Case No: 2301508/2018

THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr Guy Young**

Respondent: **Divolight UK Limited**

Hearing at London South on 27 February 2019 before Employment Judge Baron

Appearances

For Claimant: **The Claimant was present in person**

For Respondent: **Howard Lewis-Nunn - Counsel**

JUDGMENT

It is the judgment of the Tribunal as follows:

1 The claim for accrued leave pay fails;

2 The Respondent was in breach of contract in not giving the Claimant the notice of termination to which he was entitled under his contract of employment and **orders** the Respondent to pay the sum of £4,220 to the Claimant;

3 The Tribunal declares in accordance with section 24 of the Employment Rights Act 1996 that the complaint by the Claimant under section 23 of such Act that there has been an unlawful deduction from the wages properly payable is well founded and the Tribunal **orders** the Respondent to pay to the Claimant the sum of £349.46;

4 The Respondent was in breach of contract in not reimbursing expenses incurred by the Claimant on behalf of the Respondent and the Tribunal **orders** the Respondent to pay to the Claimant the sum of £1,044.49;

5 The claim in respect of pension contributions is dismissed following a withdrawal of that claim by the Claimant.

REASONS

Introduction

1 The Respondent was incorporated on 12 October 2016. Its sole director is Michael Ross, who was at the time in his final year at university. The sole shareholder is Nord Holding of Riga, Estonia. The Claimant entered into an arrangement with the Respondent with effect from 1 November 2016,

and the relationship ended on 2 March 2018. The principal issue in these proceedings is the nature of that relationship.

2 The relevant statutory provision is section 230 Employment Rights Act 1996, the material parts of which are as follows:

> **230 Employees, workers etc**
>
> (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, express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether 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 profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

3 On 5 April 2018 the Claimant presented a claim form ET1 to the Tribunal in which he made various claims which raise issues of jurisdiction.[1] I will deal with each in turn:

3.1 Accrued holiday pay**.** This claim can potentially be brought as a claim for breach of contract, in which case the Tribunal will have to find that the Claimant was an employee. The Tribunal only has jurisdiction for a claim of breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Alternatively the claim can be brought as a claim under the Working Time Regulations 1998 for which the Tribunal has to find that the Claimant was at least a worker.

3.2 Notice pay**.** This is a claim of breach of contract, and so the Claimant must have been an employee.

3.3 Arrears of pay. This claim can be brought under Part II of the Employment Rights Act 1996 on the basis of the Claimant being a worker as being unlawful deductions from wages.

3.4 Arrears of expenses**.** Again, the Claimant must have been an employee as under section 27 of the 1996 Act expenses are excluded from the definition of 'wages'.

4 It is the contention of the Claimant that he was an employee of the Respondent. It is the contention of the Respondent that he was a self-employed contractor and that the Respondent was a client or customer of a profession or business undertaking within the exception in paragraph (b) of section 230(3) above.

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[1] There was also a claim in respect of pension contributions but that was withdrawn at a preliminary hearing on 8 November 2018 and consequently is dismissed.

5 The Claimant gave evidence and called Gerald Passalacqua, the Sales Manager of the Respondent from 14 November 2016 until July 2018. I read a witness statement of Emma White, who did not attend to give her evidence. In my view the contents of her witness statement do not add anything to the documents in the bundle, and the oral evidence I heard. Evidence for the Respondent was given by Mr Ross. The bundle consisted of 390 pages, but thankfully I was referred to only a modest number of them.

The facts as to status

6 I find the material facts to be as below. It is not necessary nor appropriate to record all the evidence I heard, nor to resolve every dispute of fact. I have only taken into account the documents in the bundle, or parts of such documents, to which I was referred.

7 The business of the Respondent is the provision of LED lighting. The background is somewhat obscure but as I understand it the Respondent is related to an established company based in Israel.[2] Mr Ross' father, Vladamir Ross, acted in at least an advisory capacity. The moving force behind the Respondent wished to establish a business in the UK.

