



EMPLOYMENT TRIBUNALS

First Claimant: Ms P Karimi
Second Claimant: Ms C Patricio
Respondent: Fadi Ltd T/A Fadi Tailoring

RECORD OF A PRELIMINARY HEARING

Heard at: London South (by CVP) **On:** 14 September 2022
Before: Employment Judge D Wright

Appearances

First Claimant: In person through translator
Second Claimant: In person through translator
Respondent: Mr. Fadi, Director

JUDGMENT

1. The Respondent's oral application of 14 September 2022 to strike out the First Claimant's claim for failure to serve documents in compliance with case management directions of 1 July 2022 is refused.
2. The First Claimant was a worker for the purposes of the National Minimum Wage Act 1998 between 24 January 2020 and 7 March 2020.
3. The Respondent owes the First Claimant £831.75 gross in respect of unpaid wages for the period in paragraph 2. Such sum to be paid within 14 days of this order.
4. The Respondent's oral application of 14 September 2022 to strike out the Second Claimant's claim for failure to comply with case management directions of 1 July 2022 is refused and the Second claim is adjourned with further directions.

REASONS

1. These reasons are provided at the request of the Respondent following the hearing on 14 September 2022.
2. The First Claimant attended in person through a translator, although her English was good enough that she asked to engage in English and rely upon the interpreter only when necessary. I agreed to this request. Likewise, the Second Claimant attended in person through a translator but made the same request to which I agreed.
3. The Respondent appeared in person without any translator.
4. These reasons shall deal with the claims separately, starting with the Second Claim.

BACKGROUND TO THE SECOND CLAIM

5. There were significant procedural defects surrounding the Second Claimant's claim for unpaid wages. I therefore set out various directions orally. These were further listed in a CMO dated 14 September 2022. The reasons for these directions are contained in the CMO.
6. Following the Second Claimant's failure to comply with the directions her claim stood struck out automatically on 22 September 2022 as set out in the CMO. Between the initial hearing and these written reasons, I confirmed this dismissal by way of a judgment on 11 October 2022.

BACKGROUND TO THE FIRST CLAIM

7. The First Claimant says that she took up employment with the Respondent, with her first shift being on the 24 January 2020. She says that she finished her employment on 7 March 2020.
8. The First Claimant accepts that there was to be a two-week trial period. However, her evidence is that at no point was she told this was an unpaid trial period.
9. Her evidence before me today was that she worked on 19 days for the Respondent, all of which were seven and a half hours long, with the exception of one day, which was nine and a half hours long. These dates were 24, 25, 29 and 31 January, plus 1, 5, 7, 12, 15, 17, 20, 21, 22, 28 and 29 February. She also worked on 4, 6 and 7 March, with a longer day on 3 March. She then resigned due to non-payment of wages.
10. Prior to starting work, the First Claimant says there was no discussion of the rate of pay or that the trial period would be unpaid. She says that she applied as a shop assistant, and her duties were standard shop assistant jobs such as answering the phone and serving customers. Later, she was told she could do repairing of clothes and taking orders and Felicity, the shop manager, gave her

repairs and audit jobs to do. Further, the First Claimant says she was sometimes left alone in the shop with no supervision.

11. The First Claimant was given a written contract in late February or early March, although she did not sign that contract because she did not agree with the terms of it. In particular, a term such as the trial period being for one year.
12. In the draft contract before the Tribunal there is a job title of “tailor’s assistant” and a wage of £7.50 an hour. I note that £7.50 an hour is below the minimum wage at that time for a 24 year old which was £7.70. That higher rate is the one that the First Claimant is claiming.
13. I also note that the contract says that the first two weeks’ pay would be held by the employer until the employee leaves the job. There is no mention in the contract of an unpaid trial period. However, that is not necessarily determining in this case, but it is something which I will be taking into consideration.
14. The Respondent’s case is that this was always going to be an unpaid trial period and that he did not initially want to give the First Claimant any work or work experience. However, due to her pressure and constant asking he decided to try and do something nice. The Respondent says that it is common amongst fashion students, which the First Claimant is or was at the material time, to do unpaid internships and apprenticeships. The Respondent felt that this arrangement was akin to that. In fact, he had some other students, in a later year than the First Claimant, working on exactly that basis at the same time. The difference I note there is that their placement was arranged through the University, whereas the First Claimant’s placement was not arranged through the University.
15. There is unfortunately, a paucity of evidence relating to the terms agreed before the First Claimant started work. The Respondent has directed me to text messages to be found in pages five and six of his bundle and then at page 11 of his bundle, which he says show clearly that the First Claimant understood this was to be an unpaid trial period.
16. The First Claimant says this was a two-week paid trial period. The Respondent in his evidence says two weeks but possibly more because her grasp of the English language could have been better.
17. The Claimant says that she was carrying out all the usual jobs that a shop assistant would do whereas the Respondent says that she was simply observing jobs and that when he was in the store if he saw the manager giving her work, he would tell her to stop as she was not being paid. The First Claimant denies that that was ever said to her.
18. However, what does appear to be common ground between these two parties is that on occasions at least, the shop manager was giving the First Claimant actual work to do rather than simply shadowing.
19. The Respondent does not accept the days and hours claimed by the First Claimant and points out that she did not complete time sheets. He also accepts

that he did not provide a written policy to her requiring the use of timesheets, instead telling her this orally.

