Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr T Fraser	Bespoke Kitchen Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 1st March 2019

EMPLOYMENT JUDGE Richardson

Representation
For the Claimant: in person
For the Respondent: Mr G Oretel, Direct of Respondent

JUDGMENT

The judgment of the Tribunal is that

(1) the claimant's claim of employment status under S230(1) and (2) Employment Rights Act 1996 is not well founded. The claimant is a worker under S230(3)(b);
(2) the claimant's claim of arrears of pay is well founded;
(3) the claimant's claim for arrears of holiday pay is well founded;
(4) the claimant's claim for notice pay fails and is dismissed.
(5) The respondent is ordered to pay the claimant the sum of £1978.30

REASONS

Background and Issues

1. The claimant was engaged by the respondent, a kitchen/bathroom/ wood furniture design and installation business, as a carpenter/cabinet maker between 15th May and 14th June 2018. The claimant claims that he was an employee on a permanent contract and is owed arrears of wages, holiday pay and payment in lieu of notice. The respondent asserts that the claimant was self employed and was not entitled to either holiday pay or notice pay and that he misrepresented his worked hours.

Evidence and proceedings

2. I was provided with a bundle of documents by the respondent exhibited as R1 which contained documents largely already known to each of the parties. The respondent also provided a witness statement from Mr Oretel and a signed and dated witness statement from Mr L Piwowar, former workshop manager, who did not attend. I have attributed little if any weight to Mr Piwowar's statement where it is not corroborated by other evidence as his evidence was test by cross examination.

3. The claimant produced no witness statement. After a break to read the respondent's witness statements the claimant confirmed that he relied on his particulars of complaint in the ET1 as his evidence in chief . As a matter of necessity because the evidence in chief was insufficient to establish the facts necessary to conclude a fair decision on the claim, the claimant responded to questions from me and was cross examined by the respondent.

4. A considerable amount of the 3 hour hearing was taken up by eliciting the claimant's evidence in chief. Once evidence was closed and submissions heard and the outstanding sums involved, the parties were encouraged to reach a settlement, without success. Judgment was reserved as there was insufficient time to run over the 3 hours allocation.

5. There was a dispute of fact on the three principle issues which were
   (i) the claimant's work status;
   (ii) the hours he worked; and
   (iii) his rate of pay.

6. I explained to the parties the format that would be followed in the hearing and a brief summary of the law. I asked the respondent to clarify what he claimed was the claimant's status. Was the claimant was self employed (as stated in the grounds of resistance in the response form ET3) or a casual worker and therefore a independent worker (as stated in Mr Oretel's witness statement)? Mr Oretel clarified his position – he asserts that the claimant was at the relevant time self employed.

7. I explained to the parties that as the crucial issues in the case were in dispute that my findings of fact would be made on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved conflicts of evidence as arose on the balance of probabilities, the civil standard of proof.

8. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents.

9. My findings of fact relevant to the issues which have been determined are as follows.

Findings of fact

10. Mr Oretel runs a business designing and installing kitchens, bathrooms and built-in furniture. The correct name of the respondent is Bespoke Kitchen Services Limited. At the relevant time the respondent employed a workshop manager, Mr L Piwowar, who shortly after the period covered by this claim, returned to Poland.

2017

11. The claimant is a cabinet maker. In 2017 the claimant provided carpentry services to the respondent company working in its workshop and on installation sites.

12. The claimant provided four typed invoices for carpentry workshop and on site services setting out his claimed hours of work for the periods 9th – 22nd February of 90 hours; 1st – 10th March of 36 ¼ hours; 14th – 24th March of 64 hours and 28th March – 4th April 2018 of 39 hours and providing his bank account details for a bank transfer in settlement.

13. All hours were charged at the agreed hourly rate of £10. The hours worked were 8am to 5pm which were the workshop's normal working hours. Apart from the first invoice, the claimant deducted 1 hour each day for rest breaks. For the first week of work the claimant deducted half an hour break time. It was the respondent's practise for subcontractors to deduct an hour for lunch. This was not a disputed fact.

14. All four invoices were paid and the parties parted company amicably.

15. The claimant was aware that Mr Piwowar intended to return to Poland in about a year's time.

2018

16. The respondent had installed kitchens in two properties built by a Mr Richards. Mr Oretel had been impressed by the quality of Mr Richards' work. He invited Mr Richards to join the business which he did on 4th April 2018. Mr Richards was given a contract of employment and put on PAYE. Mr Richards spent most of his time with customers and on site at installations undertaking some installation work himself.

