



EMPLOYMENT TRIBUNALS

Claimant: Miss C Simmons

Respondent: Mr Panayiotis Andreou Chimonides
T/A Cutthroat Kings Barbers

Heard at: East London Hearing Centre

On: 28 September 2023

Before: Employment Judge Reid

Representation

Claimant: in person (accompanied by her parents Mrs S Simmons and Mr D Simmons)

Respondent: in person (accompanied by his aunt Ms Leslie)

Mr Chimonides – I apologise I referred to you at times during the hearing as Mr Andreou. This was because you sometimes put this name at the end of your three names and put your family name first.

Note: the hearing on 2 November 2023 will go ahead as the Claimant has won her claims. See separate Orders as to what each side has to do to prepare for this hearing. See also the summary at the end of judgment explaining the various types of compensation as this may assist the parties if they wish to try to settle the claim via ACAS.

JUDGMENT (Reserved)

(corrected version 16.10.23 – only para 49 amended)

The judgment of the Tribunal is that:-

1. The Claimant was not an apprentice of the Respondent and was the Respondent's employee within the definition in s230(1) Employment Rights Act 1996.
2. The Claimant was entitled to be paid the relevant adult NMW rate throughout the period of her employment. She was wrongly paid the apprentice rate and there was therefore an unlawful deduction from her wages contrary to s13 Employment Rights Act 1996.

3. **The Claimant was unfairly dismissed by the Respondent on 9 July 2022, contrary to s94(1) Employment Rights Act 1996.**
4. **The Claimant was wrongfully dismissed by the Respondent on 9 July 2022. She is entitled to statutory minimum notice under s86 Employment Rights Act 1996.**
5. **The Claimant is owed the holiday pay which accrued in each holiday year throughout her employment, whether she took it unpaid (the February 2022 holiday) or did not take it.**
6. **The Claimant is owed statutory sick pay for the period when absent for surgery in September 2021.**

REASONS

1 The Claimant presented a claim on 12 September 2022. This hearing was the second hearing of her claim, the previous judgment dated 24 March 2023 having been reconsidered and set aside on 16 May 2023, when it was accepted that the Respondent had not been notified of the previous hearing.

The claim and response and the parties' respective cases

2 The Claimant claimed unfair dismissal, notice pay, holiday pay and arrears of wages. In essence her claim was that she had been underpaid throughout the period of her working for the Respondent because throughout the period she had been paid (in cash, weekly) at the national minimum wage (NMW) rate for apprentices and not at the correct adult NMW rate for non-apprentices. She also said that her pay had not in practice gone up in April 2022 to the adult aged 21 NMW rate as claimed by the Respondent, because she had continued to be paid in cash the same apprentice amount she had always been paid, around £100-£116 (net) per week. The Claimant said she had not signed the contract the Respondent produced as part of this claim (she said it was not her signature on it) and said that although the Respondent produced for this claim weekly payslips for the period from the end of February 2020, she was not issued with these at the time, only ever receiving two payslips when she specifically asked for them at particular times.

3 The Claimant claimed she had not been paid when she took a week's holiday in February 2022 and had not taken any holiday at any other time because she knew she would not be paid for it; she had also not been paid for accrued but untaken holiday on termination.

4 The Claimant claimed that she had not been paid statutory sick pay during a four week absence for surgery in September 2021.

5 The Claimant also claimed she had been unfairly dismissed by the Respondent on 9th July 2022 when he said he would issue a P45 and 'take her off the books' because she

had been signed off sick. As she claimed she was not truly an apprentice but an employee, she also said she was entitled to notice pay.

6 The Respondent's case was that the Claimant was an apprentice under an apprenticeship agreement. The Respondent relied on a written employment contract (making no reference to an apprenticeship) dated 26 February 2020 which he said the Claimant had signed (although the Claimant said she had not signed it and her signature on it was a forgery). The Respondent said at this hearing that his case was that notwithstanding he said it was a genuine apprenticeship agreement, he had not intended to pay the Claimant at the NMW apprenticeship rate; he said he had intended to pay her at the adult NMW rate which was higher, and blamed his accountant for in practice paying the lower apprentice rate. This was inconsistent with his cover letter with his bundle which said that the Claimant had been correctly paid at the apprenticeship rate (and then the over 21 rate from April 2022). The Respondent said that he had not noticed between February 2020 and April 2022 that the Claimant was only being paid at the apprentice rate despite it showing on the payslips he said he had given to her. He said that in any event her pay had gone up in April 2022 to the correct aged 21 adult NMW rate.

