



**EMPLOYMENT TRIBUNAL**

**BETWEEN**

**CLAIMANT**

**AND**

**RESPONDENT**

**Mr V. Riekstins**

**(1) Car Sales Solutions Limited  
(formerly known as  
'Hunter Capital Devine Limited')  
  
(2) Car Sales Hampshire Limited**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**Held at: SOUTHAMPTON**

**On Monday, the 4<sup>th</sup> March 2019**

**Employment Judge: Mr D. Harris (sitting alone)**

**Representation:**

<b>For the Claimant:</b>	<b>In person</b>
<b>For the First Respondent:</b>	<b>No attendance</b>
<b>For the Second Respondent:</b>	<b>No attendance</b>

## **JUDGMENT**

1. The Tribunal finds that the Claimant was an employee of the First Respondent (namely, Car Sales Solutions Limited (formerly known as 'Hunter Devine Capital Limited')) from the 7<sup>th</sup> April 2017 until his resignation on the 24<sup>th</sup> October 2017.
2. At the time of his resignation on the 24<sup>th</sup> October 2017, the First Respondent owed the Claimant the sum of £5,280.00 (gross) in respect of unpaid wages for the period from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017.
3. The Tribunal having made an award to the Claimant in respect of unpaid wages and having found that when these proceedings were commenced the First Respondent was in breach of its duty to the Claimant to provide him with a written statement of the particulars of his employment, the First Respondent shall pay to the Claimant the sum of £1,956.00 representing four weeks' pay capped at £489.00 per week.
4. Accordingly, there shall be judgment against the First Respondent in the sum of £7,236.00, comprising:-
  - (a) the sum of £5,280.00 (gross) in respect of unpaid wages; and
  - (b) the sum of £1,956.00 pursuant to section 38(3) of the Employment Act 2002.
5. The claim against the Second Respondent shall be dismissed.

## **REASONS**

1. By his Claim Form presented on the 5<sup>th</sup> March 2018, the Claimant brought a claim against the Respondents alleging unpaid wages for the period from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017.
2. By a document entitled "Particulars of Claim" dated the 11<sup>th</sup> August 2018, the Claimant set out his case against the Respondents as follows (using the paragraph numbering as appears in the Particulars of Claim):
  1. The First Respondent in this case is Hunter Devine Capital Ltd. The Second Respondent in this case is Car Sales Hampshire Ltd.
  2. The Claimant's place of work was at the Company's premises located at 2 Pegham Close, Laveys Lane, Fareham, Hampshire, PO15 6RX.

3. It is disputed by the Respondents that the Claimant was employed by them.
  4. The commencement of the period of continuous employment was 7<sup>th</sup> April 2017.
  5. The Claimant was employed as a car mechanic.
  6. The Claimant was not given a contract of employment. The Claimant was not given a statement of the terms of his employment.
  7. The Claimant gave notification for ACAS Early Conciliation for the First Respondent on the 8<sup>th</sup> January 2018, and the Second Respondent on the 11<sup>th</sup> January 2018.
  8. The Claimant pleads:
    - a) The Claimant was subject to a breach of contract because of an authorised deduction of wages. He was not paid for some of the hours that he worked (Employment Rights Act 1996 Sect 13(3)).
  9. The Claimant was employed on the 7<sup>th</sup> April 2017 as a car mechanic. He was paid monthly, and received corresponding payslips from his employer.
  10. The last wage payment received by the Claimant was on the 28<sup>th</sup> August 2017, for the period of work from 17<sup>th</sup> July to 13<sup>th</sup> August 2017.
  11. The Claimant continued to work for the employer in the expectation that he would be paid as normal.
  12. The Claimant continued to work until 17<sup>th</sup> October but was not paid for the 2 month period of working from 14<sup>th</sup> Aug till 17<sup>th</sup> October 2017. This amounted to 528 hours @ £10 per hour. The Respondent failed to pay the Claimant £5,280.00.
  13. The Claimant did not receive payslips for the last 2 months that he worked.
  14. The Claimant raised a grievance on the 24<sup>th</sup> Oct 2017 and resigned from his post due to the non-payment.
3. The First Respondent's response to the claim, as set out in its formal Response (received by the Tribunal on the 10<sup>th</sup> May 2018), can be summarised as follows:
- 3.1 the First Respondent contended that the Claimant was a self-employed contractor for services;
  - 3.2 the First Respondent disputed the Claimant's calculation of his unpaid wages;
  - 3.3 the First Respondent asserted that the Claimant had made misrepresentations about his skills and qualifications as a car mechanic;
  - 3.4 the First Respondent asserted that the Claimant's performance at work was not satisfactory and that there were time-keeping and "*other issues*".

