EMPLOYMENT TRIBUNALS

Claimant: Mr S Murphy

Respondent: WSBL Limited

HELD AT: Manchester **ON:** 29 January 2019
30 January 2019
(In Chambers)

BEFORE: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: In person
Respondents: Miss Gauld, Counsel

JUDGMENT

The decision of the Tribunal is that:-

1. The claimant was an employee as defined by section 230 of the Employment Rights Act 1996.

2. The claimant was not unfairly dismissed by the respondent pursuant to Section 100(1)(c) of the Employment Rights Act 1996.

3. The respondent did not make an unlawful deduction from the claimant's pay.

Accordingly, the claimant's claims are dismissed.

REASONS

The Hearing

1. A Preliminary Hearing in relation to this claim was held on 7 September 2018. A Case Management Order (CMO), sent to the parties on 24 September 2018, clearly identified the issues (as set out below save for one amendment agreed with

the parties at the Hearing) and specifically requested the parties to make an application promptly to the Tribunal for amendment if they did not consider that the list of issues set out in the CMO accurately recorded the issues to be determined. No such application was made. The parties agreed that it was a claim in which section 100(1)(c) applied. It was understood that there were no health and safety representatives and/or committee.

2. At the outset of the hearing, the claimant stated that he really believed his claim should be a whistleblowing claim. Having heard from Miss Gauld I explained to the claimant that he could make an application (to change his claim to a whistleblowing claim) which I would consider but that a possible consequence, if his application was successful, would be that the hearing would be postponed so that both parties were able to properly prepare for a hearing in full knowledge of the legal issues to be determined. The claimant then confirmed that he did not wish to make such an application.

3. Separately, the respondent disclosed, at the outset of the hearing, the minutes of health and safety meetings from January 2017, October 2017, December 2017 and May 2018. These were included in the Bundle. Accordingly, I amended, with the agreement of the parties, the list of issues slightly to include a consideration of Section 100(1)(c)(iii) (see below).

Evidence

4. I heard evidence on behalf of the respondent from Mr Steve Riley ("Mr Riley"), the respondent's Operations Manager. The claimant, who was unrepresented, gave evidence on his own behalf. During the course of the hearing, the Tribunal was referred to documents contained within an agreed bundle. I explained at the outset to the parties that I would only read documents to which I was referred by the witness statements unless there were any additional documents to which they wished to refer me. None were so referred.

The Issues

5. As stated above, the issues were agreed during a Preliminary Hearing held on 7 September 2018. Those issues are set out below with one amendment (as explained above):

Employment Status

(1) Was the claimant working under a contract of employment and therefore "an employee" as defined in Section 230(1) of the Employment Rights Act 1996?

Health and Safety Disclosure

(2) If so, can the claimant show that he was employed at a place where there were no safety representatives or safety committee and that, on 14 March 2018 he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

(3) In the alternative, can the claimant show that he was employed at a place where there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means and that, on 14 March 2018, he brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Reason

(4) If so, was the reason or principle reason for the dismissal that he had made a health and safety disclosure on 14 March 2018?

Unlawful Deductions From Pay – Part 2 Employment Rights Act 1996

(5) Did the respondent make an unlawful deduction from the claimant's pay by failing to pay him for the period between 16 March and the termination of his employment on 27 March 2018? If so, what was the amount the claimant should have been paid in that period?

Remedy

(6) If any of the above complaints succeed, what is the appropriate remedy?

Findings of Fact

6. From the evidence the Tribunal made the following findings of fact.

7. The respondent is a company which produces soundproofing material for a range of services. The main manufacturing is done via two calendar machines which turn a mix of polymers and recycled material into a compound. This compound is then rolled into sheet or jumbo roll format depending which customers require.

8. The claimant started working for the respondent in August 2016 but, at that time, was engaged by Clayton Recruitment to work for the respondent and was not directly engaged by them. He was engaged directly by the respondent from 3 January 2017. His contract of employment, dated 28 March 2017, appeared in the Bundle.

9. That contract refers to the claimant's position as in Production Operative and includes the following terms and conditions:-

(i) a probationary period of six months;

(ii) an hours of work clause which states "due to the nature of your role, there are no set or standard hours of work for you. You will work a variety of shifts, which may vary from week to week. You are not guaranteed a minimum number of hours of work each week and in a particular week you may receive no work at all from the company. However, the company will endeavour to give you advance notice of

the hours that you will be offered to work in a particular week. You are not obliged to accept the hours of work offered and the company has no obligation to offer you work on an ongoing basis";

(iii) no notice period but states, "due to the nature of the position no notice period is required nor will be given however you will be asked regarding your ongoing availability and will need to keep the company appraised of this if you wish to be offered work when it is available";

(iv) holiday entitlement;

(v) as regards sickness absence: "in the case of incapacity of work due to personal sickness or injury, your manager should be informed by telephone (not text) at the earliest possible time. It is not acceptable to leave a message with reception or a colleague" and, "should you be absent in your first six months, you may qualify for Statutory Sick Pay."; and

(vi) a disciplinary and grievance procedure, for details of which the claimant was referred to the staff handbook".