8 It was desired to obtain the services of an individual to generate sales, and for that purpose engaged Michael Page Recruitment Agency. On 13 September 2016 Ms Young from the agency sent to Mr Ross a synopsis prepared by the Claimant setting out his experience, together with brief details of his then current employment. The Claimant was interviewed by Mr Ross via Skype on 16 September 2016. In his witness statement Mr Ross referred to the Claimant having set out the sales volume he was confident of achieving, and it was on that basis that the Respondent was to enter into an arrangement with the Claimant. Mr Ross also said in evidence that the Respondent was paying the Claimant for his own connections in the industry.[3] It is clear that Mr Ross relied on the Claimant's personal knowledge of the industry and his contacts when engaging him, particularly as Mr Ross was entirely new to the industry.

9 On the following day the Claimant sent an email to Ms White headed 'package details' with his desired basic terms. He was seeking a salary of £70,000, a bonus structure, a car allowance of £6,000 and also a mileage allowance, 25 days holiday and three months' notice on each side.

10 There were then further discussions concerning financial details. Importantly on 30 September 2016 Ms White sent to the Claimant text copied from an email by Mr Ross to her setting out 'basic terms of job offer' as follows:

> Basic Salary £65,000 per annum payable monthly
> Bonus: Details to be confirmed
> Car allowance £6,000 + HMRC Mileage Scheme
> Mobile Phone & Laptop
> Pension
> Start date: Tuesday 1st November 2016

[2] I use the phrase 'related to' deliberately because the evidence was not clear.
[3] Paragraphs 2 and 5.

11 Then at 10:56 the Claimant sent an email to Ms White with a document he had prepared headed 'Offer of Employment'. It was in the form of a detailed offer of employment. It included such offer, and it set out his salary and other material details. It was in a form which could quite properly by sent by an employer to a prospective employee.

12 Mr Ross had different ideas about the legal nature of the proposed relationship. On 4 October 2016 Mr Brown of Michael Page Recruitment sent an email to the Claimant with another document attached. That document was headed 'Offer of Consultancy Service Contract'. It was also in the form of a letter to the Claimant. After an introductory paragraph the functions the Claimant was expected to fulfil were set out as follows:

> Your service shall including, but not be limited to building up the UK division of the Company and developing a business strategy generating sales whilst promoting the Company brand to M&E Contractors, NIC/ECA Contractors, Developers, Design & Builds Architects along with Direct Retail and Commercial clients.

13 That text was copied from the Claimant's document. The letter then continued as follows:

> Please note, this is not an offer of employment and shall not be treated as such. As discussed, this is an offer to enter into a consultancy service contract: you shall provide your services as a business (either via a legal entity or as self-employed) rather than in your personal capacity. As you mentioned earlier of such capacity, please provide us a confirmation that you are able to provide such services via a business entity (a limited company, partnership or self-employment)
>
> We consider the following structure of your fees acceptable by us:
> 1) monthly fixed fee in the amount of £5,420.00 covering your services provided to the Company; and
> 2) commission fee, the structure of which shall be confirmed later.

14 The duration of the arrangement was set out:

> Our initial contract's term will be six (6) months, commencing on 5 November 2016, to help both parties to evaluate the suitability of this business opportunity. We encourage you to use this opportunity to discuss issues and questions with our CEO, Vladimir Ross, and Director, Michael Ross.
>
> Following the initial term the contract will be reviewed – and hopefully renewed.

15 The Claimant sent an email to Mr Ross on 5 October 2016 at 10:49 saying there were some points he wished to clarify 'before agreeing to this contract.' Although somewhat extensive it is simpler to set the points out in full rather than attempting to summarise them:

1) Will I be staying employed as an external consultant or once Divolight is set up will I be employed directly by the company?
2) Do you agree to pay the initially discussed car allowance of £6,000 per year £500 per month, along with the Government mileage reimbursement scheme of £0.45 for the first 10,000 miles and £0.25 thereafter?
3) Has the suggestion for expenses regarding mobile and broadband been agreed?
4) Is this a fixed 6 month contract and what notice period will be required and given?
5) Based on the annual leave allowance are you happy with the proposed 25 days? This is always pro rata of the year, so 2.08 days per calendar month
6) Are you still looking at getting an office/stock holding/technical lab area? If so when?
7) As discussed before are you still looking at bring on the Sales Manager Position in line with my business plan and if so when? (Direct through myself and not through Michael Page)

