



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104270/2024

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Held in Glasgow via Cloud Video Platform (CVP) on 6 February 2025

Employment Judge F Eccles

10 **Ms M Stephen**

**Claimant
Represented by:
Ms S Christie -
Solicitor**

15 **Oxygen Lifestyle Ltd**

**Respondent
Represented by:
Ms J Nicola -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that (i) the respondent made an unauthorised deduction from the claimant's wages; (ii) the respondent shall pay to the claimant £772.25 as outstanding wages and (iii) the complaint for notice pay is dismissed.

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REASONS

Background

1. The claim was presented on 28 March 2024 against Oxygen Boutique (Oxygen Retail) Ltd. The claimant complained of unfair dismissal, non-payment of wages totalling £772.25 and failure to pay notice pay. The claimant also sought an award for injury to feelings. The claim was resisted on the grounds that the claimant was not employed by the respondent, was a "freelancer" and did not complete the work for which she sought payment.
2. At initial consideration, an Employment Judge issued a Notice to the claimant under Rule 27 of the Rules of Procedure 2013 in relation to the Tribunal's jurisdiction to (i) consider the complaint of unfair dismissal given the lack of

qualifying service and (ii) make an award of injury to feelings without a claim under the Equality Act 2010 or for whistleblowing. At the same time, the Employment Judge asked the respondent to confirm whether or not they accepted that the claimant met the definition of “worker” as defined by Section 230(3) of the Employment Rights Act 1996.

3. The respondent replied to the above request by asserting that the claimant did not complete the work to warrant any payment for wages, complete the tasks given to her or display hours worked.
4. The claimant was unrepresented at the time of presenting her claim. She was legally represented from 1 May 2024. The claims of unfair dismissal and for injury to feelings were withdrawn on 1 May 2024.
5. Standard Orders were issued to the parties on 2 May 2024.
6. A final hearing was listed for 11 July 2024. Parties were notified of the above hearing.
7. On 28 June 2024, the claimant applied for an Unless Order under Rule 38 of the Rules of Procedure 2013 on the grounds that the respondent had not complied with the Standard Orders issued by the Tribunal. On 9 July 2024, the claimant applied for strike out of the response under Rule 37 of the Rules of Procedure 2013 on the grounds of non-compliance by the respondent and failure to actively pursue the response.
8. On 9 July 2024 Ms Joanna Nicola for the respondent contacted the Tribunal to confirm that she would be unable to attend the final hearing due to another important commitment. The claimant did not agree to the hearing being postponed. The respondent did not attend the hearing on 11 July 2024. In the absence of the respondent, the Tribunal did not consider it appropriate to determine the applications made by the claimant for strike out or an unless order. The Tribunal decided to postpone the hearing. The Tribunal reserved consideration of any application for expenses made by the claimant. Having considered information before it, including details of payment to the claimant,

the Tribunal amended the name of the respondent to Oxygen Lifestyle Limited trading as Oxygen Retail.

- 5 9. The claim was re-listed for a hearing on 6 August 2024. A Note of the hearing on 11 July 2024 and a Notice of the hearing on 6 August were issued to both parties.
10. The respondent did not attend the hearing on 6 August 2024. A judgment was issued by the Tribunal that the respondent should pay the claimant (i) £772.75 as outstanding wages and (ii) £197.85 as statutory notice pay.
- 10 11. Ms Joanna Nicola for the respondent informed the Tribunal on 8 August 2024 that Oxygen Lifestyle Ltd did not trade as Oxygen Retail Ltd and that Oxygen Retail Ltd had ceased trading. Ms Nicola stated that the claimant had not been employed by either company. Ms Nicola was informed by the Tribunal on 12 August 2024 that the name of the respondent on the judgment issued on 6 August 2024 was that recorded on the Note issued by the Tribunal following the hearing on 11 July and sent to parties on 15 July. Ms Nicola was asked to confirm whether the respondent sought reconsideration of the judgment. The respondent sought reconsideration of the judgment on the grounds that it had been made against a company that does not exist, the claimant had not been employed, the claimant had failed to perform her duties and had breached confidentiality by sharing customer e mail addresses before being asked to stop working. The application for reconsideration was opposed.
- 15 20 25 30 12. A reconsideration hearing was listed for 21 October 2024. Ms Nicola informed the Tribunal that she would be abroad on the above date. The hearing was postponed and re-listed for 13 November 2024. At the above hearing, the Tribunal decided that it was in the interests of justice to revoke the judgment dated 6 August 2024 to allow the respondent to enter a response to the claim. In their response, the respondent submitted that the claimant was employed on a freelance basis by Oxygen Retail Ltd which is a separate company from Oxygen Lifestyle Ltd, neither of which employed the claimant. The respondent submitted that the claimant did not undertake the work for which she now claims payment.