10. In fact, the claimant worked a standard 36 hour week every week from the date on which he was engaged by the respondent until the termination of his employment (apart from during any periods of absence due to sickness or holiday). It was expected that he would turn up for his shift and, if he was sick, it was expected that he would notify his manager in advance.

11. During the period the claimant worked for the respondent, the respondent ran four shifts and, accordingly, had four teams, each of which worked three twelve-hour shifts. On each shift there was a Leading Hand, one person on mixing and two labourers, whose role was removing trimmings and/or taking finished goods into the warehouse. The claimant was one of the labourers for one of the teams.

12. As there were four teams there were eight labourers in total. Of those eight, Mr Riley understood six to be "permanent" employees and the claimant and one other (who was on permanent night shifts) to be "casual" employees. This was based on what he had been told about the contracts on which they were employed.

13. Mr Riley did not start work for the respondent until March 2017. He identified, by late 2017, after monitoring production, that two labourers per shift was not necessary and was surplus to requirements. For a period of time thereafter however, the respondent had an increase in demand in other work and so one of the two labourers on each shift would take a share of the work on the press.

14. The claimant started to suffer from shoulder pain in his left shoulder which he considered was as a result of working on the press. Having seen the doctor, he was signed off work from 14 to 28 March 2018. The reason given was shoulder tendonitis.

15. It is agreed between the parties that there was a conversation between the claimant and Mr Riley which took place on either 14 or 16 March 2018. The date is not material. Although the precise content of that conversation was disputed, I find that the claimant did raise an issue with Mr Riley about the hoist not performing well; about the claimant's body position whilst using the hoist; about what could be done to improve the situation; and about the possibility of using a scissor lift. It was also agreed, during that conversation, that Mr Riley would ask maintenance to have a look at the hoist.

16. During the claimant's absence from work, Mr Riley noticed that, despite the claimant's absence, the respondent was still hitting targets and had not needed to cover the claimant's absence with overtime. Accordingly, and on the understanding that the claimant's contract was not an employee contract but a contract in relation to which there was no obligation to provide work (which he considered to be a casual contract) Mr Riley asked HR to send a letter to the claimant to confirm that he was no longer needed and that there would no longer be any work for him. That letter, dated 22 March 2018 (but not received by the claimant until 28 March 2018) appears at page 46 of the bundle and specifically states that "due to a change in production needs, the requirement for casual workers is currently reduced and no hours are available for you in the immediate future". The claimant was given no notice.

17. On 22 March the claimant heard a rumour that the company was "getting rid" of him. He rang human resources on 27 March and a letter was read out to him which terminated his employment. He received that letter on 28 March.

18. Mr Riley confirmed that, as it was his understanding that the claimant (along with one other labourer) was casual, there was no need for the respondent to conduct a redundancy exercise. In his view, it made sense to ensure that casual staff were let go before having to consider making redundancies. As the other casual worker was engaged on a permanent night shift (a difficult role to fill) and the claimant was, in any event, absent, the claimant was his obvious choice.

19. The claimant was paid for three days' absence on SSP rates. The claimant confirmed that, during the period of sickness absence up to the date of termination of his employment he would only have worked for three days.

20. Mr Riley also confirmed that Shaun Greenlees was, at all material times, the respondent's health and safety representative as well as Technical Manager. Minutes were produced of health and safety meetings which were attended both by Mr Greenlees and Mr Riley, amongst others. Those meetings take place once a month to discuss accidents, near misses and so on. Mr Riley confirmed that the health and safety meetings have taken place since the end of 2016. He stated that a notice on the notice board states that Shaun Greenlees is the health and safety representative and that, generally speaking, supervisors and lead hands report issues to Shaun for discussion at those meetings. It is usual practice, and was at all material times, for workers to raise issues with the supervisors and lead hands to raise at those meetings.

21. Mr Riley gave evidence to the effect that, since the claimant's contract was terminated, the respondent has four teams of three, rather than four, working the calendar shift rotation. In other words, all teams now operate with only one labourer. He also confirmed that no other workers were taken on (save for an Engineer) for a significant period since the termination of the claimant's contract.

The Law

Employment Status

22. "Section 230 of the Employment Rights Act 1996 defines an employee 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;
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> (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) In this Act "worker" ….means an individual who has entered into or works under (or, where the employment has ceased, worked under)-
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> (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 or any professional business undertaking carried on by the individual

and any reference to a worker's contract should be construed accordingly".

23. The Tribunal was referred to the case of **Autoclenz v Belcher and Others 2011 ICR 1157, SC** in the context of sham contracts.