20. The First Claimant tells me that she kept her a record of the dates that she worked on her phone and that is what she based her ET1 on. The Respondent has been unable to provide a copy of the rota or advance an alternative case for the days worked. The only date he specifically takes issue with is the first day claimed which he says was her coming in to do admin and have an introductory chat.
21. The First Claimant says that she was paid £223.15. This is evidenced by her bank statements which show payments into her account from the Respondent on 6 March for £123.15 and 7 March for £100.
22. The Respondent says that the total he paid was £533. This is supported in the letter from HMRC outlining the sums that the Respondent told them the First Claimant had been paid in that financial year. The Respondent explains the discrepancies by saying that the balance of £309.85 was paid by cash during the month to cover her expenses, and that he then takes the cash out of any BACS payments made. The First Claimant denies having received any cash payments.
23. There are no payslips before the Tribunal, nor any evidence of cash transactions from either party.

THE LAW

24. Under Section 1(2) of the National Minimum Wage Act 1998 a person qualifies for the national minimum wage if they are an individual who:
 - a. Is a worker;
 - b. Is working, or ordinarily works, in the United Kingdom under his contract; and
 - c. Has ceased to be of compulsory school age.
25. It is accepted that there will be occasions when an employer may request a potential employee to undertake an unpaid trial shift(s) as part of a selection process. However, the legislation does not give explicit guidance as to how long these may last. The Tribunal therefore must take all the factors into account to determine whether an individual falls into the definition in s1(2) NMWA 1998.

DISCUSSION AND FINDINGS

26. With respect to the Respondent, I do not accept that the text messages show that there was to be an unpaid trial period. I find that they show she accepts there was a trial period, and they also show that she was asking why she was not being paid and when she was going to be paid. I find that this shows that she was unaware this was to be an unpaid trial period.

27. The Respondent's evidence was slightly contradictory. At one point he says this was akin to an internship or placement for university fashion students but on the other hand he accepts that he paid her some money and provided a written contract of employment, albeit the exact terms were still being negotiated at the point of dismissal.
28. I find that the First Claimant was carrying out all the normal roles of a new tailor's assistant, including serving customers, carrying out repairs and sometimes running the store on her own.
29. As above it is lawful for an employer to have an unpaid period of assessment or interview before employing somebody. However, a two-week unpaid trial period is in my mind, an excessively long period. People can have probationary periods on an employment contract where their employment can be terminated at will and in fact within the first two years of any employment it is very easy for an employer to get rid of an underperforming employee at any time provided they are not conducting any unlawful discrimination or harassment.
30. As such, a trial period should be a brief time for one or possibly two shifts at most. Considering the lack of evidence from either party showing that there was to be an unpaid trial period, and noting the terms of the draft contract, which do not make any reference to an unpaid trial period, but rather make reference to the first two weeks money being held by the employer until the termination of the employment, I find that during this entire period the First Claimant was indeed a worker under the definition in the National Minimum Wage Act (with the exception of the first day – see below). Therefore, she was entitled to the minimum wage for all hours that she has worked.
31. The question I then must determine is how many hours did the First Claimant work? Unfortunately, it would appear that the First Claimant did not complete timesheets during her time there. However, this is not surprising when one considers the slightly chaotic appearance of working at the Respondent's premises. In particular, the lack of any written contract, any written agreement at the start of employment, the lack of any evidence of the terms of the agreement, the lack of a copy of the rota and the lack of pay slips in evidence before this Tribunal.
32. Whilst the Respondent disputes the dates worked, I note the First Claimant's explanation for how she knows which days to claim for. I also note that these have been consistent since the issue of her ET1.
33. The Respondent has been aware of those dates for over two years. I am aware that it is difficult to prove a negative or to prove that she was not there, but I need to look at this in the round. The Claimant has given clear evidence and a clear explanation for how she came to those dates whilst the Respondent was evasive and unhelpful on this point.
34. Over a period of roughly a month and a half the First Claimant claims 19 days. This does not seem unreasonable, and I find that the First Claimant attended the store on 19 days.

35. The only specific day that the respondent has taken issue with before the Tribunal was the 24th of January, on which he says she came into the store to discuss things, but that it was not a working day. I accept that and therefore I find that the 24th of January was not a working day. It was more of an interview or “getting to know you” day which did not involve work. Therefore, I find that the First Claimant was entitled to 17 days’ pay at seven and a half hours and one day at nine and a half hours which gives a total number of hours of 137 hours. At the national minimum wage rate of £7.70 that comes to a pre-tax total of £1,054.90 which the First Claimant should have been paid for.
36. It is a legal requirement that pay slips are provided and I would expect a pay slip to outline the hours worked alongside the cash advance already paid during that pay period and therefore deducted from her payment.
37. I have zero evidence before me either in the terms of payslips, bank statements or petty cash accounts to show that this £309.85 has in fact been paid. I therefore prefer the First Claimant’s evidence on this point find that no cash payments were made.
38. Therefore, I find on the balance of probabilities that the amounts already paid to the First Claimant by the Defendant is £223.15. This means there is a pre-tax balance owing of £831.75. The Respondent is to pay this by 28 September 2022.

Employment Judge Wright
26 September 2022