13. The claim was listed for a final hearing on 6 February 2025. The hearing took place by CVP. The claimant gave evidence and was represented by Ms Shona Christie, solicitor. The respondent was represented by Ms Joanna Nicola, director. Ms Nicola gave evidence for the respondent. The claimant provided the Tribunal with a Bundle of Documents. The respondent provided copies of a credit card and credit card statement.
14. It was not in dispute that the respondent does not trade as Oxygen Retail. The Tribunal considered it appropriate and in accordance with the overriding objective to amend the name of the respondent for the purposes of this judgment by deleting reference to Oxygen Retail as a trading name of the respondent.

Findings in fact

15. The Tribunal found the following material facts to be admitted or proved; on 14 November 2023, the claimant was offered the post of Website and Customer Service Administrator with Oxygen Boutique. The respondent trades as Oxygen Boutique. The respondent was incorporated on 3 May 2023. They have the same registered office as Oxygen Retail Ltd. The nature of the respondent's business is retail sale of clothing. The claimant was interviewed for the post by Ms Joanna Nicola, a director of the respondent and Oxygen Retail Ltd. The work was online and involved the claimant responding to customers' messages relating to products and orders.
16. The claimant began working for the respondent around 14 November 2023. Ms Nicola provided the claimant with training as to how she should answer customer messages. The claimant used her own laptop and mobile phone to undertake work for the respondent. The claimant did not have core hours. The claimant was able to work at times to suit her studies. It was anticipated that the claimant would reply to messages received from customers by 6pm each day.
17. By e mail dated 23 November 2023, Ms Nicola informed the claimant that she *"was really happy with (your) work so far and would love to train (you) to do other bits"*. Ms Nicola confirmed to the claimant the hourly rate was £11, and

that the claimant could invoice her at the end of the month and that she could pay the claimant *“asap after the invoice”*. The claimant replied by e mail of 24 November 2024 confirming that she was willing to take on additional tasks. The claimant provided Ms Nicola with bank details for payment.

5 18. The claimant sent an invoice and timesheet to Ms Nicola on 30 November 2023 for 37.67 hours totalling £414.37. The invoice was addressed to Oxygen Boutique. On or about 1 December 2023 the claimant received a payment for £414.37. The payer was identified as Oxygen Lifestyle Ltd.

10 19. The claimant was in regular contact with Ms Nicola. The claimant did not feel supported. Ms Nicola was increasingly frustrated by the number of customer complaints and enquiries the claimant was able to answer during December 2023. This was a busy period for the respondent. The claimant experienced issues with her laptop and had difficulty accessing customer e mails. The claimant’s contact with Ms Nicola left her feeling stressed and anxious. On 28
15 December 2023, the claimant’s mother contacted Ms Nicola to raise concerns about the level of support provided to the claimant. Ms Nicola contacted the claimant on 28 December 2023 alleging that she had breached her privacy rights by passing her contact details to the claimant’s mother. Ms Nicola denied having employed the claimant and alleged that she had not completed
20 any tasks to the detriment of the respondent’s customer service.

20. The claimant felt aggrieved about her experience of working with the respondent and was left feeling anxious and upset. The claimant submitted an invoice and time sheet to Oxygen Boutique on 28 December 2023 for the work she had undertaken during December 2023. The claimant sought
25 payment for 70.25 hours totalling £772.75. The claimant did not receive payment of the above invoice. The claimant did not undertake any further work for the respondent from 28 December 2023. The claimant has not been paid any notice by the respondent.

Issues

21. The issues to be considered by the Tribunal were identified as follows:

1. Did the claimant undertake work for the respondent?
2. If so, did the claimant undertake work for the respondent as an employee, a worker or a self-employed “freelancer”?
3. If the claimant undertook work as an employee or a worker for the respondent, did the respondent (i) make an unauthorised deduction from the claimant’s wages by failing to pay her £772.75 and (ii) if the claimant was an employee of the respondent, did the respondent fail to pay the claimant notice pay?

Deliberations

22. The Tribunal began by considering whether the claimant had undertaken work for the respondent. From the evidence before it, including a sale order (103) and correspondence with the claimant (104), the Tribunal was persuaded that the claimant was undertaking work for the respondent. The Tribunal found that the respondent traded as Oxygen Boutique. This was the trading name used by the claimant when submitting her invoices for payment and in response to which she received payment. The claimant did not dispute that there was confusion at the time of presenting her claim (when she was a litigant in person) as regards the correct name of the respondent. This was understandable given the limited documentation available to the claimant in relation to her work with the respondent. Ms Nicola argued that evidence of the claimant being paid by Oxygen Lifestyle Ltd (77) should be disregarded as the funds for paying the claimant came from a credit card in her name and that of Oxygen Retail Ltd. The Tribunal was not persuaded that it could attach significant weight to the above evidence in circumstances where the payer of the claimant’s invoice was identified as the respondent and the evidence before the Tribunal was consistent with the claimant undertaking work for the respondent.