24. It is well established that a contract of employment cannot be altered merely by attaching a different label to it. A misrepresentation of the true position between the parties may result in a Tribunal finding an element of the contract to be a "sham". In **Autoclenz** an Employment Tribunal decided that car valets whose contracts specified that they were self-employed sub-contractors were, in reality, employees. The Tribunal was not deterred from this conclusion by two clauses that, on their face at least, negated employment status: a clause allowing the sub-contractors to supply a substitute to carry out the work on their behalf; and a clause stating that there was no obligation on Autoclenz to offer work or on the claimants to accept work. The Tribunal found that these clauses did not reflect the reality of the claimants' situation. They were expected to turn up and do the work provided, were fully integrated into

the respondent's business and were subject to a considerable degree of control by the respondents.

25. The Court of Appeal held that a Tribunal faced with a sham allegation must consider whether or not the words of the written contract represent the true intention and expectation of the parties (and therefore their implied agreement and contractual obligation), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. The focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise the Tribunal must examine all of the relevant evidence, including the written term itself, in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were.

26. The Court of Appeal confirmed that clauses are not necessarily not genuine merely because in practice, for example, the men always did turn up for work. However, evidence that the parties had a joint intention that the workers would turn up each day and were, in fact, under an obligation to do so, may be taken into account.

27. In the Supreme Court, it was confirmed that the Tribunal was entitled to find that the documents did not reflect the true agreement between the parties. The Tribunal had taken into account, among other things: the fact the claimants had no control over the way in which they did their work or their hours of work; that they had no real economic interest in the way work was organised; that they could not source materials for themselves; and that they were subject to the direction and control of Autoclenz's employees on site.

28. Notwithstanding the decision in **Autoclenz,** clear evidence of employee status (control, mutuality of obligation and personal performance) will be required before an express contractual term of the contract that negates employment status can be disregarded.

Health and Safety Dismissals

29. Section 100(c)(1)(c) states as follows:-

> (1) "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principle reason) for the dismissal is that:-
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> (c) being an employee at a place where
>
> (i) there was no such representative or safety committee; or
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> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety".

Unlawful Deductions

30. Section 13 of the Employment Rights Act 1996 states as follows:-

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless:-
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> (a) the deduction is required or authorised to be made by virtue of the statutory provision or a relevant provision of the worker's contract, or
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> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction".
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> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

Conclusions

Unfair Dismissal

Employment Status

31. Despite an express contractual term which negates employment status, I have concluded that the claimant was an employee. My reasons for this conclusion are set out below.

32. The claimant attended work on a regular shift pattern in the same way as all other employees. He also had to inform the respondent when he was sick.

33. Although it may not be enough, when considering whether or not a contract is a sham, that the claimant did in fact turn up for work every day, in this case, having no obligation in the contract to offer or accept work was entirely inconsistent with the practice of having to notify the respondent if the claimant was unavailable for work, for example if he was ill. It was clearly expected that the claimant would turn up for each shift along with the other members of his team unless he gave notice. It was never really contemplated that he would refuse work.

34. The claimant worked under the control and supervision of the respondent's employees and had no say in how, when or where the work was performed.

35. Accordingly, I find that there is clear evidence to suggest that the hours of work clause does not contain genuine rights.

Health and safety dismissal

36. The claimant was, in fact, employed at a place where there was a health and safety representative or a safety committee as demonstrated by the minutes produced by the respondent on the day of the hearing.

37. I have concluded however, that it was not reasonably practicable for the claimant to raise the matter by those means as he was unaware that there was such a health and safety representative or safety committee. The respondent was similarly unaware at the preliminary hearing given the issues agreed.

38. I also find that the claimant did bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. He spoke with Mr Riley and drew to his attention the fact that he felt the press was causing injury to his shoulder.

39. An employee who is dismissed shall be regarded for the purposes of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principle reason) for the dismissal was the fact that he brought to his employer's attention the circumstances discussed above. This is an issue of causation.

40. I conclude that, in all the circumstances of the case, the reason the respondent dismissed the claimant was that:

(1) there was a reduced requirement for labourers on the work the claimant had originally been employed to do;

(2) the upturn in work which had been experienced by the respondent since identifying that two labourers were not required on each shift had started to reduce;

(3) the claimant's absence made the respondent realise that they could manage without him; and

(4) the respondent believed that the claimant was a casual worker and that his contract could be terminated without the need for a redundancy procedure and/or redundancy payments.

41. I found no evidence to suggest that the respondent terminated the claimant's contract because of a health and safety disclosure, namely the conversation between Mr Riley and the claimant, and I accepted Mr Riley's evidence about his reasons for terminating the claimant's contract. That said, I can understand why the claimant may have formed that view given the lack of explanation and the sudden termination of his contract.

42. Accordingly, the claimant was not unfairly dismissed.

Unlawful Deductions from Wages

43. The claimant was due to work only three days between 16 March and the termination of his employment on 27 March 2018. The claimant agrees that he was paid statutory sick pay for those days and his contract of employment entitled him to be paid statutory sick pay for those days. Accordingly, there has been no deduction from the claimant's wages.

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Employment Judge Rice-Birchall

Date 11 March 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 March 2019

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FOR THE TRIBUNAL OFFICE

[JE]