaving date of 4 March 2022 (50-61).

21. The Tribunal's finding on the disputed evidence is this.

22. Mr Holden, for whatever reason, wanted to terminate Ms Alexander-Stewart's assignment early. For obvious financial reasons, Mr Holden wanted to avoid paying for as much of the contractual four weeks' notice period as he could. On 15 February, during her meeting with Mr Holden, Ms Hamilton, doing her best for her client, offered to put a two weeks' notice period to Ms Alexander-Stewart on the basis that Ms Alexander-Stewart would not have to work it.

23. Ms Hamilton presented this as a "fait accompli" to Ms Alexander-Stewart. Ms Alexander-Stewart protested her entitlement to four weeks' notice but Ms Hamilton was adamant that all that was on offer was the two weeks. With that the conversation ended and Ms Hamilton proceeded on the assumption that she had an agreement with Ms Alexander-Stewart.

24. As far as Ms Alexander-Stewart was concerned, she did not see that she had agreed anything. Rather, she was stuck with what was happening.

APPLICABLE LAW

25. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the "1994 Order"), so far as it is relevant, provides:

> *"**3 Extension of jurisdiction***
>
> *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum"*

26. Section 13 of the Employment Rights Act 1996 (the "ERA"), so far as it is relevant, provides:

> *"**13 Right not to suffer unauthorised deductions***
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless-"*

27. Section 23 of the ERA, so far as it is relevant provides:

> *"**23 Complaints to employment tribunals***
>
> *(1) A worker may present a complaint to an employment tribunal –*
>
> *(a) that his employer has made a deduction from his wages in contravention of section 13"*

28. The Tribunal was referred to *Delaney v Staples (t/a De Montfort Recruitment)* [1992] ICR 483. That case made it clear that a person cannot claim for notice pay as wages under section 23 of the ERA unless, in effect, it is a claim for wages referable to a period of "garden leave".

CONCLUSIONS

29. The Tribunal has made the factual findings so that it can properly categorise the sum that may be owing to Ms Alexander-Stewart.

30. It is clear that two weeks' notice was paid as part of a "garden leave" arrangement. In other words, Ms Alexander-Stewart remained under contract for the two weeks but did not have to attend work. As far as the subsequent two weeks, in respect of which pay is disputed, are concerned, there was no such arrangement. Ms Alexander-Stewart was not required to attend work for those two weeks. Both sides regarded the contract as at an end on 1 March 2022 on the expiry of the two weeks which were paid for.

31. What we have, therefore, is a claim for notice pay by a worker (as opposed to an employee) arising from an alleged dismissal in breach of a contractual provision to give four weeks' notice. The *Delaney* case made it clear that such a sum could not be recovered as "wages" under section 23 of the ERA. Rather, if it is to be recovered in an employment tribunal, it must be claimed under the provisions of the 1994 Order. The difficulty with that in Ms Alexander-Stewart's case is that the 1994 Order only extends to "employees" and does not cover a "worker". The employment tribunals have no jurisdiction to decide the claim either under section 23 of the ERA or under the 1994 Order.

32. The Tribunal, therefore, must dismiss the claim.

Employment Judge A Matthews
Date: 2 November 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
02/11/2022