23. Having concluded that the claimant undertook work for the respondent, the Tribunal considered the claimant's employment status with the respondent. It was the claimant's position that she undertook work for the respondent as an employee, failing which as a worker. The respondent submitted that the claimant was a "freelancer" with neither employee nor worker status.
24. In terms of Section 230(1) of the Employment Rights Act 1996 ("ERA 1996") an "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. In terms of Section 230(2) of ERA 1996, a "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
25. In terms of Section 230(3)(b) of ERA 1996, a "worker" is an individual who undertakes under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
26. Having considered the evidence before it, the Tribunal concluded that the contractual relationship between the claimant and respondent was that of worker and employer within the meaning of Section 230(3)(b) of ERA 1996. The Tribunal was not persuaded that the claimant worked under a contract of employment. On the understanding that she replied to customer messages received by 6pm, the claimant was entitled to work at times that suited her studies. She provided her own equipment, and it was agreed that she would be paid by submitting an invoice for the hours she worked each month. The Tribunal was not persuaded that the above arrangements were consistent with the claimant being an employee. The Tribunal was also not persuaded that the claimant was self-employed or a "freelancer" as submitted by the respondent. The claimant was trained by Ms Nicola for the respondent in how she should reply to customer messages and there was no evidence before the Tribunal to suggest that she could arrange for anyone else to undertake this work in her place. There was no evidence of the claimant providing work

for anyone else and, in all the circumstances, the Tribunal was not persuaded that the relationship between the respondent and the claimant was that of a client and business undertaking of the claimant. Overall, and in all the circumstances, the Tribunal concluded that the claimant had agreed to undertake work for the respondent as a worker. She had agreed to personally reply to messages received from the respondent's customers and had not done so by virtue of a contract in terms of which the respondent was a client of the claimant's business. When reaching the above decision, in addition to the statutory provisions referred to above, the Tribunal considered the authorities referred to of Autoclenz Limited v Belcher and Others 2011 ICR 1157, Uber BV and Others v Aslam and Others 2021 ICR 657, and Mr Z Bandi and Others v Bolt Operations OU & Bolt Services UK Limited (ET case number 2206953/2021) by the claimant and IWGB v Central Arbitration Committee 2024 ICR 189 by the respondent.

27. Having determined that the claimant was a worker, the Tribunal considered whether she was entitled to payment of wages for December 2023. Payment had been sought from the respondent in terms of an invoice and time sheet addressed to Oxygen Boutique on 28 December 2023 for work undertaken during December 2023. The claimant sought payment for 70.25 hours totalling £772.75.

28. From the evidence before it, the Tribunal was persuaded that the claimant had undertaken the work for which she sought payment. The Tribunal did not doubt that the claimant had a strong sense of grievance from her experience of working with the respondent and had been left feeling anxious and upset. The Tribunal did not however accept the respondent's submission that it should find that the claimant did not do the work for which she was seeking payment. The Tribunal accepted the claimant's evidence that she had undertaken the work detailed in the time sheet and for which, as previously, she had submitted an invoice for payment. It was not in dispute that December was a busy time for the respondent's business and when many customer messages needed answering.

29. In terms of Section 13 of ERA 1996, an employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
30. There was no evidence before the Tribunal of the claimant having authorised or agreed to any deduction from the payment of her wages for work undertaken for the respondent. The Tribunal was satisfied that the respondent had made an unauthorised deduction from the claimant's wages by failing to pay her for work undertaken in December 2023 and that the amount properly payable to the claimant is as stated in the invoice in the sum of £772.25 being 70.25 hours at the rate of £11 per hour. The Tribunal has therefore declared that the respondent made an unauthorised deduction from the claimant's wages and shall pay the claimant the sum of £772.25 as outstanding wages.
31. The claimant also sought notice pay from the respondent. As referred to above, the Tribunal did not find that the claimant worked for the respondent under a contract of employment, Employees are entitled to statutory notice pay under Section 86 of ERA 1996. The same rights do not apply to workers as in the case of the claimant. The Tribunal has not therefore found that the claimant is entitled to statutory notice, and this complaint is therefore dismissed.

Conclusion

32. In all the circumstances, the Tribunal concluded that the claimant was employed by the respondent as a worker and that she is due to be paid for the work undertaken during December 2023 in the sum of £772.25.