RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Prystupa**

Respondent: **Expedient London Limited**

Heard at: **East London Hearing Centre**

On: **5 December 2018**

Before: **Employment Judge A Ross**

Representation

Claimant: In person
Interpreter: Ms M Dzulik

Respondent: Ms C Askey, Director

JUDGMENT having been sent to the parties on 19 December 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By a series of three claims issued on 5 September 2018, 25 September 2019 and 11 October 2018, the Claimant brought claims of unlawful deductions from wages and unpaid pay holiday pay.

2. The Respondent had not filed responses to the first two claims but Ms Askey had filed a response to the third claim which she intended should stand for all three. I extended time to file responses in respect of the first two claims for reasons given at the time, today, after having heard Ms Askey's application.

3. In the responses, the Respondent's case was that the Claimant knew that he was paid rolled up holiday pay within his £10.00 per hour rate but it was admitted that the Claimant had not been paid at the correct rate, with 28p per hour being missed off.

4. This was an unusual case. The Claimant attended and confirmed that no money was outstanding on his holiday pay claim or his unlawful deductions from wages complaint.

5. The Respondent provided proof of sums paid to the Claimant on 29 November 2018 in settlement of his claims. The Respondent did not agree that the Claimant was entitled to all the sums paid to him but Ms Askey had decided to pay it nonetheless to avoid the legal and other costs associated with this hearing. In any event, the Claimant did not withdraw his case and the hearing proceeded.

6. Before me, the Claimant claimed an award under section 38 Employment Act 2002 and, secondly, sought a preparation time order.

7. From the outset, I explained my powers to make each of those awards. It seemed that neither party understood the limits of my jurisdiction. No blame was attached to either for this.

8. Turning to the evidence, I heard oral evidence from the Claimant. There was very limited cross-examination because there were no real facts in dispute. I read 23 documents provided by the Claimant which are at C1 and I also considered documents provided by the Respondent which are labelled R1, R2, R3 and R4.

Findings of fact

9. The Claimant was employed by the Respondent as a security guard at events. His first shift was on 3 June 2017. The Claimant applied for this role by email, completing an email application on or about 9 March 2017; see R3. The application is headed "*application to provide services on a casual basis*".

10. The work was casual and offered on an "as and when basis", when the Respondent was providing services to events. This is demonstrated by:

    10.1 An offer by text or WhatsApp, to all those in the Claimant's position for shifts at events. The Claimant could accept any of the shifts or not. It was entirely up to him.

    10.2 There was no evidence of any requirement to offer any number of hours to the Claimant or for the Claimant to offer any number of hours or shifts to the Respondent. This is evidenced by the number of hours shown in R2 and when they were worked. As the Claimant explained, the hours could all be worked in one week such as when an athletics championship was being held at the West Ham stadium or it could be a single match such as at Twickenham.

    10.3 The shifts varied in length.

    10.4 The shifts varied in location.

10.5 The Claimant faced no discipline or sanction for not working any shift offered. Further, the Claimant worked for an agency on other roles when he was not working a shift for the Respondent. This agency work comprised of mostly office work.

10.6 The Claimant had tax and N.I deducted at source from sums paid to him by the Respondent.

10.7 The Claimant was not provided with a statement of terms and conditions at any point. Completion of an online application is no substitute for a proper set of terms to which employees are entitled to under section 1 Employment Rights 1996.

Issues

11. Turning to the issues, the first issue in this claim was whether the Claimant was an employee or a worker. In considering whether the Claimant was employed under a contract as an employee or a contract of services I directed myself to the authorities referred to in *Autoclenz v Belcher* at paragraph 17-20.

12. I reminded myself in particular of the following principles. The essential requirements for a contract of employment are as follows:

12.1 There must be a mutuality of obligation on each side to create a contract of service;

12.2 The operative agrees that in consideration of a wage or other remuneration he will provide his own work and skill in performance of some service for the employer;

12.3 The Claimant agrees to be the subject of the control of the person for whom he was working, to a sufficient degree, to make that person master or an employer;

12.4 The other provisions of the contract are consistent with it being a contract of service.

13. No single test on this issue is conclusive. The approach to be adopted by the Tribunal is a multiple test. The Tribunal must weigh up all the relevant factors and decide whether, on balance, the contract is a contract of employment.

14. There must be an irreducible minimum obligation on each side to create a contract of service.

15. I have also considered paragraph 32-35 of the speeches in *Belcher* v *Autoclenz*.

Conclusions

16. Under section 38 Employment Act 2002, I found that there was no mutuality of obligation in this case between Claimant and Respondent. There was no

obligation on the Respondent to provide work and no obligation on the Claimant to accept it. He could choose whether to carry out agency work or to work for the Respondent. The Claimant was a worker and not an employee. He was employed under a contract to provide services within Section 230(3) Employment Rights Act 1996, not under a contract of service. I heard no evidence stating that he was part of any employment structure. His labour was hired on an "as and when" needed basis, on a casual basis. I heard very little evidence that he was an employee. I found that there was deduction for tax and National Insurance by the Respondent, but I find that this is not inconsistent with him being a worker.

17. I considered the preparation time order application under Rule 76 of the Rules of Procedure. I incorporate Rule 76 into these Reasons.

18. The Claimant misunderstood the costs jurisdiction and the jurisdiction to make preparation time orders. He believed he was entitled to a preparation time order as of right because the Respondent had paid him money in recognition of the complaints.

19. I have concluded that no preparation time order should be made for the following reasons:

    19.1 There is no evidence that the Respondent acted unreasonably. From the submissions I heard, the Respondent had sought to resolve the claims and to avoid the costs of the hearing. This is evidenced in the ET3 which accepts that an error was made in respect of the rolled-up holiday pay and in the documents attached to the ET3.

    19.2 The Respondent put her money where her case was. She paid the amount requested prior to the hearing despite disputing that it was due.

    19.3 As to whether the response had no reasonable prospect of success, it is true that rolled-up holiday pay is unlawful, but that in a certain set of circumstances a set-off against liability may be awarded. Here, it seems that the Claimant knew all along that holiday pay was being paid within the hourly rate. An email (see R4) which was sent to new staff including the Claimant, on 27 March 2017, stated:

    "*any holiday pay entitlement is rolled into your hourly wage. For example, an SIA on £10.00 per hour consists of £9.18 pay and £0.82p annual leave pay totaling to £10.00 per hour, will be paid per hour whilst you are working on each shift*".

    Thus, there was a consensual contractual agreement in place that holiday pay was included in the hourly rate. I have considered *Lyddon v Englefield Bricks* [2008] IRLR 198 and the points made in that case, especially the law at paragraph 24. I am satisfied that the Respondent stated and the Claimant knew all along what proportion of the £10 per hour rate was holiday pay. So, the Respondent's claim that the Claimant had been paid holiday pay had a good prospect of success. It was only that the Respondent had made an error that lead to the Claimant being

paid anything at all in respect of holiday pay.

19.4 In any event, in my discretion, on facts where the Respondent admitted the error in its ET3 and paid everything due by the date of the hearing, I would not have made a preparation time order even if any of the threshold conditions were made out.

20. In summary, the application for an award under section 38 of the Employment Act 2002 is refused. The application for a preparation time order is refused.

Employment Judge Ross

11 February 2019