



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4106578/2024 and 4106579/2024

**Final Hearing held in Glasgow by Cloud Video Platform (CVP)
on 7 November 2024**

Employment Judge: R Sorrell

**Members: J S Anderson
J Haria**

Miss I Leckie

**First Claimant
In Person**

Miss V Levinson

**Second Claimant
In Person**

Shakebar Limited

**Respondent
Mr H Ertekin
Director**

FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

- (i) The claimants were workers for the purposes of the Employment Rights Act 1996 and the National Minimum Wage Act 1998.

E.T. Z4 (WR)

- (ii) The claimants claim for the minimum wage is well founded and upheld.
- (iii) The respondent is ordered to pay to the First claimant the gross sum of £314.80 (Three Hundred and Fourteen Pounds and Eighty Pence).
- (iv) The respondent is ordered to pay to the Second claimant the gross sum of £264.80 (Two Hundred and Sixty Four Pounds and Eighty Pence).

The respondent shall be at liberty to deduct from the above sums prior to making payment to each of the claimants such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of earnings of that amount made to each of the claimants, and if it does so, duly remits such sums so deducted to HM Revenue and Customs, and provides to each of the claimants written evidence of the fact and amount of such deductions and of the sums deducted having been remitted to HMRC, payment of the balance to each of the claimants shall satisfy the requirements of this judgment.

REASONS

Introduction

- 1 The claimants lodged a combined claim of sex discrimination, equal pay and national minimum wage. It was agreed at the Case Management Preliminary Hearing held on 23 October 2024 that only the minimum wage complaint would proceed.
- 2 This hearing was therefore scheduled to determine whether the claimants were 'workers' and therefore entitled to be paid the minimum wage by the respondent for the hours worked. This was a virtual hearing held by way of the Cloud Video Platform.
- 3 The respondent resists the claim. It is their position that the claimants were contractors for the company, not employees or workers.
- 4 As parties did not have legal representation, the Tribunal explained the purpose of and procedure for the hearing, as well as the issues the Tribunal had to decide in accordance with the law. It was further explained that the Tribunal was required to adhere to the Overriding Objective of dealing with cases justly and fairly and to ensure that parties were on an equal footing.

5 Parties did not lodge any productions in advance of, or during the course of
the hearing.

Findings in Fact

The following facts are found to be proven or admitted;

5 6 The First claimant's date of birth is 7 September 2002.

7 The Second claimant's date of birth is 23 July 2002.

8 The respondent business makes and serves refreshments at music festivals.

9 The respondent has been in the festival trading business since 2007. Over
the years the business has grown and the respondent has needed more staff
10 to work at the festivals. Most of the staff recruited are based in England where
the majority of festivals are held.

10 In previous years, a friend of the First claimant, Anna, had worked for the
respondent at the Glastonbury Festival. A few months before the Glastonbury
Festival took place in June 2024, Mr Ertekin of the respondent asked Anna if
15 she could find six or seven people to work at the Festival for him. He let her
deal with that as he did not want to get involved.

11 The First claimant was subsequently contacted by Anna who asked whether
she and the Second claimant would like to work with her for the respondent
making and selling refreshment drinks at the Festival in June 2024.

20 12 Anna told the First claimant they would work roughly 35 hours over a period
of five days from 26-30 June 2024 and that everyone who worked for the
respondent the previous year was paid £500 for that work. She explained the
nature of the work, the camping arrangements and that the Festival entry
ticket was part of the arrangement.

25 13 The claimants agreed to undertake the work for the respondent on the basis
of the verbal information Anna had given them. At the time, both of the
claimants were students and were not working or seeking work elsewhere.

- 14 Anna subsequently added the claimants to a Whatsapp group chat with herself and five other people who had also agreed to undertake the work.
- 15 The claimants asked Anna if they needed to confirm anything with Mr Ertekin and she responded that they would receive further information closer to the time.
- 16 The work was confirmed by Mr Ertekin a couple of days before the Festival. The claimants were advised of the time to arrive, which gate to enter and the parking arrangements. The terms of the arrangement were not discussed.
- 17 The respondent had three refreshment vans on site at the Festival and the claimants were assigned to work at the same van with Jake, a respondent employee. They were trained to make smoothie and milkshake drinks by Jake and he supervised them throughout the five day period.
- 18 On the third day the claimants worked, Jake said they could stop working, enjoy the rest of the Festival and not receive any payment. The claimants said they would prefer to work. Jake then told them that the amount of pay they would receive for the five day period would depend on how hard Mr Ertekin thought they had worked.
- 19 The claimants were shocked at what Jake had said but did not believe that could be done so they continued to work the hours they were doing for the last two days.
- 20 The claimants approximate working hours were 9.00 am until 7.00 pm each day. Their hours were not recorded by the respondent. On one of the days they started work one and a half hour's late. They were not given any formal breaks and took short breaks during quieter periods.
- 21 The claimants were paid different amounts by the respondent for the work carried out. A day or two after the Festival, the respondent paid the First claimant £200.00 and the Second claimant £250.00 by bank transfer. They did not receive a pay slip.

22 The claimants subsequently discovered that the other people who had done the same work as them had also been paid different amounts by the respondent.

23 The First claimant contacted Mr Ertekin for an explanation about her payment.
5 Mr Ertekin responded that he had calculated it based on effort. His response did not make sense to her as the claimants had expected to be paid at least the minimum wage for the hours they worked.

24 The claimants worked a total of 45 hours each over the five day period.

25 The claimants Festival entry tickets paid for by the respondent did not form
10 part of the payment by the respondent to the claimants for the work undertaken.

