Case Number: 3201008/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Baker**

Respondent: **(1) Dasign House Romford Ltd t/a DG Solutions**
(2) Disign House Maidstone t/a DG Solutions

Heard at: **East London Hearing Centre** **On: 20 September 2018**

Before: **Employment Judge Ferguson (sitting alone)**

Representation

Claimant: **Mr F Jaffier (Consultant)**

Respondent: **Mr K Nathan (Consultant)**

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. **The Claimant's complaint of unauthorised deductions from wages is dismissed.**

2. **The Claimant's complaints of unfair dismissal and wrongful dismissal succeed.**

3. **The Respondents shall pay the Claimant £83,738.19. The calculation of the award, for which the Respondents are joint and severally liable, is set out in the attached schedule.**

Recoupment

Prescribed period:	28/02/2018 to 20/09/2018
Total award:	£83,738.19
Prescribed element:	£16,541.49
Balance:	£67,196.70

REASONS

INTRODUCTION

1. By an ET1 presented on 16 May 2018, following a period of early conciliation from 6 February to 6 March 2018, the Claimant (DOB: 4 April 1973) brought a claim for unfair constructive dismissal, wrongful dismissal and unauthorised deductions from wages against DG Solutions. The First Respondent responded to the claim alleging that the Claimant was not an employee, but had been engaged as an independent contractor.

2. The Tribunal directed a preliminary hearing to determine the employment status issue, but due to a listing error the hearing did not go ahead and instead a closed preliminary hearing (case management) took place on 31 August 2018. The Second Respondent was added as a party and it is agreed by all that the Respondents are joint and severally liable for the acts of the business trading as DG Solutions. For simplicity I will refer to both Respondents as "the Respondent". By the time of the preliminary hearing a final hearing had already been listed to take place on 20-21 September 2018, so it was agreed that those dates would be kept and the judge hearing the case would decide whether to determine the employment status question only, or to determine the whole claim. As it happened, the listing was reduced to one day due to lack of judicial resources.

3. I discussed the issues with the parties at the start of the hearing. It was clear from the pleadings that the issue of the Claimant's employment status was in fact the only issue in dispute on liability. The Respondents had not argued that, in the event that the Claimant was found to be an employee, there had been no dismissal or that any dismissal had been fair. I therefore decided that I would proceed to determine the whole claim, including remedy.

4. After the hearing had been adjourned for reading time and recommenced at approximately 11.15am, the Respondent applied to amend their response to argue in the alternative that the Claimant was not dismissed and/or his dismissal was fair. I refused the application. The Respondent has been professionally represented throughout the proceedings. They have had ample opportunity to apply to amend their response at an earlier date, most notably at the preliminary hearing on 31 August. I note that in their case management agenda completed for that hearing the Respondents said that the only issue in dispute was the Claimant's employment status. There had been no hint of any alternative defence until the Respondent sent a draft list of issues to the Claimant three days before the final hearing, which stated:

> "Assuming the Claimant was an employee, which the Respondent denies, the Respondent raises the following issues:
>
> 5 Why did the Claimant actually resign?
>
> 6 Did the Claimant contribute to his resignation?
>
> 7 Did the Claimant resign because his misdeeds were being

> unearthed by another self-employed Consultant (who was especially contracted to audit the financial affairs of the Respondent Company)?"

5. When pressed as to the Respondent's position Mr Nathan said that it was only the reason for the Claimant's resignation that was in dispute. The Respondent wished to argue that he had resigned "for reasons best known to himself". The Respondent did not wish to argue that there had been no fundamental breach of contract or that any dismissal had been fair. Having read the witness statements and documents I noted that the Claimant cited the alleged breach of contract as the reason for his resignation at the time and the Respondent had not put forward any evidence of a different reason. The application to amend appeared to be a last minute afterthought and in all the circumstances I considered that it was not in the interests of justice to allow it.

6. The only issue on liability for unfair dismissal therefore was whether the Claimant was an employee within the meaning of s.230 of the Employment Rights Act 1996 ("ERA"). If he was, his claim succeeds. As to remedy, the Respondent argued that the Claimant had failed to mitigate his losses.