4. In its formal Response to the claim (received by the Tribunal on the 10<sup>th</sup> April 2018), the Second Respondent made identical assertions as the First Respondent. The Second Respondent asserted that the Claimant was a self-employed contractor for services and disputed the Claimant's calculation of his unpaid wages. The Second Respondent was also critical of the standard of the Claimant's work and asserted that the Claimant had misrepresented his skills and qualifications as a car mechanic.
5. In an email sent to the Tribunal on the 10<sup>th</sup> May 2018, the First Respondent's sole director, Mr Paul Taylor, made a request for specific disclosure of the Claimant's qualifications, informed the Tribunal that the First Respondent intended to call up to 5 witnesses at the final hearing and gave notice that the First Respondent intended to raise a counterclaim against the Claimant for unsatisfactory work. On the issue as to who the Claimant worked for, Mr Taylor seemed to indicate in his email that the Claimant had been "*engaged by the Defendants*".
6. On the 25<sup>th</sup> October 2018, the Tribunal wrote to the Respondents requesting representations from them as to why their Responses should not be struck out on the grounds that they had not been actively pursued by the Respondents.
7. The Respondents failed to respond to the Tribunal's letter dated the 25<sup>th</sup> October 2018 and so, on the 8<sup>th</sup> November 2018, an Order was made striking out the Responses. The Respondents were informed that they were entitled to receive notice of any hearings and decisions of the Tribunal but would only be entitled to participate in any hearing to the extent permitted by the Employment Judge.
8. The final hearing was listed on the 4<sup>th</sup> March 2019. The Claimant attended the hearing but the Respondents failed to attend. No reason for their non-attendance was communicated to the Tribunal prior to the hearing or on the day of the hearing.
9. Rule 47 of the Tribunal's Rules of Procedure (2013) provides that if a party fails to attend a hearing, the Tribunal may proceed with the hearing in the absence of that party but before doing so, the Tribunal should consider any information which is available to it, after making any enquiries that may be practicable, about the reasons for the party's absence.
10. Before deciding whether to proceed in the absence of the Respondents, the Tribunal satisfied itself that the Notice of the Hearing had been sent to the Respondents' contact addresses (which was the same address for both Respondents) given in their ET3s. The Tribunal reminded itself that their Responses had been struck out because of their failure to engage with the proceedings. The Tribunal noted that no application had been made by the Respondents to set aside the striking out of their Responses. The Tribunal bore in mind that had the Respondents attended the final hearing, their participation in the hearing was likely to be circumscribed as a consequence of their Responses being struck out. The Tribunal nevertheless decided to delay the start of the final hearing in case the Respondents were running late. On a number of

occasions, the Tribunal's clerk went to the waiting area to call out the names of the Respondents and on each occasion he returned to the Tribunal room to say that there was no sign of the Respondents. After waiting for some 40 minutes, the Tribunal decided that the start of the hearing should not be delayed any further. No reason for the non-attendance having been communicated to the Tribunal, it was decided to proceed with the hearing in the absence of the Respondents.