17. On Monday 14th May the claimant on his own initiative contacted the respondent and spoke to Mr Piwowar asking for availability of work. Mr Piwowar said he would mention it to Mr Oretel. Mr Oretel telephoned the claimant early on Tuesday morning 15th May at about 7am. Mr Oretel invited the claimant to

come in immediately to work. Mr Piwowar, who was responsible for manufacturing the kitchens in the factory, was at this stage due to leave in about 4 - 6 weeks time.

18. The time that the claimant arrived at the respondent's workshop on 15th May 2018 is in dispute. The claimant says that he arrived at 8.45am and after a 15 minute chat with Mr Oretel, he started work at 9am. Mr Oretel says that the claimant arrived at 11.30am and that he made a note in his diary. The diary nor a copy of the relevant page were provided.

19. The claimant's time sheet on page 27 of the bundle shows the claimant claimed hours worked between 9am – 5pm including lunch on 15th May 2018. Mr Oretel amended the recorded hours (see paragraph 29) but he did not amend hours for 15th May to 4 ½ hours on claimant's slip of paper for week 1; he only reduced the claimant's claimed hours by 1 hour lunch break, not 3 ½ hours for allegedly turning up at 11.30 am on his first day. I therefore accept that the claimant arrived at 9am on 15th May 2018 to start work.

20. The claimant claims that he discussed and agreed with Mr Oretel his terms of engagement. He asserts that Mr Oretel told him he needed the claimant to cover for Mr Piwowar when he left; it was permanent employment. They had a lot of work on – five or six kitchens being manufactured. Terms agreed according to the claimant were:

- Full time employment
- Working in the factory/workshop to take over from Mr Piwowar;
- Normal hours 8 am – 5pm Monday – Friday although Mr Oretel wanted the claimant to start at 7.30am start,
- £12.50 per hour.

21. Mr Oretel claims that the claimant was engaged on the same basis that he had provided sub contract carpentry services in 2017. Mr Oretel said that the terms of the claimant's engagement were as they were in 2017:

- subcontract work, as and when required;
- £10 per hour.

22. After his first week and throughout the following weeks, Mr Oretel wanted to know what hours the claimant was working. It is disputed whether he asked for notification of the claimant's hours or for an invoice. Mr Oretel claimed he asked for an invoice. The claimant said Mr Oretel asked for hours. I return to this point of contention below.

23. On 12th June 2018 the claimant handed over to Ms Walker, the part time office assistant/book keeper, four hand written slips of paper torn out of a small notebook, recording his worked hours. No reference was made to the hourly rate.

24. The first slip for " Week 1 May 18th 2018" claimed for 35 hours 45 minutes. The breakdown given was:

8 hours from 9am – 5pm on Tuesday 15th May;
9 hours from 8am – 5pm on Wednesday 16th May;
9 ¾ hours from 7.15am - 6pm on Thursday 17th May; and
9 hours from 8am – 5pm on 18th May.

25. The slip of paper for "Week 2 May 25th" was:

9 hours 8am – 5pm each day except for Thursday 24th May which was a claim for 9 hours 15 minutes.

26. "Week 3 June 8th the claimant claimed 9 hours a day each day for hours worked between 8am and 5pm coming to a total of 45 hours.

27. For "Week 4 8th June" the claimant also claimed Monday – Friday 9 hours a day 8am – 5pm, a total of 45 hours.

28. The overall total was 171 hours.

29. Mr Oretel reviewed the claimant's hours and did not believe that they were accurate. He noted that the claimant had charged daily for an hour worked when he should have taken an unpaid break. Mr Oretel marked up the slips of paper, reducing each day by one hour. He 'felt' that the claimant had worked nearer to 96 hours at £10 per hour and therefore made a bank transfer to the claimant's account of £960 on 20th June 2018 as an initial payment and he wanted to discuss the balance with the claimant.

30. During the evening of Tuesday 12th June 2018 Mr Oretel received a text message from the claimant saying that he would not be in the following day until *"about 10.30 all going well".* The claimant was going to view two houses and in each case the owners were unable to accommodate viewings in the evening because of their shift patterns.