7. The Claimant also claimed wrongful dismissal and unauthorised deduction from wages, but the wages claim was never particularised and was not pursued at the hearing.

8. The Claimant also claimed compensation under s.38 of the Employment Act 2002 for failure to provide a written statement of initial employment particulars pursuant to s.1 ERA.

9. I heard evidence from the Claimant. On behalf of the Respondent I heard from Thomas Ward.

THE LAW

10. The right under s.94 ERA to claim unfair dismissal applies only to employees, defined in section 230 ERA as follows:

> (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.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) …

11. In order to determine whether a claimant works under a contract *of service*, as opposed to a contract *for services*, tribunals must look at a number of factors, none of which is determinative on its own. Relevant factors include the degree of control exercised by the respondent, the extent to which the claimant is integrated into the organisation and the "economic reality" of the relationship, i.e. whether the claimant is in reality working on his or her own account (see, e.g., O'Kelly and others v Trusthouse Forte plc 1983 ICR 728). Certain characteristics, namely control, mutuality of obligation and personal service, are essential to an employment relationship.

12. As to financial matters, payment by commission only or by a share of profits will usually point towards self-employment, whereas payment of a regular salary is a strong indicator of employment. Another relevant factor is the payment of income tax and national insurance contributions. Deductions at source point to employment; gross payments suggest self-employment. Registration for VAT will normally be a strong indicator of self-employment, but may be outweighed by other factors (see Cascade Aluminium Windows Ltd v Powlson EAT 321/82).

13. The parties' stated intention as to the nature of their relationship may be relevant but the tribunal should consider the substance of the matter. Contractual arrangements must be entered into in good faith, however, and not with the purpose of defrauding the tax authorities, otherwise the contract will be void and no rights under it will be enforceable.

FACTS

14. There was very little dispute about the facts. The Claimant provided a detailed statement describing his relationship with the Respondent and why he believed he was an employee from March 2014 until he resigned on 6 February 2018. The Respondent's only witness was Thomas Ward, an independent consultant who has been engaged by the Respondent since August 2017. In respect of most of the Claimant's evidence, there was nothing put forward by the Respondent to counter it. Mr Nathan tested the Claimant's account in cross-examination, as he was entitled to do, but the Claimant maintained what he had said in his witness statement. The facts set out below, therefore, are effectively undisputed and I accept them to be accurate.

15. The Respondent is a medium-sized business that sells and installs double-glazing. It employs approximately 25 people.

16. The Claimant joined the Respondent as a sales executive, selling double-glazing, in October 2013 on a self-employed basis. He had no basic salary, no car, no holiday entitlement or any other benefits. He was provided with "warm leads", so he could visit prospective customers in their homes and he would receive weekly commission on any sales. There was no obligation on the Respondent to provide him with work, nor was he under any obligation to accept work.

17. On or around 28 February 2014, the Claimant was called into the Respondent's accounts office. On his arrival he met four of the company's shareholders, including Peter Hemming, and two accounts administrators. Mr Hemming complimented the Claimant and said that because he had done so well, the Respondent wanted him to take over the role of Branch Manager for the Letchworth office. He said it would be a full-time position, Monday to Friday 8.30am to 6.30pm and 9.30am to 2pm every other Saturday. There was a salary of £6,000 per month and 15 days' holiday. The Claimant asked whether he would be receive a contract of employment and be paid on PAYE. Another of the shareholders, Daniel Dacosta, said the Respondent did not have company contracts and the Claimant would have to remain self-employed. The Claimant did not press the Respondent further on this because he was concerned the offer might be withdrawn. In his oral evidence the Claimant said he felt he did not have a choice in the matter.

18. The Claimant accepted the position and began working as the Branch Manager. The role required the Claimant to be present in the office full time and he did not believe he was entitled to send a substitute. According to his witness statement, "The role was full on and I was constantly making business decisions under the full control of the Shareholders." He was responsible for managing staff absences, holiday requests, sale opportunities, contracts, customer monies and information, travel expenses, providing guidance and training to staff, liaising with head office, administration and revenue figures. He was not required to have personal liability insurance or to indemnify the Respondent for any losses caused by him.

19. For three or four weeks in July/August 2014 the Claimant took on a training role, for which he was paid £4,500 a month plus commission. He was also given a company car and a petrol allowance. In August 2014 Mr Dacosta asked the Claimant to become Business Manager. The Claimant was asked to improve the infrastructure of the business. His salary initially remained the same, but was increased to £6,500 a month in late 2014 and his hours of work were confirmed as 9am to 5pm Monday to Friday. In July 2015 his pay was increased to £7,000 a month. During this period the Claimant was responsible for, among other things, hiring and firing employees. The bundle included, as an example, a letter from the Claimant, with the title "Head of Business", on the Respondent's headed paper to an employee confirming that his application for voluntary redundancy was accepted. All such decisions had to be approved by the shareholders.

20. Also during this period the Respondent took some steps to appoint the Claimant as a Director and shareholder of Dasign House Romford Ltd. In March 2016, to reflect this change, the Claimant's salary was increased to £10,000 a month. The paperwork was never completed, however, and the Claimant did not become a Director or a shareholder.

21. The Claimant's evidence was that in the role of Business Manager he introduced a healthcare scheme for all members of staff and shareholders, including himself. At some stage he also informed the shareholders that employees were entitled to 28 days' holiday and this was introduced across the company. The Claimant could not remember whether his holiday entitlement was increased to 28 days at the same time or earlier, but it was certainly 28 days by 2017. He was expected to give two weeks' notice before going on annual leave and would not be paid if he did not.

22. For a period in 2017 the Claimant was appointed as Director of a related company, Disign House Maidstone Ltd, but he resigned the position in late 2017.

23. Throughout the period that the Claimant worked for the Respondent he was provided with two leased company cars. He had a company email address, used company computers for all business dealings and was instructed to carry out functions under the complete control of the shareholders. He did not work for any other employer.

24. It is not in dispute that the Claimant invoiced the Respondent monthly, via a company called RPBAKER Ltd and that no income tax or national insurance was deducted by the Respondent. RPBAKER Ltd was registered for VAT and charged VAT to the Respondent. A sample invoice in the bundle shows £6,500 plus VAT charged for

"business consultancy" and £3,250 plus VAT charged for "disbursements". The Claimant's evidence was that he considered he did not have a choice because the Respondent demanded that he produce invoices.

25. In August 2017 the Respondent engaged Thomas Ward as a consultant. Mr Ward's evidence is that he was "charged with performing a forensic audit of the company's trading statistics and then to put in place Controls and Procedures to curtail any misappropriation or trading malpractices". He said that after about a month it "became clear that there were considerable events going on within the Company that the management may have been oblivious to". He took various steps in relation to the Claimant, including removing his wife's car from the company's insurance policy and cancelling an order for a new company car. He said the Claimant "appeared to operate as he chose and prior to terminating his contract for services, he involved the Company on a new CRM System with the price fixed at £40k… The Claimant had adopted several titles with the Company and, indeed appointed himself Director of some entities, without any evident authority but the Claimant was always self-employed, invoicing the Company for whatever work he did."

26. In September 2017 the Claimant's salary was reduced to £6,500 and his company car was downgraded. The car was later replaced with a car allowance of £500 per month. The Claimant says that the Respondent also threatened to dismiss him twice, but later retracted the threat.

27. The Claimant was cross-examined about why he had put up with fluctuations in his pay. He said that he was not happy about it, but he was "in it for the long term" and was part of the fabric of the company, so he accepted it for the sake of his family.

28. On 22 January 2018 the Claimant received an email from the Respondent's accounts department as follows:

> "Good Afternoon
> the owners from dg solutions had a meeting last week.
> and from that meeting they saying (ALL SELF EMPLOYED) would be placed on a new holiday scale started from the 1st Jan 2018 that's 15 day's including bank holiday per year
>
> Also please can you report to tom ward your rota on a Friday for the next week please.
>
> Also from the meeting the owners are asking for a date on the new software up a running please."

29. On 26 January 2018 the Claimant emailed Mr Ward to complain about IT work that Mr Ward had carried out without the Claimant being consulted. Mr Ward responded:

> "I have referred your email back to all the Partners who have asked me to obtain the information in my original email as requested… I have also been told that the final sign off for all IT will be mine. I am not looking for a fight Richard and these new duties have been placed on me rather than

> me asking for them. However, we have to stop this now. What I will say is that if I ask for something, there is a reason, and that may not need to be relayed to anyone, so please just give me what I want when I want it."

30. On the same day, one of the shareholders, Scot Harrison, confirmed to the Claimant that he had to report to Mr Ward. The Claimant was also told that he had to start paying for his family healthcare. The Claimant's evidence is that he objected to this, whereas Mr Ward says that the Claimant "readily accepted" that a recharge applied to him. All of the Claimant's job functions, except for IT and telecommunications, were passed on to Mr Ward. No explanation was given to the Claimant.

31. On 31 January 2018 the Claimant raised a grievance about the reduction in salary, loss of annual leave and being demoted. He alleged that the Respondent's conduct amounted to "a serious breach of trust and confidence" and "undermines the employment relationship". The letter was sent to all six shareholders. The Claimant did not receive any response. On 1 February 2018 the Claimant had a conversation with Mr Dacosta, who said that the shareholders were unhappy with the Claimant because of his grievance letter.

32. On 6 February 2018 the Claimant wrote to the Respondent, referring to the grievance and saying:

> "Given Mr Dacosta's response and the wilful failure of any of the other shareholders to respond to my grievance letter, regretfully, after 5 years of employment I am left with no option but to terminate my contract of employment on the basis that my employer has demonstrated that it no longer intends to comply with the terms and conditions between employer and employee.
>
> For the reasons set out above, I write to inform you that I am resigning from my current position with immediate effect, due to a fundamental breakdown in trust and confidence."

33. Apart from an acknowledgment of his resignation letter, the Claimant has never received any response to his grievance or resignation letter.

34. For several months after his resignation the Claimant tried without success to find employment at a similar level of remuneration. He then decided to start his own business, selling IT support and communications systems to businesses, while working part-time selling windows and doors. He expects to match his income from the Respondent within 18 to 24 months from the date of the hearing. He capped his losses in his Schedule of Loss at 10 months after the date of the hearing. He expects to earn £3,000 to £4,000 gross from window and door sales during that period.

CONCLUSIONS

Unfair dismissal

35. As noted above, the only issue in dispute is the Claimant's employment status.

The Respondent relies on the fact that the Claimant invoiced the Respondent for his services, paid his own tax and national insurance and charged VAT to the Respondent. Mr Nathan also argued that the Claimant would not have agreed to fluctuations in his pay if he had been an employee. He also queried the lack of complaint when other benefits such as holiday and healthcare were removed, although he acknowledged that the grievance had been submitted about one week after the reduction in holiday.

36. The Claimant argues that the true factual position, based on his largely unchallenged evidence, was that he was employed under a contract of service from March 2014 until his resignation.

37. I accept that the submission of invoices, charging of VAT, and lack of tax deductions by the Respondent, are indicative of self-employment. Every other factor, however, points towards employment.

38. From March 2014 onwards the Claimant was in a permanent full-time post and worked exclusively for the Respondent thereafter. He was paid a monthly salary, had fixed hours of work and paid holiday entitlement (albeit initially below the statutory minimum). He used the Respondent's computers. There was a clear mutuality of obligation and he was not entitled to send a substitute. He was making business decisions on behalf of the Respondent, under the supervision and control of the shareholders. He had a company car. Later he became entitled to 28 days' paid holiday and if he did not give at least two weeks' notice of any leave taken he would not be paid. He was also in the Respondent's employee healthcare scheme, paid for by the Respondent until late 2017 when Mr Ward decided that this should be recharged to the Claimant. Even if it is right that the Claimant "readily accepted" this, I do not consider that to be a significant factor in the context of such strong evidence of employment. Fluctuations in pay are not necessarily inconsistent with employment. They were the consequence of negotiated changes to the Claimant's role, until late 2017 when the Claimant's pay was unilaterally reduced to £6,500 a month. The Claimant's evidence was that he felt he had to accept this, taking into account the longer-term picture and the need to support his family. That is not inconsistent with him being an employee.

39. Although Mr Nathan suggested that the Claimant's lack of complaint about changes to his terms and conditions was inconsistent with employment, the fact is the Claimant did complain promptly about the reduction of his holiday entitlement and his demotion. He also later complained about the failure to respond to his grievance. That behaviour is entirely consistent with employment.

40. Mr Ward's evidence, implying without directly alleging that the Claimant had been operating without any oversight or control from the shareholders, is nowhere near sufficient to undermine the Claimant's account of the employment relationship. The Claimant has been asserting since at least February 2018 that he was an employee. The Respondent has never substantively responded to his allegations, relying on a bare assertion that he was a self-employed contractor. The facts do not support that assertion.

41. Applying a multiple test, taking into account all of the factors above, I am satisfied that the Claimant was an employee. The tax arrangements in this case are

outweighed by very clear evidence that the Claimant was not, in reality, in business on his own account. The economic reality was that he was employed under a contract of service.

42. He resigned in response to the changes to his job role, reduction in holiday pay and failure to respond to his grievance. Those are matters capable of constituting a fundamental breach of the contract of employment and in the absence of any defence from the Respondent I accept that the Claimant was constructively dismissed. It is not alleged that the dismissal was fair.

43. The Claimant's complaint of unfair dismissal therefore succeeds.

Wrongful dismissal

44. As I have accepted that the Claimant was dismissed, it follows that he was not given statutory notice (3 weeks) as required and his complaint of wrongful dismissal also succeeds.

Matters on remedy

45. Both parties had miscalculated the basic award, using a multiplier of 4 instead of 4.5. The correct award is 4.5 x £489 = £2,200.50.

46. The figures in the Claimant's Schedule of Loss were not disputed by the Respondent, save that the Claimant had mistakenly used his gross pay to calculate future losses. He estimated that the tax deductions would have equated to 27% of his gross pay. This was not disputed by the Respondent, so I have applied that deduction to all gross figures used for the compensatory award. I have also used 27% as the marginal tax rate for grossing up purposes. The Claimant's weekly pay was therefore £1,500 gross and £1,095 net. He also had a taxable car allowance of £500 per month, which equates to £84.23 net per week. There are 29.3 weeks from the end of the notice period to the date of hearing, and 43.3 weeks from the date of hearing until ten-month point at which the Claimant has capped his compensation claim.

47. I accept that the Claimant has made reasonable efforts to mitigate his losses. His evidence of having attempted to find employment at an equivalent level was not challenged by the Respondent. He has managed to earn a small amount while setting up a new business, which I consider to be a reasonable way of mitigating his losses. Although he does not expect to be earning the same income that he had with the Respondent until 18 to 24 months after the hearing, he has capped his claim based on a notional date 10 months from the date of hearing. I consider that to be a realistic date by which the Claimant should be able to match his previous level of earnings.

48. The Claimant has earned £8,385.52 gross (£6121.43 net) to the date of the hearing from sales work. He estimates earning £3,000 to £4,000 gross over the 10-month period after the hearing. That evidence was not challenged. Bearing in mind the level of sales work to date I have assumed the higher end of that estimate (£4,000 gross, £2,920 net).

49. There is no dispute that the Claimant was never given a written statement of

initial particulars of employment. This was a serious breach of the obligation in s.1 ERA so I consider it appropriate to award the higher amount of four weeks' pay.

50. The Respondent failed to respond to the Claimant's grievance and Mr Ward said in his evidence, "The Company did not respond to the Claimant's grievance as he was never recognised as an Employee." In light of my finding that he was in fact an employee, this is self-evidently not a good reason for the failure. I find that it was a deliberate failure to comply with the ACAS Code and justifies an uplift of 25%.

51. The attached schedule is otherwise self-explanatory. The compensatory award substantially exceeds the statutory cap, so the total award is the cap of £78,000 (the Claimant's gross annual pay) plus the basic award (£2,200.50) plus three weeks' notice pay (£3,537.69), giving a total figure of £83,738.19.

Employment Judge Ferguson

8 October 2018