EMPLOYMENT TRIBUNALS

Claimant: Mr T Foster

Respondent: Eve Taylor (London) Limited

HEARD AT: HUNTINGDON ET **ON:** 15th August 2017

BEFORE: **Employment Judge Ord**

REPRESENTATION

For the Claimant: Mr Pike, Solicitor.

For the Respondent: Miss L Millin, Counsel.

PRELIMINARY HEARING

JUDGMENT ON ISSUES

1. The claimant was not an employee of the respondent within the meaning of Section 230(1) of the Employment Rights Act 1996.

2. The claimant was not a worker within the definition of Section 230(3) of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998.

3. The claimant's claims are therefore dismissed and the hearing listed for 1st and 2nd March 2018 is vacated.

REASONS

1. The claimant presented a single claim form to the Employment Tribunal on 2nd May 2017 having completed the ACAS early conciliation process. He brought claims for unfair dismissal, breach of contract (notice pay) and for outstanding holiday pay under the Working Time Regulations 1998.

2. The claimant was born on 6th October 1941 and is thus now 75 years of age. From 1971 until 31st March 2008 he ran his own owner-driver haulage business which he closed following a decline in trade and when his biggest customer began to use in-house drivers rather than owner drivers.

3. Thereafter the claimant did part time agency work driving heavy goods vehicles as a Class 2 HGV Driver. He continued this until August 2012 when he surrendered his licence because in his words he had "had enough" of HGV driving.

4. The claimant's wife is employed by the respondent company. The respondent company previously traded from premises at Papyrus Road in Werrington, Peterborough. From time to time whilst the respondent business was based there the claimant was asked to do what he describes as "ad hoc jobs".

5. From April 2009 onwards whilst the claimant was working as an agency HGV driver he carried out additional work for the respondent cutting grass, cutting hedges and doing general gardening and ground maintenance work, and when requested carrying out driving work for the respondent.

6. Between April 2009 and 3rd January 2017 the claimant submitted invoices on a monthly basis. The invoices were produced on headed note paper with the claimant's name, address, mobile and land line telephone numbers. The invoices were hand written with dates, the address of the respondent, a short description of the work done and the amount to be charged. The invoices were handwritten by the claimant's wife, who also completed the claimant's time sheets which showed (where relevant) the hours claimed on the invoices.

7. As an example on the 23rd July 2010 the claimant produced an invoice which read:-

> *"17/06/10 Maintenance to units 1, 2, 3 and weedkiller £35*
> *13/07/10 Deliver goods to Blackpool £120"*

The total of the invoice was £155 and it is marked "Paid BACS". There is no specific hourly rate on those invoices. Invoices for specific events such as deliveries, attending trade shows or carrying out maintenance were separate to the hourly based invoices.

8. It is not disputed that from early 2013 onwards the claimant attended the respondent's premises more than he had done previously. He continued to send invoices to the respondent company on a monthly basis for work helping in the respondent's warehouse and separate invoices when he was carrying out maintenance work or driving to and from exhibitions which the respondent business attended.

9. The claimant says that after he had been diagnosed with prostrate cancer in late 2012 Mrs Eve Taylor, the Chairman of the respondent company told his wife to tell him to "come in to work and not to sit at home dwelling on it". The claimant's primary case was that from April 2009 onwards he was an employee of the respondent (albeit initially on a casual basis) alternatively that he became

an employee in February 2013 after Mrs Taylor asked the claimant – indirectly, via his wife – to work every day so he was not at home dwelling on his health.

10. The claimant in his evidence accepted that from April 2009 onwards he was not working full time, described himself as his own boss and said he was doing odd jobs when he was asked to come in. He did not have set hours and there was no obligation upon the respondent to provide him with work.

11. There was a dispute between the parties about whether the claimant had requested time off when he was attending hospital for cancer treatment. There was a further dispute about whether the claimant had to request time off when he was on holiday.

12. In relation to holidays the claimant says that he booked holidays through the respondent. The respondent has a wall chart which every employee's absences were recorded in particular in relation to holidays. The claimant does not appear on that holiday chart and the respondent's unchallenged evidence was that other self employed contractors who carry out work from time to time for the respondent company also would not appear on that chart. There was no evidence of the claimant requesting holidays.

