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EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondents**
Mr R Almflh		Flower Station Ltd

Heard at: London Central **On**: 6 March 2017

Before: Employment Judge Glennie (sitting alone)

Representation
For the Claimant: In person
For the Respondents: Mr D Cohen (owner)

REASONS

1. In this case the Claimant, Mr Almflh, brings complaints of unlawful deduction from wages under Part I of the Employment Rights Act 1996, non-payment of holiday pay and non-payment of notice pay, the latter being a claim of breach of contract. The Respondents, who are correctly identified as Flower Station Limited, resist those complaints.

2. The issues were identified by Employment Judge Goodman in terms that amount to first the need for a decision as to Mr Almflh's status with the Respondents, that is, was he an employee, a worker or effectively in business on his own account. If the last of those were the case, then he would not be able to bring his claim before the Tribunal at all. Secondly, if he was a worker has there been a non-payment of wages and has there been non-payment of holiday pay. Finally, if he was an employee, has he a claim for non-payment of notice pay. I have indicated to the parties that I will give a decision in principle and I will give the figures that I have worked out, but the latter will be open to further discussion.

3. On the question of whether an employee, a worker, or neither of these, it is clear to me that Mr Almflh was at least a worker within the terms of section 230(3) of the Employment Rights Act 1996 because a worker is defined as someone who works under a contract of employment, or any other contract 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.

4. On this point I have evidence from Mr Almflh, from Mr Cohen the owner of the Respondent company and from Ms Atanackovic an assistant and employee within the company. The position is that Mr Almflh answered an advert for a self-employed driver to deliver flowers for the Respondents' business. He worked for about seven weeks and it seems to me that out of 42 days during that period he worked for 37 days according to his invoices. The evidence touched on the question of tax status and I indicated to the parties that self-employment is not one of the concepts that appears in the employment legislation. That is a tax concept, and it is evident from the invoices that Mr Almflh rendered that the agreement was, and there is no dispute about this, that he would be paid £10 per hour for his work, and it is quite clear that it was not intended that there would be a deduction for income tax from that. Otherwise one would see payslips, her payroll number and so on and indeed Ms Atanackovic said that the company employs employees properly so called, and when they do, that they have the requisite paperwork to fill out.

5. I should say that I accept that evidence from Ms Atanackovic and I will say that generally I have considered that all three witnesses who gave evidence did so honestly. I do not think anyone was trying to mislead me or anybody else in any way. Of course there are differences of recollection and of understanding, but I am satisfied that everyone was being entirely truthful in the matter.

6. The way in which the work was organised was that on a Friday a rota would be made up for the bikers for the following week. I accept from Mr Cohen that those in the Claimant's situation were acting as a supplement or an extra to the employed workforce and therefore their hours and the need for them could vary.

7. The position was that on a Friday the individuals could say what their availability was for the following week and that would be taken into account when the rota was made up. I asked what happened on the odd occasion when someone found they could not make it on a day that they had been booked for. Mr Almflh said that this happened to him once in the course of the seven weeks. He phoned up and he was told that he should come in because he was needed. It does not surprise me that this might be the reaction. Equally it does not surprise me that Mr Cohen says that from time to time the bikers engaged on this arrangement would ring up and say that they simply could not come in the next day, and if that happened there was not much the Respondents could do about it.

8. It seems to me that the crucial point is that it would unrealistic to suggest that someone working in the way that Mr Almflh did, relatively full hours over a period and in terms of a rota arrangement that I have indicated was someone who could be regarded as carrying on a profession or a business of their own. I do not mean to demean the status of someone who is delivering as a courier or similar, but it seems to me unrealistic to say that this is a professional activity. Nor does it seem to me to be right to say that someone in the Claimant's position is carrying on his own business of offering services as a courier to the world in the way in which, for example, a builder or decorator or gardener who operates their own business undertakes occasional items of work for various people. I am satisfied that the relationship here was within the definition at least of a worker.

9. The question of whether Mr Almflh was an employee is relevant therefore only to the notice pay claim and it seems to me that the essential answer to that is that I find that whatever Mr Almflh's status was, there was not anything that could amount to a dismissal by the Respondent. I accept Ms Atanackowic's evidence that when it came to it Mr Almflh was asking to be paid, as indeed he is now asking the Tribunal, and that he was not told that he would not be paid, which is something that in my judgment to a fundamental breach of contract. He was told that he had to get the paperwork right in order to be paid.

10. I can accept that because I can see that in the first instance at least Mr Almflh rendered at least one invoice showing VAT which was not correctly charged, and so it seems to me entirely likely that the response might have been that you should get the paperwork right in order for us to pay you and if that was so, then that would not in my judgment amount to a fundamental breach of contract, and therefore if there was a contract of employment there would not have been a dismissal. In those circumstances, Mr Almflh decided to leave of his own accord, but I will add although therefore even if Mr Almflh was an employee the breach of contract claim for notice pay would fail.