8) Has a trip to Head Office in the first week to get all the details, build relationships with all internal contacts, literature, samples etc been agreed?
9) Will Divolight still be looking at providing the following to do the job: Laptop, iPad, Printer, Business Cards, Divolight email address for business use? All of the above are the property of Divolight and returned if the contract is terminated

16 On 6 October 2016 there was a telephone conversation between the Claimant and Mr Ross following which the Claimant sent an email to Mr Ross timed at 16:46 hrs. The material section is as follows:

> Just to clarify what we discussed in answer to my questions:
>
> 1) Once Divolight UK is set up my contract will be with them as a direct employee. Until then I will invoice the company regarding any salary (£65,000 p. a.) car allowance and expenses.
> 2) Divolight have agreed to pay a car allowance of £6,000 pa, paid monthly along with the Government mileage reimbursement scheme of £0.45 for the first 10,000 miles and £0.25 thereafter
> 3) The notice period will be 1 month during the probation period and not 2 weeks
> 4) 25 days holiday
>
> Based on the above, please email back that this is all fine just so we have it in writing.
>
> I am working in London tomorrow and will drive to my office to resign in the afternoon once I have received your email.

17 On 7 October 2016 the Claimant sent a reminder email to Mr Ross asking for confirmation on the four points so that he could resign and start his notice period. There was a conversation at about 5 pm following which the Claimant sent a further email to Mr Ross at 19:04 hrs:

> As discussed during our phone call earlier I have given my notice and at this stage will be in a position to start my new role with Divolight on Monday 7th November 2016.

18 In his witness statement the Claimant referred to that conversation and said that Mr Ross 'clarified everything was OK and the package was fine, so I could give my notice in.' Mr Ross did not refer specifically to that conversation in his witness statement but stated that 'eventually Mr Young agreed to provide consultancy services to Divolight UK as an independent consultancy business.'[4] I asked Mr Ross whether he recalled the conversation. Mr Ross clearly sought to avoid answering the question. What he told me was that he said that the points raised by the Claimant would be irrelevant if his business plan worked because the Claimant would have become wealthy. I prefer the evidence of the Claimant and find that Mr Ross did agree to the points which the Claimant had raised. It is significant that quite naturally the Claimant wanted specific confirmation as to the terms of engagement before he took the decisive step of giving in his notice to his then employers.

19 The Claimant met Vladimir Ross and another person said to be from the Israel head office on 12 October 2016, which was the day the Respondent was incorporated. The outcome was a list of tasks to be undertaken for the purpose of starting the business. That list was prepared by the Claimant. Most of the tasks were to be undertaken by the Claimant. They included appointing a Sales Manager, appointing an accountant, obtaining storage

[4] Paragraph 3.

space, effecting insurances, and the writing of various employment policies.

20 It is difficult to make specific findings of fact covering the way the relationship worked in practice during the 15 months of its existence. I make what are necessarily somewhat random findings based on the evidence before me.

21 The Claimant was based in the office premises taken by the Respondent in Crawley. The Claimant was himself instrumental in locating the facility. The Claimant was provided with a laptop and a mobile phone by the Respondent. He worked normal office hours from Monday to Friday save when on leave, and he was expected to work those hours.

22 All company documents were stored using the Microsoft OneDrive software. The relevance of that point is that documents created by the Claimant were stored using the Respondent's facility, rather than the Claimant's own storage facilities.

23 The Claimant's leave was recorded on an Excel spreadsheet in OneDrive. It showed the annual entitlement, the days already taken as leave, and the residual balance. The sheet for the calendar year 2017 showed 6.24 days as having been carried over from the previous year, and the sheet for 2018 showed 13.24 days as having been carried over. There was no written document recording the Respondent's leave year, nor the right to carry leave over from one year to the next. On at least one occasion in June 2017 the Claimant cleared his leave dates with Mr Ross beforehand. The Claimant also kept his business diary on OneDrive using Outlook.