Respondent's Submissions

26 Mr Ertekin submitted that the respondent works at music festivals and this
15 kind of work cannot be treated like shop or other business work. He knows the rules that apply to shop or other business work but they have to change the way they work at festivals as they can't employ or sack staff and they need to make it work for everyone. The respondent therefore has a system in place that the amount of money earned is dependent on how hard the person works.
20 Part of the payment is the ticket for the festival and that is what happened in this case. He is here to learn if the respondent has to change the way it works.

Claimants' Submissions

27 The Second claimant submitted on behalf of both claimants that she is sorry
25 it was an exceptionally quiet time at Glastonbury, but they cannot be paid in terms of effort. The minimum wage is £11.44 per hour, but the amount of money she was paid is equivalent to £5.00 per hour and the amount of money the First claimant was paid is equivalent to £4.00 per hour which isn't fair. It is also unfair to say they were slacking, everyone had their roles and they did work in the back sometimes too. They didn't receive their minimum wage and
30 that is what they would expect to see.

Relevant Law

28 The definition of ‘worker’ is contained in section 230 (3) of the Employment Rights Act 1996 (“ERA”). Section 230 provides:

5 (1) *In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

10 (2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if is express) whether oral or in writing.*

15 (3) *In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) –*

(a) a contract of employment, or

20 *(b) 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;*

25 *and any reference to a worker’s contract shall be construed accordingly.*

(4) *In this Act “employer,” in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*

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(5) *In this Act “employment” –*

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

5 *and “employed” shall be construed accordingly.*

29 The definition of ‘worker’ in section 54 (3) of the National Minimum Wage Act 1998 (“NMWA”) is identical to that contained in section 230 (3) of the ERA.

10 30 The Supreme Court authority of ***Uber BV and ors v Aslam and ors 2021 ICR 657, SC*** gives guidance in approaching the issue of worker status. This provides that the issue of whether a contract was a ‘workers’ contract within the statutory meaning was not to be determined by applying ordinary principles of contract law. The rights which the claimants sought to invoke
15 were created by legislation and therefore had to be determined by statutory interpretation, taking a purposive approach. The question of whether work is performed by an individual as a worker or as an independent contractor is to be regarded as a question of fact to be determined by an employment tribunal.

20 **Issues to be Determined by the Tribunal**

31 The Tribunal identified the following issues required to be determined:

- (i) Did the claimants enter into and work under a contract of employment or any other contract whether express or implied, oral or in writing, whereby they undertook to do or perform personally any work or
25 services for the respondent 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 claimants?
- (ii) If so, how many hours did each claimant work?
- (iii) What amounts of compensation (if any) are the claimants entitled to?

Conclusions

32 It was not in dispute that there was no intention to create legal relations between the parties. The dispute concerned the nature of that relationship and the number of hours worked by the claimants.

5 33 The Tribunal found that the claimants had entered into and worked under a verbal contract with the respondent at the Glastonbury Festival for a five day period from 26 June until 30 June 2024 that was based upon the information provided by Anna. In reaching this view, the Tribunal took account of the following factors.

10 34 It was Mr Ertekin's own evidence that he asked Anna to find people to work for the respondent at the Festival and that he left it to her to deal with as he did not want to get involved with that side of things.

15 35 The Tribunal found that Anna had told the claimants they would work for around 35 hours over the five day period, be paid £500 and given the Festival Entry ticket, based on her own experience the previous year. This is because the claimants gave consistent and credible evidence about that. While the Tribunal accepted Mr Ertekin may have told Anna to inform them that their pay would depend upon how much money the respondent made, Mr Ertekin conceded that it seemed this had not been properly communicated to the claimants. He equally accepted in evidence that he did not know if Anna had explained to the claimants that the Festival entry ticket formed part of their pay.

36 It was not in dispute that the claimants undertook to do the work personally for the respondent and in fact did so.

25 37 The Tribunal further found that the respondent was not a client or customer of the claimants because the Tribunal accepted the claimants evidence as reliable that at the time they were both students and were not working or seeking work elsewhere.

38 The Tribunal was satisfied that the respondent exercised a considerable degree of control over the claimants in their work. This is because it was not in dispute that they were required to work for the period of 26-30 June 2024, start work at 9.00am each day and were assigned to a specific respondent van with a respondent employee who trained and supervised them throughout the five day period. There was also mutuality of obligations in that, the respondent undertook to provide work for the claimants and pay them for that and the claimants undertook to perform that work in return for payment.

39 In the absence of any record of the claimants working hours for the work undertaken, the Tribunal found that the claimants each worked a total of 45 hours. Although Mr Ertekin did not accept the claimants were told by Jake they could stop working on the third day, it was not in dispute that the claimants worked the last two days.

40 In calculating the total number of hours worked by the claimants, the Tribunal accepted, to a degree, the claimants consistent evidence that their approximate working hours each day were 9.00am - 7.00pm, over Mr Ertekin's evidence that he "felt" they only worked a total of 35 hours, which we considered had little evidential basis.

41 That said, the Tribunal also had regard to the claimants' evidence that on one of the days they started work one and a half hour's late and that they took breaks during their working hours when it was quieter. The Tribunal therefore considered that a total of 45 hours worked by each claimant was reasonable in all the circumstances.

Compensation

42 The Tribunal has assessed the First claimant's compensation as follows:

45 hours x £11.44 (minimum wage rate) = £514.80 - £200 (paid by respondent) = £314.80

43 The Tribunal has assessed the Second claimant's compensation as follows:

45 hours x £11.44 (minimum wage rate) = £514.80 - £250 (paid by respondent) = £264.80

44 For all these reasons, the claimants were workers for the purposes of the ERA and the NMWA and their claim for the minimum wage is well founded and upheld.

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R Sorrell

Employment Judge

6 January 2025

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Date sent to parties

7 January 2025

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