13. In relation to his not working whilst he was having cancer treatment Mrs Taylor's evidence was that the only time she knew that the claimant was attending hospital was because his wife would take time off to do with him.

14. The respondent was unable to produce some wall charts from, in particular the years 2014/2015. They say that this wall chart had been lost and there was no reason to doubt that evidence as other wall charts had been produced for other years.

15. The claimant continued to invoice the respondent each month for fees calculated on an hourly basis. These invoices would be sent to the respondent and would be processed by the claimant's wife who held an administrative role within the respondent. She also wrote out the timesheets against which the invoices were checked. These would then be stamped as approved and Mrs Taylor would then organise payment. Mrs Taylor did not do any further checking as between invoices and timesheets saying that she continued to trust the claimant's wife in her administrative role.

16. The claimant according to Mrs Taylor brought his wife to work every day and then simply stayed. His evidence was that there was "always something to do", and that "nobody told him not to stay".

17. Matters came to a head during the Christmas/New Year period at the end of 2016. Mrs Taylor, who was on the premises, became aware that the claimant was at the premises and that he subsequently invoiced for his attendance. Her evidence was that other than family members the only other person in the premises was the claimant's wife. Everyone else had either retained holiday for the 3 days between Christmas and New Year or had taken those days as unpaid leave. She questioned in her own mind why the claimant was invoicing for his time spent on those 3 days because in her words there was "nothing for him to do". The claimant's wife was in attendance because she had used up all

of her holiday and did not want to take unpaid leave. She was carrying out administrative tasks which were required.

18. Against this background Mrs Taylor and her co-directors came to the decision that the respondent no longer needed the claimant's services. She therefore told him that he was no longer required on the 3rd January 2017.

19. it is against that background that the claimant makes his claims.

The Law

20. Section 94 of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed.

21. Under Section 230(1) of the same Act "Employee" means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.

22. Under the Working Time Regulations 1998, Regulation 13 and 13(A) a worker is entitled to 4 weeks (under Regulation 13) and an additional 1.6 weeks (under Regulation 13(A)(2)(e)) subject to a maximum of 28 days aggregate entitlement under both Regulations 13(A)(3).

23. Under those regulations "worker" means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment or any other contract whether express or implied and (if it is express) either 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 professional or business undertaking carried on by the individual. This same definition of "worker" applies to the Employment Rights Act 1996 by virtue of Section 230(3).

24. I have been referred to the cases of *Pimlico Plumbers Limited v Mullins & Smith (Court of Appeal, 2017) EWCA Civ 51*, and *Mingeley v Pennock & Ivory trading as Amber Cars [2004] IRLR 373 (Court of Appeal)*.

25. I have had regard to those two cases and to the previous authorities referred to therein and the issues to be considered by the Tribunal when determining the status of an individual which is in dispute.

Summary and Conclusions

26. In written submissions presented to the Tribunal Mr Pike, on behalf of the claimant, set out under helpful headings the issues which he believed were indicative of employment (or worker) status and is convenient to summarise the case by reference to those headings.

27. The first matter relates to mutuality of obligations which is said on the claimant's behalf is "clear" from the evidence of claimant (which was that he attended work every day), the fact that he submitted invoices for each of those days and was paid for them. Further he categorised as the evidence of Mrs Taylor that the

respondent did not request the claimant's presence but nonetheless paid him for his time spent at the premises as "simply embarrassing" and lacking "any credibility".

28. Mrs Taylor's evidence was not quite, however, as Mr Pike describes it. Her evidence was that a situation had "grown up" over a period of time. She says that initially the claimant carried out work as and when required but then spent an increasing amount of time at the respondent's premises. She said that she, in effect, assumed that his presence had been requested but there was no evidence that it had been. She accepts that she was lax in simply accepting the invoices (which correlated with timesheets submitted) without questioning what work the claimant was actually doing, and that had she done so the situation which developed over a period of time would have been resolved much earlier.