7 The Respondent's case was that there was no dismissal on 9th July 2022 but that the Claimant voluntarily resigned with effect from this date taking into account she and the Respondent had prior to this date discussed potentially ending her employment because their understanding was that as she had been signed off sick, she would be better off financially if she claimed Universal Credit rather than only claiming statutory sick pay. The Respondent said that understanding had been that in order to claim Universal Credit, her employment would have to end.

The relevant issues

8 The issues were therefore:

- i. Whether the legal relationship was one of apprenticeship;
- ii. If it was not, whether the Claimant was an employee of the Respondent or a worker of the Respondent;
- iii. If the Claimant was an employee, whether there was a dismissal on 9 July 2022 (when the Claimant's mother Mrs Simmons had a text/message exchange with the Respondent) and whether that was an unfair dismissal
- iv. If the Claimant was an employee, whether she was entitled to notice pay.
- v. Whether the Claimant had been underpaid the NMW throughout and if so what wages she was owed (including any statutory sick pay)
- vi. Whether the Claimant was owed any holiday pay.

9 Both parties provided a separate bundle each (C 59 pages; R 56 pages). The Claimant also brought her original driving licence to the hearing showing her signature, on

the basis that she said that the signature on the employment contract was a forgery and was not her real signature, the contract not being a document she said she had seen or signed at any time during the employment and of which she had only received a copy once she had started her Tribunal claim. The Respondent had provided a witness statement. The Claimant had not provided her own witness statement (beyond the undated 2 page letter she wrote after receiving the Respondent's response in the Tribunal file) but had provided a 2 page statement from Mrs Simmons about Mrs Simmons' dealings with the Respondent after the Claimant had gone off sick.

10 Because the Claimant had not provided a witness statement in advance of the hearing she gave her evidence first so as not to disadvantage the Respondent. Mrs Simmons also gave oral evidence. The Respondent then gave oral evidence. In order to elicit the evidence about the legal nature of the relationship and the circumstances in which it ended I asked each of the Claimant and the Respondent questions because these matters had not been covered in witness statements to the necessary extent. The Respondent did not have any questions in cross-examination for the Claimant and asked Mrs Simmons one question. The Claimant had a few questions for the Respondent in cross-examination. At the end of the hearing I heard oral submissions from both parties, having giving them time to put together some notes of what they wanted to say. I reserved my decision through lack of time. Before the parties left I provisionally booked in a remedy (ie compensation) hearing for 2 November 2023, in case it was needed.

Findings of fact

The nature of the legal relationship between the Claimant and the Respondent

11 I find that the agreement between the Claimant and the Respondent was an oral agreement. Taking into account the findings of fact set out below regarding the Respondent's approach to his employment arrangements, I find that the Claimant and the Respondent did not enter into the written contract the Respondent relied on dated 26 February 2020 (page R1). I find that the Claimant did not sign it and that she did not see the contract until provided to her after she made this claim. However, even if the contract nonetheless reflected what had been agreed orally, the written terms did not support an apprenticeship agreement because it is referred to as an employment contract and there is no reference to a fixed term or any apprenticeship or any structured training or experience plan. It also contained a notice period, inconsistent with an apprenticeship agreement.

12 The oral agreement was that the Claimant be allocated a provisional/temporary chair in the barbers, to enable her to build up experience by observing the other three barbers already working there. She had already finished college and had no further exams or assessments to take, it was merely a case of observing and building up experience, with a view to establishing her own client base and achieving a permanent chair. There was no structured training or agreement to cover particular aspects of barber work or any particular timescales but it was an informal way she could get experience. There was no agreement either about a specific end date to the contract or about an end date that was ascertainable. It was a much looser arrangement. I find they agreed her hours and days but did not agree anything about notice periods or about getting any sick pay in excess of statutory sick pay. Even if the Claimant did agree her hourly pay as the apprentice NMW rate at this point, if she was not truly an apprentice she was entitled to the relevant adult rate.