31. The claimant arrived at the workshop at 11.30am on Wednesday 13th June and worked that day.

32. During the evening of Wednesday 13th June 2018 Mr Oretel messaged the claimant to tell him that they could do without him until the following Monday, ie. did not require him to work on 14th and 15th June. Mr Oretel stated in the text message:

> *" Hi Tim we're handing over jobs tomorrow and Friday so there will be no need to come in till next week. Also waiting for the wood boards to arrive so we have material to cut instead of scratching to find you jobs. Also it's difficult for all of us to keep track of the hours when you come in late so I'm happy for you to let us know when you have to be elsewhere as we will*

rather manage without the disruption of a late start as we all try to focus on our job and it's distracting to try and fill you in mid day. If in future you can get to work for five to eight in the mornings we can grab a tea to get going for eight as the rest of us area already cruising from seven in the mornings. This will not be negotiable as it's not fair on the rest of our team to try and work around your flexi hours as an ex business owner I'm sure you will understand."

39. On 25th June 2018 the claimant emailed his hours "as requested" by Mr Oretel although it is not clear whether this was an additional request to the previous requests for hours referred to above. The claimant claimed the following hours:

Monday 11th June 8am – 6.30pm - 10 hours
Tuesday 12th June 8am to 6pm – 9 hours
13th June 11.30am – 5.pm – 5 ½ hours
Thursday and Friday 14th and 15th June 9 hours each day, 8am – 5pm.

40. Mr Oretel asserts that the claimant did not return to work after the text message on 13th June 2018 and had claimed for 18 hours not worked at all on 14th and 15th June.

41. On Sunday 17th June 2018 the claimant messaged Mr Oretel to say *"I won't be in "tomorrow or Tuesday. I'm sure you will understand. Thanks again Tim."*

42. Mr Oretel replied: *"Hi Tim, that will be fine, we will discuss weather [sic] we are going to give another candidate a chance to see if he copes better with the work we require doing at the factory. We need more dedication as I would like someone to become a shareholder in the business once they have proven that they have what it takes. I was very hopeful that it would be you but to date you have not shown the enthusiasm required to become a partner in the business. You are a great guy and well liked but a business needs more than that it needs a well gelled team working together on spreading the load."*

43. On 27th June 2018 Mr Oretel messaged the claimant again to arrange a meeting to finalise the balance of the payment over £960 due to the claimant. He said: *"As you know I queried your time sheets many days you had to drop money at a friend or see someone before work also when you started you arrived after 11 yet you booked all your times from 8am I checked your explanation that you worked through your breaks and your breaks and lunchtime to make up the hours lot and have been informed that you always took your breaks without fail and in most cases longer than the agree times. You also chose your break time to suit your needs. Please let me know when you will be available to pop in at the factory."*

44. The claimant messaged Mr Oretel instructing him never to contact the claimant again.

45. Early conciliation through ACAS failed. The claimant filed proceedings on 10th October 2018. There are no limitation issues.

Submissions

46. I heard submissions from both parties of which I made a full note. I refer to the relevant submissions in my conclusions below.

Conclusions

47. There was a total failure on both parties to establish the nature and terms of their arrangement commencing on 15th May 2018 the responsibility for which must largely fall on the respondent company. It has a duty to ensure that it complies with tax regulation and employment statute.

48. I found the testimony of both the claimant and Mr Oretel to be unreliable at times. I must decide where the truth is more likely to lie, despite an absence of persuasive evidence and unreliable testimony from both parties. The burden of proof is on the claimant as it is he who brings the claim for unpaid wages, notice pay and holiday pay. If the claimant fails to discharge the burden of proof his claim to have been an employee of the respondent company must fail.

49. I have stepped back and looked at the evidence employment status. I reject immediately the suggestion by the respondent that the claimant was self employed. Mr Oretel himself was confused as he referred to the claimant as both self employed and a casual worker. They are not the same thing. There was no evidence that the claimant was self employed – that he had other clients, that he bore financial risk in providing the services he offered, that he advertised his services or had indemnity insurance. The claimant's status was either that of employee or casual labour.

50. There are indicators in the evidence suggesting both that the claimant could have been an employee from 15th May 2018 and alternatively that he could have been a casual worker. I consider examples of this below.