29. I accept Mrs Taylor's evidence in this area. I do so because, in particular, the claimant could not show any instruction or requirement for him to attend work and when he was asked what had changed in the period after he was carrying out work on a self employed basis to become an employee he said "nothing really". Whilst he came to the respondent's premises every day at 8.30am he did so at least in part to deliver his wife to work. He stayed and his evidence was that "no one told me to leave". That however is not the same as requiring him to be in attendance.

30. Further the claimant's evidence was that there was "always something to do" which is different from having specific work to carry out at the instruction of the respondent.

31. The picture that emerges, and what I find to be the case, is that the claimant attended the respondent's premises (except when he was specifically required to do so for gardening, specific items of maintenance or when he was asked to assist by attending a trade show) of his own volition. He, I find, made himself busy and assisted with what Mr Pike describes as low skilled repetitive manual work in the respondent's warehouse. That the respondent itself failed to properly manage the number of hours the claimant was spending on their premises and, on the basis that invoices matched timesheets, paid him for his time on their premises is not sufficient to create a mutuality of obligation. There was no evidence that had the claimant failed to come to the respondent's premises on any day it would have raised questions or concerns. The respondent has been lax in checking the administration of the claimant's invoices and his timesheets, but there was no obligation on the claimant to attend work and there was no obligation on the respondent to pay him.

32. The second element of Mr Pike's submissions related to the issue of "control". It is said that Ray Taylor on behalf of the respondent told the claimant what to do, when and how to do it and when to take breaks. That, however, is not consistent with the claimant's own evidence. Whilst it is correct as Mr Pike points out that Ray Taylor himself was not present in the Tribunal to give any evidence contrary to that provided by the claimant, the claimant's own evidence was inconsistent with that submission. First of all as regards breaks, he initially said that he took his breaks at the same time as everyone else "because that was common sense" but he then later changed his evidence and indicated that there were days when he worked without a lunch break and on his timesheets

there were some days when he makes reference to a half hour lunch break. He also accepted that from time to time he would leave the premises over lunch and go and assist another family member in their business. That is inconsistent with being told when to take breaks. Further contrary to the submission that Mr Taylor told the claimant "what to do, when, where and how to do it" the claimant's evidence was that there was always something to do, which is indicative of him keeping himself busy.

33. The picture that emerges and what I find was in fact the case was that the claimant chose to make himself busy. He was not instructed to do any work, although there may have been times when he asked Mr Taylor what he could do to help.

34. The third element on which Mr Pike relies was what he calls "equipment". This falls into three categories.

    (1) First he refers to the respondent providing all the equipment necessary for the claimant to do his job including candles, boxes to pack them in and labels. This relates to when the claimant was carrying out work in the warehouse. This is not "equipment". This is goods and materials which the respondent was trading in.

    (2) The second part of the "equipment" submission relates to a van (owned or hired), hotel accommodation and food whilst "staying away". This relates to times when the claimant was specifically asked to assist in travelling to and from trade shows, setting up stands etc. The respondent did not deny that the claimant was asked to do that. However, the respondent's position was that he did so as a self employed individual, hence his invoicing – on a separate invoice – for those occasions when he carried out such work.

    (3) The third section relates to the provision of "company work wear" including polo shirts, sweat shirts, fleeces, gloves and hats. The respondent did not deny that they provided these items for the claimant whilst he was working in the warehouse. That is an element which I reflect upon, particularly in relation to the issue of integration.

35. What Mr Pike does not refer to, however, is the equipment the claimant he himself provided when he was carrying out maintenance work and/or gardening work. He provided his own tools. He provided his own gardening equipment. That is not indicative of employment and much more indicative of a self employed status.

36. The next item which Mr Pike refers to is the question of personal service. It is right that the claimant did not ever send a substitute to do his work. He says his "understanding" was that he had to do the work himself. An unfettered right of substitution would be indicative of self employed status.

37. The claimant's evidence in this area was, however, somewhat equivocal. When asked if he could send someone else to do the work he was specifically asked to do he said he could not, but that was because he did not know anyone who could do the work in his place. He did not suggest that he would not be allowed

to send a substitute, either by direct evidence or by implication. When he was not at work the respondent managed without him. Mr Pike submits that this is indicative of there being no obligation to send a substitute but that is quite a different test from whether there was an unfettered right to send a substitute if the claimant desired.