13 Based on the Respondent's oral evidence I find that his intention was loosely that the provisional arrangement would probably last around a year although he did not agree with the Claimant any fixed term for the gaining of such experience and then moving on to be allocated a permanent chair; his oral evidence was that he thought it would take around a year but said in fact in practice it took a little longer until early 2021. However he then also said the Claimant never really completed the training as she was never fully ready or alternatively that she was treated as 'qualified' in April 2022 when he said her pay went up but also said that even at that point he did not consider she was fully trained. This was a conflicting and haphazard account. I therefore find that the agreement entered into orally by the Claimant and the Respondent for her to start on 6 January 2020 had no fixed term and was open-ended, inconsistent with an apprenticeship agreement. There were no terms agreed for any structured training and no suggestion that any arrangements were put in place to monitor experience gained and assess progress, also inconsistent with an apprenticeship agreement. The fact that both parties referred to it as an apprenticeship in discussions (page C34-35) does not mean that it necessarily was one.

14 The Claimant worked three days a week, usually 27 hours per week (with some occasional small variation). She was paid around £100 (net) per week in cash (although it was done by bank transfer during periods of furlough). I find that she was paid in cash the weekly amounts set out in the payslips between 28 February 2020 (R5) and 1 April 2022 (R40) (all around the £100-£116 net level), save for the week she took holiday between 21-28 February 2022 when she was not paid at all (ie not paid the amount on R39). Although she did not receive the weekly payslips with her pay I find that up until 1 April 2022 she received the cash amount recorded by the payslips.

15 I find that notwithstanding the claimed increase to aged 21 NMW rates on 8 April 2022 (page R41) the Claimant was not in practice paid this higher amount and continued to be paid at the around £116 (net) rate which had been paid prior to April 2022. The Respondent was unable in any event to explain at the hearing why he says he put the rate up in April 2022 to the age 21 rate when the Claimant had turned 21 in November 2021, given he said it had been his intention to pay the appropriate adult rate throughout. In making these findings I have taken into account the findings of fact set out below regarding the Respondent's approach to the way he managed employees, his limited understanding of what he was doing and his failure to check that what his accountant was doing was correct, either by providing the accountant with accurate information from the outset or by checking what the accountant did as regards paying staff.

16 I find that the purpose of the arrangement was for the Claimant to gain experience working on simpler cuts to begin with, but building up to other types of cut and gaining her own clients. I find that the Claimant had to do this work herself ie there was an element of personal service and she could not send someone else to do the work for her.

17 I find that there were no periods when the Respondent did not give the Claimant at least some work, even if there were also times when she was observing others. Due to the 'chair' arrangement she was in an unusual position that her role was a mix of doing some work and also gaining experience and her own clients. I find within these parameters that there was an obligation on the Respondent to provide the Claimant with at least some work; although she might not always be generating income for the Respondent when observing and gaining experience when watching others, she was given some work to do and had to do it.

18 The Claimant was under the Respondent's control. She had a fixed three days per week and any alterations to her hours on those days had to be agreed with the Respondent. The Respondent had control over the Claimant at work, deciding which work to give her and directing what other cuts she should observe. The Claimant was under his supervision.

19 Looking at the other circumstances, the Claimant was part of the team, as the junior. That integration was also evident from the fact that part of the purpose was the gaining of experience with a view to a permanent chair so that the Claimant could establish her own client base, for her benefit and the Respondent's. The way her pay was treated for tax purposes was consistent with employment.

The circumstances of termination – claimed dismissal

20 I find that the Claimant and the Respondent had a conversation in early July 2022 before she went off sick about how she would manage financially if she took time off sick for her mental health. I find that both she and the Respondent thought that in order to be able to claim Universal Credit (which they thought would be higher than statutory sick pay) her employment would have to end. The Claimant obtained a sick note from her GP signing her off for her mental health which Mrs Simmons took in for her and gave it to the Respondent at the end of her first week of absence. I find that the Respondent and Mrs Simmons had a general discussion about how the Claimant was and it was left that the Respondent would get in touch with the Claimant. It was not agreed or discussed that due to the Claimant's mental health the Respondent would only contact Mrs Simmons going forward. Nothing specific about sick pay was discussed between the Respondent and Mrs Simmons at this time.