11. I nonetheless would find, if necessary, that Mr Almflh was not an employee. I have already described in outline the nature of the relationship. There were no set hours, and there was no obligation on someone in his position to do any work at all, if they were not available or if they simply did not want to work on particular days or in a particular week. Therefore, there was no mutuality of obligation. There was no obligation on the Respondent to offer work and there was no obligation on the Claimant to do it, and so in my judgment it was not a contract of employment.

12. This leads me then to the question of what is due to Mr Almflh in his position as a worker. The dispute on the invoices is a fairly narrow one because Mr Cohen has said that, leaving aside the point of whether Mr Almflh is a worker or not, the Respondent was prepared to accept £2,637 as being due to him, his claim for being for £2,905. The dispute is about the treatment of lunch breaks and the Respondent's case is that it was a standard practice that there would be a one hour unpaid lunch break; and that this was true for employees for those who were workers in Mr Almflh's position.

13. Mr Cohen explained to me how it was important that when people were out delivering they should have breaks and that there was a health and safety aspect. Essentially the arrangement that he described was that breaks would be taken informally. The working hours did not involve continually riding back and forth with deliveries, there would be periods where they could take a break, have a coffee or cigarette or whatever, and that therefore there was deemed to be a one hour lunch break. Mr Almflh on the other hand has said that he drew up his invoices honestly and that when he took breaks he reflected that in the invoices.

14. I can see that there are some days where he has put down that there was a break, other days where he said that there was not. Ultimately on this point it seems to me that if the Respondent wishes to say that there is a deemed lunch break in the arrangement then really the burden is on them to prove that. In the

absence of something in writing addressed to the worker in this situation it seems to me is not something that I can find was actually agreed between the parties and so on that basis I find that the sum due under the invoices is the full amount of £2,905.

15. The final matter is the question of holiday. As Mr Almflh was a worker he was entitled to paid holiday and when he left he was entitled to pay in lieu for any holiday accrued but untaken. There was not any paid holiday taken so far as I am aware and provisionally I have calculated that accrued payment as follows. Mr Almflh worked between 8 and 13 September (20 days out of 23) between the 1 and 19 October (17 days out of 19). The effect of regulations 13 and 13A of the Working Time Regulations 1998 gives a maximum of 28 days paid holiday per year, which is usually calculated by reference to the year and the number of weeks in which holiday has been accrued. Forty two days gives six weeks and the statutory formula would then be that I take 28 days normal of annual entitlement, I multiply that by 6 weeks which is the number of weeks that Mr Almflh worked, I divide it by 52, which is the number of weeks in the year, giving 3.23 days entitlement.

16. The days are not rounded up in this formula and so I need to calculate the amount of a day's pay. It seems to me that the best way of doing that is to take the invoices, the total is £2,905, and divide that by the number of days worked which is 37, showing that on average Mr Almflh was earning £78.51 per day. So I multiply £78.51 X 3.23 and that gives me £253.58.

17. Those then provisionally are the two sums that I find are due from the Respondent to the Claimant. I will say that these do not reflect tax. Mr Almflh is responsible for his own tax and he must account to the Inland Revenue for the tax due on those sums.

18. In terms of the Tribunal's fees Mr Almflh seeks payment of £390 which is the correct amount of the issue and hearing fees. I have heard Mr Cohen on the points and I should say that I entirely accept that the Respondent has acted in these proceedings in good faith and the fact that I am going to order that the Tribunal fees should be added to the judgment does not mean that I think otherwise. If I did think otherwise then the Tribunal has power to go further than order payment of the fees in two respects. One is that I could make a preparation time order which would be an order really compensating Mr Almflh for the time that he has taken over the case and if I thought that the Respondents had acted unreasonably in the proceedings then I could and usually would make an order of that nature. I do not think this, so I have not broached the subject of making such an order.

19. The other thing that can happen but which I would not do in this case is imposing a financial penalty on the Respondents. That can occur where the Tribunal considers that there has been (and I am paraphrasing) a serious or a deliberate flouting of a worker's or an employee's rights by the employer and in those circumstances the Tribunal now has power to impose a financial penalty which goes not to the Claimant but to central funds. Again, if I thought that there had been any such deliberate flouting of rights than I would most certainly consider

imposing such a penalty. I do not think that and therefore I have ruled that out as well. Nonetheless it is the case that Mr Almflh has had to come to the Tribunal in order to get his remedy and the balance therefore lies in favour of adding the fees to the sum that the Respondent must pay.

Employment Judge Glennie
11 May 2017