38. The next heading under which Mr Pike makes his submissions is "business risk". Mr Pike correctly points out that the claimant provided no capital to the respondent but it is not correct to say, as he does, that he had to incur no capital expenditure in order to be able to do his job because the claimant did provide tools for maintenance/gardening work. Further, it is correct that he was paid an hourly rate for work done irrespective of the output or the quality of the work, that was the basis upon which he invoiced the respondent and upon which he was paid. It is difficult to see what "defective work" Mr Pike refers to when he indicates that the claimant had no obligation to rectify it. Although Mr Pike submits that the claimant was not in business on his own account, every aspect of the way in which he conducted his affairs was indicative of a self employed person. He paid self employed tax, submitted invoices to the respondent for his time, was paid a gross sum for that time and submitted timesheets and invoices to justify payment.

39. Mr Pike then refers to the question of "integration" and says that the claimant was integrated into the respondent's workforce by taking breaks with them (see above) and receiving Christmas Bonus/gifts as they did. That however was not the case according to Mrs Taylor whose evidence on this was not challenged. The claimant's wife, as an employee, received a Christmas Gift. Suppliers also received a gift, the claimant was on the list of "Suppliers" to whom gifts were given. That list was drawn up by the claimant's own wife. It was she who added him as a "supplier". He was not integrated into the workforce on that basis nor does the claimant point to any other aspect in which he was treated as an employee.

40. Mr Pike correctly points out that the claimant did not carry (nor was he asked to carry) public liability insurance in the later years, although Mrs Taylor said she "assumed" he had continued to carry insurance as he had such cover when he began working for the respondent.

41. In relation to the rate of pay the claimant says that Mrs Taylor told his wife to increase the amount of pay. The claimant's wife did not give any evidence in this area and Mrs Taylor denied it. She says that she was presented with invoices which showed an increased rate of pay and she accepted it. I accept Mrs Taylor's evidence on this point. It is the only direct evidence on the issue. It was suggested on behalf of the claimant that the increase in the rate of pay (from £7 to £8.50 per hour) was to reflect the National Minimum Wage/National Living Wage increases. However the increase took the figure far above that level.

42. Finally Mr Pike referred to the understanding of the parties. The claimant accepts that at an early stage in his relationship with the respondent, he was self employed and he was not an employee. He could not point to anything which changed. He referred to an invitation, when he was in the early stages of diagnosis of cancer, to come in and do some more work simply because

Mrs Taylor felt that that would be better for him than him sitting at home. That does not create an employment situation and he himself accepts that in relation to the arrangements between the parties at that time "nothing changed". Everything about the claimant's conduct over the whole period – the way he filled in time sheets and presented invoices, looked after his own tax affairs, provided his own equipment for maintenance or gardening work, did not seek permission for holidays and was not part of the holiday chart scheme and finally the fact that his own wife considered him to be a "supplier" to the company when purchasing supplier Christmas Gifts for the respondent to distribute all are indicative of self employment.

43. The way the arrangement between the parties came to an end does in my view fully demonstrate the position. Other than the claimant's wife (who did not wish to take unpaid leave having used up all of her holiday entitlement) and the Directors no one was in the respondent's premises between Christmas and New Year other than the claimant. That caused Mrs Taylor to question why he was there, what he was doing, and why he was being paid. She discussed this matter with her fellow Directors and no one could recall seeing the claimant carrying out any work during this period, and could not understand what work he could have carried out as the premises were in effect shut down for three days. On analysis of their business, they came to the conclusion that they no longer required any services from the claimant and told him this.

44. Mrs Taylor's unchallenged evidence was that her son spoke to the claimant on the 3rd January to tell him that his services were no longer required and his only question was why his wife could not be made redundant. He did not at that stage challenge the respondent's right to terminate any call on his services.

Summary

45. This is an unfortunate case which has reached the stage it did due to a degree of laxity by the respondent and what I consider to be a degree of opportunism by the claimant.