21 Mrs Simmons then chased the Respondent on 9 July 2022 (messages page C47) asking about sick pay and the claiming of Universal Credit. Instead of next checking in with the Claimant as to what she wanted to do, the Respondent jumped straight to saying to Mrs Simmons (who relayed these messages to the Claimant) he would take the Claimant off the books so that she could claim Universal Credit while she was off sick (his understanding of how Universal Credit would work taking into account his previous conversation with the Claimant before she went off sick). He then went on to say he would get her P45 sent over to her. The Respondent wrongly jumped straight to the termination idea, based on his understanding of how Universal Credit worked (rather than because of a wish to cause problems for the Claimant). The party ending the relationship was the Respondent and not the Claimant. The Respondent had received no direct communication from the Claimant with an unambiguous resignation from her. The Respondent unreasonably relied on the message from Mrs Simmons as somehow constituting a 'request' from the Claimant to have her employment 'voluntarily' terminated. If the Respondent was not sure as to what the Claimant wanted given he was dealing with Mrs Simmons and not the Claimant herself in these texts/messages, he should have contacted the Claimant to clarify exactly what the Claimant's intentions were. The employment relationship was therefore ended by the Respondent and not the Claimant and was ended without notice on 9 July 2022. The Respondent relied on the written contract in this claim but even it said that any resignation had to be in writing.

22 The Respondent accepted in his oral evidence that the date of 1 July 2022 on the P45 was probably an error by his accountant based on the fact that the Claimant's last physical day at work had been the week before. However he was also not sure where the

accountant had got the 1 July 2022 date from when he said he did not contact the accountant until 9 July 2022.

23 The Claimant's employment was therefore terminated without notice. As no longer notice period was agreed between them, she is entitled to statutory minimum notice (in her case, of two weeks).

24 The Respondent dismissed the Claimant without following any dismissal procedure at all. He did not follow the basic steps set out in the ACAS Code of Practice. This was not a case where following even a basic procedure was pointless or would have made no difference – if a process had been started the Claimant could have had the opportunity to consider what she wanted to do in the light of the previous conversation about her pay before she went off sick. Her dismissal was therefore procedurally unfair because no fair procedure was followed.

Holiday pay

25 The Respondent did not provide any evidence (for example from other members of staff) that he encouraged staff to take their holiday each leave year to make sure they did not lose it. He did not provide any evidence that he had in fact paid any holiday pay to any other employee. I therefore find that that he did not encourage the Claimant to take paid holiday or tell her that she would lose the holiday if she did not take it each year.

26 The Claimant booked and took a week's holiday between 21 and 28 February 2022. Although the Respondent said she was paid her cash for that week when she returned from that holiday I find that she was not so paid.

27 The Claimant's employment ended on 9 July 2022. When asked at the hearing the Respondent was initially hesitant as to when exactly the Respondent's holiday year was but then when prompted concluded it was January to December. The Respondent accepted he had not paid any accrued but untaken holiday on termination covering the period 1 January 2022 to 9 July 2022 (ie in the final holiday year).

Statutory sick pay – 4 weeks September 2021

28 There was no agreement that the Respondent pay contractual sick pay. In para 3 of the Respondent's grounds of resistance the Respondent accepted that if off sick the Claimant was entitled to claim statutory sick pay. The Respondent did not dispute it was payable, but had not paid it.

The Respondent's employment arrangements

29 I find that the Respondent was not aware of his obligations as an employer and took an inconsistent and haphazard approach to it. At the hearing he blamed his accountant but it was his responsibility as the employer and his accountant was largely going on what the Respondent was telling the accountant. The contract said to have been issued to the Claimant (which I have found she did not sign and did not receive until this claim) referred to the law in place prior to 1996 and did not mention anything about an apprenticeship (or

traineeship) even though it was the Respondent's case that it was one; further the notice clause did not comply with the statutory minimum. The Respondent veered between saying the apprenticeship rate was properly payable throughout to saying that his accountant had got it wrong and that his intention was to have instead paid the relevant NMW adult rate. He said never noticed from the payslips he said he issued that the apprenticeship rate was being paid over a prolonged period. He could not account for the over 21 rate starting in the payslips in April 2022 and yet the Claimant turning 21 the previous November. He took some time to answer the question as to what was the holiday year and appeared to be unaware of the requirement to pay accrued but untaken holiday at the end of the employment. The P45's date of termination contained a date he could not explain and which contradicted his own case as to when the employment ended he said by resignation. He could not explain the start date recorded in the written contract he relied on. He did not provide any evidence from other employees to support his contention that written contracts were issued and that weekly payslips were provided from which I find they were not issued to the Claimant.

30 I have taken into account that the Respondent is a very small employer and to a degree understandably relies on his accountant to make sure things are done properly. However even taking that into account, he did not have a grasp on the basics and his variable accounts and changes of tack suggested that he did not really understand his obligations as an employer and affect his credibility as to the documents he says were issues to the Claimant and as to the payments he said were in practice made.

31 For these reasons I find that the Claimant did not receive any payslips during her employment apart from on the two occasions she requested one during 2020 for unrelated benefit purposes. I also find for these reasons that the Claimant was not in fact paid the higher rate shown on the payslips from 8 April 2022 and was not paid for her February 2022 holiday on her return.

Relevant law

32 *Revenue and Customers Commissioners v Jones* [2014] ICT D43 held that a contract of apprenticeship must be for a fixed term or with an objectively ascertainable end. A provision for early termination (a notice period) is generally inconsistent with a contract of apprenticeship.

33 An employee is defined in s230(1) Employment Rights Act 1996 as an individual who has entered into or works under (or, where the employed has ceased, worked under) a contract of employment. In *Uber BV v Aslam* [2021] UKSC 5 the Supreme Court held that the correct approach (in that case considering worker status) is to start with the statutory definition. A purposive approach should be applied because of the statutory intention to give protection to individuals who are in a subordinate position and cannot influence their terms of engagement. I have found that the written contract relied on by the Respondent was not agreed to or signed by the Claimant and this is not therefore a case of analysing written terms agreed by the parties.

34 *Ready Mixed Concrete v Minister of Pensions* [1968] 2QB 497 sets out the conditions to show the existence of a contract of employment. These are firstly personal service for remuneration in consideration for their own work and skill for the employer,

secondly an agreement (express or implied) to be subject to the employer's control and thirdly the other terms need to be considered as to whether they are consistent with the existence of a contract of employment. The 'irreducible minimum' requirements are mutuality of obligation, personal performance and control.

35 The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal). It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

36 s86 Employment Rights Act 1996 provides for statutory minimum notice of termination for employees. After two years of continuous employment it is one week per complete year of employment.

37 *Smith v Pimlico Plumbers* [2022] EWCA Civ 70 held that an employee who has taken unpaid leave for which they should have been paid but who had not claimed the holiday pay at the time, can on termination claim all unpaid annual leave ie holiday pay accrued throughout the employment, whether taken or untaken.

38 The relevant NMW hourly adult rates in place which were applicable to the Claimant were as follows:

January 2020- March 2020 aged 18-20: £6.15

April 2020- March 2021 aged 18-20: £6.45

April 2021- March 2022 aged 18-20: £6.56

April 2021- March 2022 aged over 21: £8.36

April 2022 - March 2022 aged over 21: £9.18

39 *Taylor Gordon & Co Ltd v Timmons* [2004] IRLR 180 held that the Employment Tribunal does not always have jurisdiction to decide whether an employee is entitled to statutory sick pay. The Employment Tribunal only has power to decide whether statutory sick pay is payable as an unpaid wages claim where the employer accepts that it is payable and has not paid it.

Reasons

40 Taking the above findings of fact into account the Claimant was not an apprentice but was an employee of the Respondent within s230(1) Employment Rights Act 1996. As an employee she was therefore entitled to unfair dismissal protection, statutory minimum notice and statutory sick pay.

41 As regards the claim for unpaid wages (the NMW underpayment) no time limit

issues arise because the deductions continued throughout the employment up to and including her final week. There was therefore a series of deductions such that time only runs from the final deduction. The Claimant was never properly paid at any time during her employment.

42 Save in respect of the period of sick pay in September 2021 and the holiday in February 2022 when not paid at all (see below), when the Claimant was paid the apprentice rate throughout her employment she was underpaid as she was entitled to the relevant age related NMW rates in force at the time. She has to give credit for the amount she was paid as against what is owed to her (also taking into account that during certain weeks she was only on furlough pay at 80% - these weeks will need to be identified). She was also not paid at all during the last week of her employment.

43 In relation to the period of sick leave in September 2021 the Claimant is owed 4 weeks statutory sick pay, subject to the relevant waiting days.

44 The Claimant was dismissed by the Respondent with immediate effect on 9 July 2022. She was entitled to statutory minimum notice of 2 weeks.

45 Taking the above findings into account the Claimant was unfairly dismissed on 9 July 2022 because dismissed with immediate effect without any fair procedure being followed.

46 Taking the above findings of fact into account the Claimant is owed holiday pay for:

- i. the holiday year January 2020 – December 2020 (from 6 January 2020)
- ii. the holiday year January 2021- December 2021
- iii. the holiday year January 2022 – 9 July 2022 (which will pick up the unpaid February 2022 holiday).

Summary – compensation issues

47 The following is to assist the parties as neither is represented. The parties should read guidance note 6 of the Presidential Guidance on Case management at <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>. This explains issues relevant to compensation/remedy.

48 The Claimant has won her claim for unpaid wages for the underpayment of the NMW. This will mean working out what she should have been paid throughout the weeks of her employment (taking into account the periods of furlough at 80% and the 4 week period when statutory sick pay should have been paid, rather than normal pay) and then deducting what she was in fact paid. It will need to be calculated by reference to the relevant NMW rate in the period in question.

49 The Claimant has won her claim for unfair dismissal. She will be entitled to a basic award which is based on her gross weekly pay multiplied by the two complete years of her

service. The gross weekly pay figure used will be what she should have been paid as at July 2022, not what she was actually paid **and because she is aged under 22 the multiplier is half a week's pay per complete year of service**. She may also be entitled to a compensatory award which looks primarily at the net (not gross) financial losses she has suffered because she lost her job (typically a period of unemployment). However the Tribunal will also consider whether the Respondent could fairly have dismissed her at a later date and if so when, which may limit the amount of that compensatory award (called a 'Polkey deduction', explained in the Guidance referred to above). This will involve considering what the Respondent would have done had he not dismissed her but she had remained off sick (she is still signed off work now). The Tribunal will hear from both parties on this issue at the next hearing.

50 The Claimant has won her claim for notice pay (2 weeks in her case). She will be entitled to 2 weeks pay at the rate she should have been paid as at July 2022.

51 The Claimant has won her claim for holiday pay. She will be entitled to be paid that holiday pay at the NMW rate she should have been paid at the relevant time, depending on which year it relates to. Her holiday pay will be pro-rated to the number of hours per week ie it will be pro-rated to a 3 day week.

52 One of the issues at the next hearing will also be whether the Claimant is also entitled to an extra award under s38(3) Employment Act 2002 because she was not issued with a written document setting out her terms of employment as required under s1 Employment Rights Act 1996. A defence is that there were exceptional circumstances which would make that extra award unjust or inequitable. If made, that award must be at least two weeks pay and can be up to four weeks pay.

53 The attached Orders are made to enable the parties if possible to agree certain parts of the calculations which will be required at the next hearing.

54 If the parties wish to settle the claim without the need for a further hearing ie reach an agreement as to compensation, then they should contact ACAS who can assist with reaching an agreement and recording it in writing. If they do not want to do that or are unable to agree anything then the hearing on 2 November 2023 will go ahead and decide compensation.

Employment Judge Reid
Dated: 16 October 2023