51. I accept from the evidence of both parties that Mr Piwowar worked almost exclusively in the workshop and it was he who manufactured the kitchens/bathrooms, cutting timber panels to size for example. Mr Oretel needed a replacement for Mr Piwowar quickly. He claimed that the replacement was Mr Richards and accordingly he did not need the claimant as a full time employee – that he had been taken on a self employed person. I do not believe him. Mr Richards was not experienced with working timber in the factory and if it was

intended that he worked as manager in the factory producing the kitchen panels etc., then he would have been in the workshop learning the ropes from Mr Piwowar prior to the claimant being engaged on 15th M\y 2018. The claimant said that Mr Richards did not work in the factory and that he never came into the factory; Mr Oretel did not dispute that and I accept that statement as true: Mr Richards never worked in the factory as a carpenter.

52. Mr Oretel spoke of the quality of Mr Richard's building work not about how good he was at working alongside Mr Piwowar before Mr Piwowar returned to Poland. Mr Richards was out on site doing installations or seeing customers, he was not Mr Piwowar's replacement. That is also evidenced by the incomplete text message of 17th June 2018, in response to the claimant saying he would not be in on 18th and 19th June Mr Oretel replied that was fine and refers to giving "*another candidate*" a chance to see if he copes better with te work Mr Oretel required doing. That statement "giving another candidate a chance" would not have been said if Mr Richards had already been engaged as the intended replacement for Mr Piwowar in the factory. That text also suggests that the claimant too had been a 'candidate' for Mr Piwowar's role which to some extent could corroborate the claimant's claim that he was taken on permanently to replace Mr Piwowar.

53. I was shown a copy of the respondent's non-VAT inputs for May – July 2018 which shows the claimant as a subcontractor. Mr Oretel claimed that the entries on the VAT and non VAT inputs for May-July 2018 are entered on the date shown in each case by Ms Walker – for the claimant the entry was 20th June 2018 in the middle of several entries. I had no reason to disbelieve Mr Oretel and to doubt that this was a genuine document as the entry dates are not all the same, they appeared to be entered in chronological order apart from the first. I accept that this is not conclusive evidence but it is indicative of a payment of wages in the respondent's official book keeping being made on 20th June to the claimant who was recorded as a subcontractor and who was not featured in the PAYE records.

54. It was clear from the testimony and the documentation that there were occasions when the claimant behaved at times during his four weeks with the respondent as a freelance worker not as an employee. For example he did not think it necessary to start work at 7.30am "*as it was not obligatory*" despite being asked to do so by Mr Oretel. The claimant felt able to operate flexible hours – he told Mr Oretel that he would be late in on 13th June, he did not ask Mr Oretel for permission to come in late. Mr Oretel refers in his email to other occasions when the claimant arrived late or left early. There was sufficient evidence to show that Mr Oretel found the claimant's attitude to normal working hours difficult and not what was wanted – coming in late and going when he felt like it was not fair on the others – as Mr Oretel complained on 13th June 2018. Mr Oretel said that although he would accept the claimant not arriving at 7am, it was non-negotiable that the claimant arrived before 8am. Mr Oretel effectively stated

that he wanted more “dedication” to the job in a candidate.

55. When the claimant submitted his hours for four weeks on the slips of paper, handing them to Ms Walker, he did not include the hourly rate and also he had not allowed for the unpaid lunch break which he would have done had he believed that he was a subcontractor. The claimant knew that lunchbreaks were not charged – he had not charged for lunch breaks in 2017.

56. I do not believe that the claimant was dishonestly trying to claim for a lunch break when he submitted these notes – he was merely providing the start and finish times of work over the four week period. After the claimant had left the respondent’s employment (at the latest by 25th June 2018), inexplicably he then charges in his final account, for lunch hours of 1 hour daily. That was not something he did in 2017 and he knew that it was not how he and Mr Oretel had operated before. Nor is it compatible with being an employee.

57. I step back and look at the evidence and the contradictions in the evidence. I find that it more likely than not that Mr Oretel, knowing that the claimant was well qualified to take over Mr Piwowar’s role, wanted to see if the claimant could fit in and do a reliable job. It was a stroke of luck that the claimant was looking for work just as Mr Piwowar was about to leave to return to Poland. Mr Oretel did not want the claimant to go “on the books” immediately. He failed to put the claimant ‘on the books’ despite the claimant saying that he had asked to be put on the books. M Oretel wanted to be sure whether the claimant was going to be suitable filling Mr Piwowar’s role. I do not believe that the claimant and Mr Oretel agreed on the morning of 15th May 2018 that the claimant was immediately engaged on a permanent employment contract. Mr Oretel wanted the claimant to work a trial period before he was offered the role of Mr Piwowar. It didn’t work out, the claimant was not sufficiently reliable, or dedicated to the job in Mr Oretel’s opinion and the therefore decided to give another “candidate” a chance.