46. The claimant carried out some ad hoc work for the respondent on a self employed basis. He then reached the stage where he was no longer working either through his own self employed business as a haulier, nor doing agency HGV driving because he had "had enough", in his words, of driving a heavy goods vehicle.

47. At the time he was diagnosed with cancer the respondents, through Mrs Taylor, suggested that he could come into the premises and help out rather than sit at home and dwell upon it. That was a kindness and in no way an invitation to become a full time employee.

48. The matter has grown from there and the claimant decided of his own volition to attend the respondent's premises every day. A laxity in the respondent's administration/checking process lead to the claimant being present on the premises and being paid by the hour for doing so, on effectively a full time basis. However he was not asked or required to do this. His view was that "no one told him not to stay".

49. I am satisfied that there is no mutuality of obligation in this case. The claimant did not have to attend work and the respondent did not have to provide work to him. Second, he attended voluntarily. He had the right (although it was never exercised) if so desired (and it may well be the case that he never did so desire) to send a substitute to do the work. The simple truth of that lies in the claimant's own evidence that he could not send a substitute because he did not know anyone. He did not at any stage suggest that it would not be allowed.

50. Everything about the claimant's conduct throughout the entire period of him providing services to the respondent is indicative of self employment. He has, in my view opportunistically, taken advantage of the arrangement to – in a para phrase of his own words – keep himself busy.

51. There is no written agreement between the parties in this case. Had there been any form of written agreement between the parties that might well have avoided these proceedings. However I am satisfied that the claimant, throughout the period of the relationship between himself and the respondent company, acted as and was a self employed person in business on his own account. He accepts that was the position when he first started to carryout duties for the respondent and it is in his own words nothing changed during the period. There is no mutuality of obligation, he had a right which was not fettered in any way to send a substitute is he so desired and those are the irreducible minima that he cannot overcome to establish his status as either employee or worker.

52. On behalf of the respondent Miss Millin set out 15 matters which pointed in her view towards the claimant's position as a self employed individual. They were the fact that there was no contract of employment in writing, that the claimant did not request leave, that he was not included in the respondent's wall chart for leave, that he billed on his own headed invoices, that he was included in the respondent's list of self employed contractors ("Suppliers"), he did not wear company protective clothing, provided his own tools for the jobs he carried out, was not "controlled" by the respondent in so far as he was not asked to work full time, was not told when he should start work when he could take a break or to carry out a job, did not have a pay slip and was taxed as self employed, had a right of substitution, was a customer or client of the claimant, was not paid sick pay and used his own vehicle for company work Finally she says that there was no mutuality of obligation between the parties.

53. I have considered the vast majority of those matters when analysing Mr Pike's submissions on the claimant's behalf and the claimant's own evidence. Other than the claimant's constant attendance at the respondent's premises (which I find was voluntary and not as a result of any request, order or instruction by the respondent) there is nothing in the arrangement which points towards the claimant being an employee and I find that he was not.

54. In Pimlico Plumbers Court of Appeal sets out that the tests for identifying whether or not an individual was a worker. Applying those tests to the claimant's position I find as follows:-

    (1) There was no main purpose or agreement that the claimant should personally provide work for the respondent.

(2) There is no contract or agreement to provide work on agreed days.

(3) There is no expectation of any agreement for working hours.

(4) Anyone could have carried out the ad hoc jobs the claimant performed.

(5) There was no “tight control” of the claimant by the respondent.

(6) The claimant submitted invoices for his work on headed paper and conducted all his affairs on the basis of self employment.

(7) The claimant did carry out work for others (at least during part of the period) when he worked for the respondent after which in his words “nothing changed”.

55. Accordingly the claimant has not satisfied me that he was either an employee of the respondent nor a worker within the definitions in Section 230 of the Employment Rights Act 1996.

56. For those reasons the claims are dismissed. The claimant cannot bring a claim for unfair dismissal because he was not an employee. There was no contract of employment on which he can found a claim for breach of contract in relation to notice pay and as self employed person he is outside the scope of the annual leave arrangements under the Working Time Regulations 1998.

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Employment Judge Ord, Huntingdon.
29 August 2017
ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS