Case Number: 3201145/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Reilly**

Respondent: **AJS Interiors Limited**

Heard at: **East London Hearing Centre**

On: **12 October 2018**

Before: **Employment Judge Brown**

Representation

Claimant: In person

Respondent: No attendance, no representation

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant was employed as an employee by the Respondent continuously from 26 October 2006 until 23 January 2018.**

2. **The Respondent wrongfully dismissed the Claimant when it did not pay him notice pay on termination of his employment.**

3. **The Respondent shall pay the Claimant £8,199.95 net notice pay.**

4. **The Respondent unfairly dismissed the Claimant.**

5. **The Respondent shall pay the Claimant a total of £14,585.05 in compensation for unfair dismissal, comprising a basic award of £8,068.50 and a compensatory award of £6,516.55.**

6. **The Respondent failed to pay the Claimant accrued holiday pay on termination of his employment.**

7. **The Respondent shall pay the Claimant £113.31 net holiday pay.**

8. The Tribunal does not apply any ACAS uplift to the awards.

REASONS

1 By a claim form presented on 1 June 2018, the Claimant brought complaints of unfair dismissal, failure to pay notice pay and failure to pay holiday pay, against the Respondent. The Respondent presented an ET3 response to the claim beyond the time for filing an ET3 response. In the ET3 form, the Respondent said that the Claimant had, in the latter years of his engagement with them, been engaged as an independent contractor and, therefore, that he had no right to bring a claim to the Employment Tribunal.

2 The Claimant attended the hearing today. The Respondent did not attend. The Claimant produced a bundle of documents to support his claim, including a schedule of loss and a witness statement which he had prepared and signed on 22 August 2018. The Claimant also produced a witness statement from Patrick Joseph O'Connor, which the Respondent had sent to the Claimant's solicitors. I read the witness statement of Mr O'Connor and I heard evidence from the Claimant and asked him questions about his case.

3 Having heard evidence from the Claimant and questioned him, I found as follows.

4 The Claimant started employment as a site manager, or site contracts manager, with a company called AJ Sibthorpe & Co Ltd. When he started his employment, he was paid an annual salary of £36,000.

5 On 3 November 2006 Mr Patrick Joseph O'Connor was appointed as director of AJ Sibthorpe & Co Ltd. From 14 June 2005 Mr O'Connor was the sole shareholder of that company. The Claimant continued working for AJ Sibthorpe & Co Ltd until 19 February 2007, when that Company changed its name to AJS Limited. I find that the identity of the Respondent remained the same, albeit its name changed on 19 February 2007.

6 The Claimant told me, and I accepted, that, following the name change to AJS Limited, there were no changes to the Claimant's terms of employment and he remained an employee under the new company name of AJS Limited. Mr Patrick O'Connor remained a director and shareholder.

7 On 12 March 2007 AJS Limited changed its registered office to Farley House, Kinvara Business Park, Freshwater Road, Dagenham RM8 1RY. That is the registered office of the Respondent.

8 On 21 November 2011 Dalziel Geary was appointed as director of AJS Limited. In about March or April 2013, the Claimant was approached by Dalziel Geary regarding a proposal for his employment with AJS Limited. Mr Dalziel Geary proposed to the Claimant that he set up a limited company and, rather than being paid through AJS Limited's normal payroll, the Claimant's limited company would raise invoices to AJS Limited each month, for the equivalent to the Claimant's annual salary. Mr Geary advised the Claimant that he

would be paid a higher rate of remuneration. Mr Dalziel Geary assured the Claimant that he would continue to work as before. He said, "Just carry on doing the same job. There will be no difference - you will still get paid, get holidays and the use for car." The Claimant told me that Mr Geary had told the Claimant that, while other employees remained on PAYE, they would soon be converting to the new status and that other employees were already doing the same thing. Mr Geary told the Claimant that he, himself, had already set up a limited company and was being paid in this way.

9 On 20 September 2013, AJS Interiors Limited was incorporated, with Mr Patrick O'Connor as director and shareholder. The Claimant continued to work for that Company as he had done for AJS Limited. There were no changes to the nature of his work, his place of work, or the individuals to whom he reported.

10 The Claimant told me that it was only after his employment ended that he consulted the Citizens Advice Bureau and completed an online questionnaire to determine his employment status. It was at that point that he realised that he was an employee because the online questionnaire indicated that he was, from his answers.

11 I read Mr O'Connor's statement. It said that the Claimant willingly entered into a subcontractor agreement with the Respondent and that payment for services contracted to the Claimant were at an agreed set value. He said that the decision for the Claimant to become an independent contractor was mutually agreed by the Claimant and Respondent.

12 From the evidence I heard, the Claimant did set up his own independent company and he employed an accountant to calculate the appropriate tax to be paid at the end of each year by him, as a subcontractor.

13 The Claimant told me, and I accepted, however, that, after the change in payment arrangements, the Claimant was required to and did provide personal services to AJS Limited, and then AJS Interiors Limited, on a full-time basis. The Claimant worked exclusively for AJS Limited and subsequently the Respondent. AJS Limited and AJS Interiors Limited controlled the work the Claimant was to do and allocated specific work for him to complete. He did not have any input or control over the work that he completed and was simply directed to jobs by AJS Limited and, later, by the Respondent. If the Claimant was unwell and unable to attend work, it was AJS Limited/AJS Interiors Limited who would arrange for another of their employees to cover the work. AJS Limited/AJS Interiors Limited usually provided the materials for the work and would allow the Claimant to claim expenses for any materials which he purchased himself. The Claimant was required to, and did, work for 45 hours per week regularly, between the hours of 8.00am and 5.30pm. The Claimant was required to, and did, work at the location specified by the Respondent and carried out the jobs as specified. The Claimant was issued with business cards with a telephone number and email address for AJS Interiors Limited. The Claimant was required to complete timesheets weekly, but was paid the same amount regardless of the hours that he worked. He was required to obtain authorisation to take annual leave and received paid holiday pay. He was issued with and did use company vehicles, in particular a van bearing the AJS Interiors Limited logo and a company car. Both vehicles were insured, MOTed and taxed by either AJS Limited, or, subsequently, the Respondent. The Claimant claimed expenses for fuel. He was entitled to take lunch breaks of a duration specified by AJS Limited / the Respondent. He was issued with a company

mobile phone and company car by the Respondent and had returned these to the Respondent when his employment was terminated. He was issued with and produced an identification card, a hi-vis vest and hard hat, all bearing the AJS Limited, or Respondent, logo.

14 On 26 May 2016 he was notified by a letter from the Respondent that he would receive a 2 percent pay rise.

15 Following the incorporation of the Claimant's own Limited Company, ACJJ Building Services Limited, the Claimant received a P45 from AJS Limited around 24 April 2013.

16 The Claimant told me all this openly and honestly. From then on, until September 2013, he sent invoices from ACJJ (his company) to AJS Limited and received monthly payments from AJS Limited, on account of those invoices, for his personal services.

17 On 23 January 2018, without any warning consultation or discussion, the Claimant received a letter from the Respondent saying:

> "This letter is to confirm that effective from 23 January 2018 AJS Interiors Limited will no longer require the services of ACJJ Building Services Limited as a contractor for the provision of the supervisory services. In order to complete a suitable handover on live projects we will require you to be available until Tuesday 20 February 2018. We have been pleased with the quality of the services you have provided, however, due to the downturn in turnover resulting in the necessity from AJS Interiors Limited to reduce costs associated with the business (sic). I would like to thank you for your dedication and hard work to the business."

18 The Claimant told me that he was very shocked to receive the letter and that, on around 26 January 2018, he returned all property belonging to the Respondent, including his company vehicle, company phone and keys.

19 The Claimant told me that the Respondent failed to give him any notice of his termination. He said that the Respondent also failed to pay him for any accrued, but untaken, holiday pay.

20 The Claimant showed me the contract of employment that he was given by AJS Limited dated 26 October 2006. By clause 12 of the contract it provided:

> "Your contract of employment may be terminated as follows by the company: one week's notice for each completed year of continuous service up to a maximum of 12 weeks' notice after 12 weeks continuous service."

21 The Claimant told me, and I accepted, that, while he was employed by the Respondent up to the date of his dismissal, he received gross weekly pay of £1,027.31. He calculated his net weekly pay as £745.45. The Claimant was born on 6 February 1965.

Relevant Law

Illegality

22 If both parties honestly consider the contract to be one for services; that is, a contract for an independent contractor post, it cannot be contended that it is illegal as being a fraud on the Revenue merely because the Tribunal later holds that, in truth, the individual was an employee, *Young & Woods Ltd v West* and *Enfield Technical Services Ltd v Payne* [2008] IRLR 500. In those cases, two individuals had taken advice about going into self-employment and had not deliberately distorted the true position. They later argued that, in reality, they had been employees. The employers' defences of illegality through fraud in the Revenue were not upheld. The individuals had knowledge of the facts of their employment but the Court of Appeal held that there had not been a misrepresentation of the tax position.

23 Lord Justice Pill said, at paragraphs 27 and 28, " [27] For present purposes I am prepared to assume that there could be tax advantage for the Respondents in claiming to have self-employed status. I do not accept that, of itself, such advantage renders a contract subsequently found to have been a contract of employment unlawfully performed. I do not accept that a characterisation of the relationship held to be erroneous necessarily prevents an employee subsequently claiming the advantages of being, or having been, an employee.

[28] A contract of employment may, as the cases show, be unlawfully performed if there are misrepresentations, express or implied, as to the facts. An obvious example occurs when what is in fact taxable salary is claimed to be non-taxable expenses. That is, however, distinguishable from an error of categorisation (as in the present cases) unaccompanied by false representations, even if the employee had claimed the advantages of self-employment before the dispute arose….".

24 Therefore, a genuine claim to self-employment, unaccompanied by false representations as the work being done or the basis upon which payment is being made, does not necessarily amount to unlawful performance of a contract of employment.

Employee

25 *s230 Employment Rights Act 1996* provides:

"(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."

26 Four essential elements must be fulfilled in order for a contract of employment to exist between an employee and an employer. These are: that a contract exists between the worker and the alleged employer; that an obligation exists on the worker to provide work personally (*Express & Echo Publications Ltd v Tanton* [1999] ICR 693), that there is mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623), and there is an element of control over the work by the employer consistent with the contract being one of employment.

27 Even if all those requirements are fulfilled, the contract *may be* one of employment, rather than *must be* one of employment. The Courts have stated the Court or Tribunal will weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment, *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968], QBD 497, *Carmichael and Another v National Power Plc* [1999] ICR 1226 HL, *Express and Echo Publications Limited v Tanton* [1999] IRLR 367 and *Hewitt Packard Limited v O'Murphy* [2002] IRLR 4.

28 The factors that can be taken into account include: whether the person doing the work provides his or her own equipment; the degree of financial risk taken by the individual doing the work; the intentions of the parties; a prohibition on working for other companies and individuals; remuneration by way of wages or salary; payment during absence for illness; paid holidays; and membership of a company pension scheme. Those are not exhaustive factors, but are an indication of the relevant factors which can be taken into account.

29 By *s95 Employment Rights Act 1996* an employee has a right not to be unfairly dismissed by his employer. By *s98 Employment Rights Act 1996* it is for the employer who argues that a dismissal is fair to show the reason for dismissal and that it is a potentially fair reason for dismissal.

Discussion and Decision

30 I have decided in this case that the true characterisation of the relationship between the Claimant and the Respondent after April 2013 was that of employer and employee. It is clear on the facts that I have found that the Respondent required the Claimant to work personally for the Respondent pursuant to the contract of employment that they entered into in 2006.

31 The terms of the employment between them remained the same after 2013, save that there was a change with regard to the amount of salary to be paid to the Claimant, the method of securing payment (rendering invoices) and the mutually agreed characterisation of the relationship. When asking the Claimant to become self-employed, Mr Geary specifically said that the terms of his work would not change. I have accepted from the Claimant that, when he was unable to work, it was the Respondent who provided a substitute for him. There was no right of substitution in any agreement between the Claimant and Respondent and therefore there was a requirement for the Claimant to provide the work personally.

32 It was clear from the facts that the Claimant was required to work and the Respondent was required to provide work. The Claimant worked every day for the Respondent, in regular working hours.

33 Furthermore, I have concluded that there was the requisite element of control necessary between employer and employee. The Claimant was told where to work and how to work by the Respondent. He worked where he was directed and he did the work in the manner that was prescribed.

34 The essential requirements for a contract of employment were fulfilled. I needed to look at all the circumstances of the case to decide if, nevertheless, the relationship was one of employment, rather than of customer and independent contractor.

35 On the facts, the Clamant could claim expenses for any equipment that he provided and was paid expenses, for petrol, for example. The Respondent provided the Claimant with a company car, company van and company telephone. The Claimant undertook no financial risk doing the work. He behaved as if he was an employee. While the parties intended that the Claimant would be an independent contractor when the Claimant set up his company; in fact, the Claimant was required to work exclusively for the employer, the Respondent. There was no expectation by either party that the Claimant would be free to work for any other employer. While the Claimant submitted invoices, he was paid the same amount from week to week and the Claimant was paid during his holidays.

36 Nearly all the indications of employment status in this case point to the Claimant being an employee, rather than an independent contractor. The only contrary indications are the agreement between the Claimant and the Respondent that the Claimant would become an independent contractor and that he would be subject to CIS tax. It seemed to me that the balance of the circumstances in the case was very much in favour of me finding that reality of the contractual position was that a contract of employment existed at all times between the Claimant, as employee, and the Respondent, as employer.

37 The question remained, however, whether that contract was an illegal contract because there had been some misrepresentation of the tax position, so that there was a fraud on the revenue.

38 However, on the evidence the Claimant gave at the Hearing, the Claimant had set up his independent contracting company and had engaged his own accountant to administer his tax affairs on that basis. He believed that he was operating as an independent contractor and took professional advice to ensure that his tax was properly paid. It was only after he was dismissed that he consulted the Citizens Advice Bureau and took an online questionnaire. On doing so, he discovered that, in fact, the nature of his employment relationship was one of employee/employer, because all the factors set out in the online questionnaire indicated employment.

39 From Mr O'Connor's witness statement, the Respondent also believed that the Claimant was an independent contractor.

40 Applying *Young & Woods Ltd v West* and *Enfield Technical Services Ltd v Payne* [2008] IRLR 500, there was a genuine claim to self-employment in this case. There was no deliberate distortion of the true position. This was simply a case where the Claimant, having discovered his true employment status after the end of his employment, brought a claim to the Employment Tribunal. I have decided, on the facts, that the Claimant genuinely was an employee, rather than a contractor. The contract was not an illegal contract and the Claimant is not prevented from bringing a claim to the Employment Tribunal.

41 I have also found, insofar as it is necessary to do so, that, if there was a transfer of the Claimant's employment between 2006 and 2018, the Claimant's employment continued pursuant to *TUPE 2006.*

42 I have further found that the Claimant was unfairly dismissed. The Respondent undertook no consultation with the Claimant before they dismissed him. He was simply

told of his dismissal by a letter, after the Respondent had already made a decision. There was no fair process and the Respondent has not appeared before me today to establish a fair reason for the dismissal.

43 The Respondent also failed to pay the Claimant any notice pay. The Claimant was employed for 11 complete years. He was entitled to be paid, both under his contract and under *s86 Employment Rights Act 1996*, 11 weeks' notice pay.

44 Furthermore, the Claimant was not paid any holiday pay at the termination of his employment. He was entitled to be paid for accrued, but untaken, holiday.

45 The Claimant claimed an uplift because the Respondent had failed to comply with the ACAS Code of Practice. However, I have decided that both employer and employee believed that the Claimant was an independent contractor during his employment. That is why I have decided that the contract between them was not an illegal contract and that the Claimant was able bring his claim to the ET. Seeing that both parties genuinely believed that the Claimant was not an employee, they must both have believed that the Respondent did not need to comply with the ACAS Code of Practice on Discipline and Grievances at Work 2015. I therefore found that the Respondent was not at fault in not having complied with the ACAS Code of Practice when it ended the Claimant's employment. In those circumstances, I did not consider that an ACAS uplift was appropriate.

Remedy

46 I made the following awards of compensation to the Claimant on account of wrongful dismissal, unfair dismissal and failure to pay holiday pay.

Notice Pay

47 The Claimant was entitled to 11 weeks' notice pay at £745.45 net per week. 11 x £745.45 = £8,199.95 net. I ordered the Respondent to pay the Claimant £8,199.95 net notice pay.

Unfair Dismissal

48 The Claimant was entitled to a basic award calculated as follows: 11 (complete years' service) x 1.5 (the Claimant was aged 41 or over at all times during his employment) x £489 (maximum week's pay at the relevant time) = £8,068.50.

49 With regard to the compensatory award, I adopted the figures set out in the schedule of loss calculated by the Claimant's solicitor. They appeared to be correct.

50 The Claimant obtained new work on 3 April 2018, at a lower rate of pay. The Claimant had a full loss of earnings for 10 weeks from the date of his dismissal until 3 April 2018: 10 x £745.45 = £7,454.50. His loss from 3 April 2018 to 12 October 2018 was 27 (weeks) x £233.20 (difference in weekly pay between old and new jobs) = £6,296.40.

51 The total loss of earnings from date of dismissal to the date of the hearing was £13,750.90.

52 I also awarded the Claimant £500 loss of statutory rights. The total of all those figures was £14,250.90.

53 From that needed to be deducted £1,400 paid to the Claimant as a termination payment. The balance was £12,850.90.

54 I also awarded the Claimant future loss of 8 weeks' pay from today. The Claimant told me that he had not looked for better paid work, but would start to do so after today's hearing. 8 x £233.20 = £1,865.60.

55 £12,850.90 + £1,865.60 = £14,716.50.

56 11 weeks' notice pay awarded to the Claimant needs to be deducted, so that the Claimant does not recover double for the same period of loss. £14,716.50 - £8,199.95 = £6,516.55. The total figure for compensatory award is £6,516.55.

57 I ordered the Respondent to pay the Claimant a total of £14,585.05 in compensation for unfair dismissal.

58 I did not apply any ACAS uplift for the reasons already stated.

Holiday Pay

59 The Claimant was entitled to 5.6 weeks holiday, or 28 days holiday, in a holiday year. 23 days of the calendar year had elapsed before his dismissal. The calculation is 23/365 x 28 days = accrued holiday entitlement of 1.76 days. The Claimant had taken one day's holiday on 1 January 2018. He had therefore accrued 0.76 holiday days. His daily pay was £745.45 / 5 = £149.09. 0.76 x £149.09 = £113.31.

60 I ordered the Respondent to pay the Claimant £113.31 holiday pay.

Employment Judge Brown

9 November 2018