58. Was the claimant taken on as an employee or a casual worker? S230 Employment Rights Act 1996 provides that both are providing a personal service. I have had regard to the leading authorities of Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance[1968] 2 All ER 433 and Autoclenz Ltd v Belcher [2011] UKSC 41. The key issue is whether there was a mutuality of obligation on the respondent to provide work and on the claimant to accept work.

59. I find that the claimant accepted the work at the respondent company and having done so there was an obligation on the claimant to perform the work personally which he did. Whilst the claimant may have believed that he was joining the respondent company as an employee he did not conduct himself as an employee; it became clear to Mr Oretel that the claimant as not going to become a ‘dedicated’ employee as Mr Piwowar had been. Mr Oretel layed off

the claimant on 14th and 15th June because there was insufficient for him to do. He did not say don't come in next week. However, in response on Sunday 17th June the claimant said "I won't be in on Monday or Tuesday". The claimant did not say that he was never going to return, or that he resigned in the circumstances. The claimant did not protest to Mr Oretel that he had a right to work as an employee and that Mr Oretel could not just lay him off without pay. When the claimant decided on 17th June, that he was not going to go in on Monday and Tuesday (18th and 19th June) that is incompatible with the status of employee who had an obligation to turn up for work. Mr Oretel's conduct towards the claimant was throughout not inconsistent with the claimant being a worker. The claimant's conduct throughout was also much more in line with being a freelance worker who wanted and took flexibility in his hours. He chose when and what hours to work in a way which was convenient to him and incompatible with being an employee.

60. Taking the evidence in the round and bearing in mind that there are contra-indications for employment and worker status, on the balance of probabilities, I find that there was no mutuality of obligation - the claimant's attitude to flexibility, probably deriving from his previous experience of running his own business and being a freelance worker with Mr Oretel in 2017, was sufficient to override the fewer indications that he was engaged as an employee on probation. On the paucity of evidence it is finely balanced decision but the evidence tips towards the claimant not being an employee but a worker. He wanted to be an employee for the purposes of his claim but the indications are that he conducted himself as a casual worker and for that reason I find that he was a casual worker. The claimant failed to establish to the standard of proof that he was an employee.

61. The claimant's entitlement is to payment for his hours work and holiday pay. What was the hourly rate? The burden of proof is on the claimant to demonstrate that it was £12.50 as he claims it was. Mr Oretel denies agreeing to pay £12.50 and says it was £10 as it had been previously in 2017. £10 was the rate that Mr Oretel paid an instalment against the claimant's hours, which payment the claimant accepted- he never protested on receipt of the BACS transfer of £960 that it was 96 hours which should have been paid at £12.50. The claimant never wrote to Mr Oretel and said don't you remember we agreed £12.50 per hour on 15th May 2018. I therefore can only conclude on the evidence that the claimant has failed to meet the balance of probabilities that the hourly rate was £12.50 and I find that the hourly rate must therefore be £10.

62. What were the hours worked? Looking at the four slips of paper at page 28 setting out the claimant's hours 15th May – 8th June, I find that he worked in those four weeks, on the basis of the evidence before me, a total of 152 hours @ £10 per hour. The claimant also claimed for w/c 11th June for hours worked Monday – Friday totalling 42 ½ hours but I find that he has not established that he worked on 14th and 15th June. His hours for week commencing 18th June

were 24 ½ hours, giving a total for five weeks' work of 176 ½ hours at £10 per hour = £176.50.

63. With regard to holiday pay, the claimant is entitled to holiday pro-rated to his hours worked. The claimant relied on the government calculator for holiday pay of some 26 hours. I find that he is entitled according to the government calculator to 21 hours 19 minutes holiday pay @ £10 per hour which amounts to approximately £213.33.

64. As a worker under S230(3)(b) the claimant is not entitled to notice pay. The claimant is entitled to receive from the respondent the total sum of 176.50 hours arrears of pay and 21 hours 19 minutes of holiday pay expressed as 21.33 hours) at £10 per hour giving him a total of 197.83 hours amounting to £1978.30.

Employment Judge Richardson
Signed on 6th March 2019