24 The Claimant submitted monthly invoices all in the name of 'Young Lighting Consultant'. Such invoices were submitted to the Respondent and only to the Respondent. The text stating the service supplied was 'Business Set Up'. The invoice requested that payment be made to a bank account in the Claimant's personal name.

25 I accept the Claimant's evidence, despite its lack of precision, that he mentioned to Mr Ross on several occasions the issue of introducing a PAYE system, and that the attitude of Mr Ross was that it would incur extra costs for the business. I take judicial notice of the facts that there would of course be some extra administrative costs incurred, but more particularly that the Respondent would have to pay the employer's National Insurance contributions.

26 The Claimant arranged banking facilities for the Respondent in the UK and he was provided with a card for that account. In paragraph 27 of his statement her listed his other duties, and that list was not challenged to any material extent.

> My tasks included . . . running the day to day duties of an office, ordering stock, recruiting staff, UK logistics, setting up UK storage, meeting clients, surveys, quoting, lighting designs, office stationery, building display stands, marketing, company insurance, training.

27 The Claimant went to Israel for a few days from 14 November 2016 to visit what he described as the Head Office. All expenses were paid for by the Respondent, or more likely the ultimate parent.[5]

Discussion and conclusion as to status

28 There cannot realistically be any credible suggestion of the Claimant having been undertaking a profession or business of which the Respondent was a client or customer. The sole issue before me is whether there was a contract of employment, or in the alternative whether the Claimant was a worker in relation to the Respondent. The definition of employment which, despite its age, is generally accepted as the starting point is that of Mackenna J in *Ready Mixed Concrete v. Minister of Pensions and National Insurance*[6] although it is obviously couched in terminology more appropriate to its time than 2019:

> A contract of service exists if these three conditions are fulfilled:
> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;
> (iii) The other provisions of the contract are consistent with its being a contract of service.

29 The question of control requires some clarification. What is important is the right of the putative employer to exercise control over the putative employee, whether or not that control is in fact exercised in practice.[7] A further element has more recently been added, which is that there must be a mutuality of obligation as between the parties, that is that the putative employer must be obliged to provide work, and the putative employee must be obliged to carry out that work. That has also been said to be no more than a test as to whether there was a contract at all.

30 I find that the Claimant was an employee of the Respondent. There is no one critical factor which is determinative either way. It is necessary to look at the overall relationship. The label that the Respondent sought to put on the relationship does not determine the nature of the relationship. That is a matter of law based upon the facts. Any agreed label may be material where there is genuine ambiguity, which I do not find to be the case here.

31 The Claimant was obliged to work five days a week, apart from the agreed periods of annual leave, and work during normal working hours. The Claimant was not simply supplied with a task and was free to choose when he carried out that task. The very use of the phrase 'annual leave' indicates an employment relationship. It begs the question as to leave from what? Contrast such terminology from circumstances where an individual states that for a certain period he will not be available. Further, the Claimant cleared the leave he wished to take with Mr Ross.

32 The suggestion by Mr Ross that the Claimant was engaged because of his contacts is neither here nor there. Any individual at a senior level will of course be engaged because of his knowledge, skill-set and, in the case of a salesman, his contacts. It is the first of the elements of the *Ready Mixed*

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[5] In his witness statement the Claimant said the expenses were paid for by Vladimir Ross.
[6] [1968] 2 QB 497 QBD at 515
[7] See *White v Troutbeck SA* [2013] IRLR 286 EAT & [2013] IRLR 949 CA

Concrete definition that the employee provides his own work and skill in the service of the putative employer. That is exactly what the Claimant was doing here.

Facts as to termination and conclusion on claims

33 On 2 March 2018 Mr Ross and his father told the Claimant that the arrangement was to be terminated because the desired level of sales had not been achieved. The reason for the decision is not material. There was some discussion about the Claimant becoming a commission-only sales agent, but that is not material either.

34 There were then some exchanges of emails concerning monies which the Claimant said were due to him, and also about a possible future commission-only working relationship. There was no reply of any substance from Mr Ross to the requests made by the Claimant for what he said was due to him despite details calculations having been provided by the Claimant. The Claimant decided to commence these proceedings.

35 The first claim being made is for accrued leave pay amounting to £4,189.26, being the Claimant's calculation based on 15.4 days of leave outstanding. I have to determine what the Claimant's accrued entitlement was, if any, as at 2 March 2018 and at what rate it should be paid.

36 The calculation made by the Claimant, as I understand it, is based on an annual entitlement of 25 days for the whole period of his employment, after allowing for the days of paid leave he did take. There was no agreed leave year. There was no term agreed as to whether or not the Claimant could carry forward any unused leave from one leave year (whatever that may have been) into the next leave year.

37 I am prepared to imply a term that the contractual leave year was the calendar year on the basis that some such provision is necessary to give business efficacy to the contract at common law, and that the calendar year is likely to be the default period. I am not prepared to imply a term that the Claimant was entitled to carry over leave from one year to the next. It may be that some employers will allow a limited number of leave days to be carried over, but that will be as a result of a specific contractual provision. The Claimant relied upon a payment having been made to Mr Passalacqua which covered leave from a previous year. That payment was however made on the recommendation of the Claimant. I do not consider it to be material, and it is certainly insufficient to demonstrate that there was an established implied term.

38 My conclusion is that the Claimant is entitled to the benefit of the Working Time Regulations 1998 and in particular to regulations 13 (which defines the leave year) and 14 (which provides for payment on termination) where the provisions of those Regulations are more favourable than what was agreed. I find that it was agreed that the Claimant should have 25 days of annual leave and that that was in addition to Bank Holidays. On the basis of eight Bank Holidays that makes a total of 6.6 weeks of annual leave.

39 The Claimant had been employed from 1 November 2016 and thus 1 November became the commencement of the leave year. That is more favourable to him than 1 January. The Claimant's employment ended on 2 March 2018. His employment was thus for 0.33 years entitling him to 2.21

weeks of leave. The leave spreadsheets show that during the relevant period the Claimant had 10.5 days of leave, and there were also three Bank Holidays, making a total of 13.5 days. That equates to 2.7 weeks, which is more than the accrued entitlement. The leave claim therefore fails.

40 The second head of claim is for one month's notice pay. Mr Lewis-Nunn contended that any entitlement was limited to the statutory minimum of one week in accordance with section 86 of the Employment Rights Act 1996. I find that there was agreement on one month's notice and the Claimant did not receive that notice. In the alternative I find that at common law an employee of the Claimant's seniority would be entitled to one month's notice as being a reasonable period. This is a claim for breach of contract and the remedy is in damages being the amount which the Claimant would have received if notice had been given. I calculate that the net amount after allowing for statutory deductions was £4,220.[8]

41 The third head of claim is for two days' pay in March 2018. I find that that claim succeeds. The Claimant is entitled to be paid for days worked, and the non-payment is an unlawful, deduction from wages within Part II of the Employment Rights Act 1996. The gross sum due on the basis of the salary being paid by equal monthly instalments, and accruing equally on each day of the relevant month (whether a working day or not), amounts to £349.46 gross. That sum has been awarded on a gross basis because it is money due to the Claimant for work done. It is concneptually different froma claim of breach of contract. Either the Respondent must make statutory deductions or that if paid gross then the Claimant must account

42 The final claim is for expenses incurred during January and February 2018 amounting to £1,044.49. The amounts were not disputed and Mr Ross did not in reality seek to avoid liability when giving evidence. I find that the Respondent had reimbursed expenses in the past and no justification was put forward for not reimbursing them on this occasion.

Employment Judge Baron

Dated 06 March 2019

[8] This is based upon the Claimant paying tax and NIC in accordance with normal allowances and rates.