11. The Tribunal heard oral evidence from the Claimant assisted by an interpreter, Mr V. Kusners. The Claimant confirmed that the contents of his Claim Form, his Particulars of Claim and his witness statement dated the 7<sup>th</sup> September 2018 were true. He stated that he had been engaged by Mr Paul Taylor, to whom the Claimant referred as "the boss". He stated that Paul Taylor agreed to pay him at the rate of £10 per hour as a car mechanic at his garage premises at 2 Pegham Close, Laveys Lane, Fareham. Mr Taylor also assisted the Claimant with accommodation by providing him with a caravan in which he could live until he could afford a house. The caravan was located close to the garage. The Claimant said he was happy to get the job. He said that he signed an employment contract when he started work for Paul Taylor but he was never given a copy of the contract. He stated that when he started working for Paul Taylor, he was asked to provide Mr Taylor with his National Insurance number and his bank account details. The Claimant believed that Mr Taylor was paying the Claimant's income tax on a PAYE basis and his National Insurance contributions. The Claimant disagreed with the contention that he was self-employed. He believed himself to be employed by Paul Taylor.
12. The Claimant worked full time in Mr Taylor's garage. He was paid on a monthly basis. He had to "clock in" and "clock out" every day that he worked. Mr Taylor controlled the hours that the Claimant worked and threatened that if the Claimant was 5 minutes late, Mr Taylor would not pay him for the first 30 minutes of work. The Claimant's working day in Mr Taylor's garage normally started at 7.30am and he regularly worked until 7pm and sometimes later. Mr Taylor told the Claimant that he was "the boss" and that he was always right. He controlled what the Claimant did at work. The Claimant threatened on two occasions to resign and the response from Mr Taylor was that he would have to give written notice to resign.
13. The Claimant took holidays from the 21<sup>st</sup> May to the 24<sup>th</sup> May 2017 and from the 5<sup>th</sup> July to the 12<sup>th</sup> July 2017. He asked Mr Taylor if he could take further holidays from the 19<sup>th</sup> September to the 26<sup>th</sup> September but that request was refused by Mr Taylor. The Claimant was informed by Mr Taylor that his holiday entitlement was 1 month per year and that he had used up his entitlement.
14. The last pay that the Claimant received from Mr Taylor was on the 28<sup>th</sup> August 2017, which covered the period up to the 13<sup>th</sup> August 2017. The Claimant described an unusual system of payment on the part of Mr Taylor. It was Mr Taylor's practice to present the Claimant with what appeared to be an invoice from the Claimant (see, for example, page 38 in the hearing bundle prepared by the Claimant). The Claimant would be asked to sign the purported invoice, which he did, and he would then be paid.

15. The Claimant worked for Mr Taylor continuously from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017. He worked six days a week, from Monday to Saturday, often finishing at 7pm and sometimes later. His evidence was that he worked 528 hours over that period, which consisted of 56 working days. He was not paid by Mr Taylor for the work that he did during that period. The Claimant's last day of work for Mr Taylor was on the 17<sup>th</sup> October 2017. He stopped work because he was not being paid by Mr Taylor. On the following day, the 18<sup>th</sup> October 2017, the Claimant went into work to speak to Mr Taylor about his unpaid wages and was told by Mr Taylor to pack his things and that he would not be paid. No reason was given by Mr Taylor for his refusal to pay the Claimant.
16. Having heard the unchallenged evidence from the Claimant, the Tribunal made the following findings of fact:
  - 16.1 The Claimant was engaged to work as a car mechanic by Mr Paul Taylor in the garage operated by Mr Taylor at 2 Pegham Close, Laveys Lane, Fareham.
  - 16.2 Mr Paul Taylor is the sole director of the First Respondent.
  - 16.3 The Claimant started work for Mr Taylor on the 7<sup>th</sup> April 2017 and stopped working for him on the 17<sup>th</sup> October 2017.
  - 16.4 From the 7<sup>th</sup> April 2017 to the 17<sup>th</sup> October 2017, the Claimant worked solely for Mr Taylor's business. He worked long hours from 7.30am to 7pm and sometimes later. He worked 6 days a week with a day off on Sunday. Mr Taylor controlled the work that the Claimant did and he also controlled the Claimant's hours of work. Mr Taylor also provided the Claimant with a caravan close to the garage in which he could live. The Claimant regarded Mr Taylor as his employer and referred to him as "the boss".
  - 16.5 The Claimant signed an employment contract when he started working for Mr Taylor's business but he was never given a copy of the contract.
  - 16.6 Mr Taylor paid the Claimant for his work at the rate of £10 per hour.
  - 16.7 The Claimant was required to "clock in" and "clock out" so that Mr Taylor could keep a close eye on the Claimant's working time. If the Claimant was late arriving at work, his pay would be reduced.
  - 16.8 Mr Taylor controlled the time off that the Claimant could take from his work.
  - 16.9 Mr Taylor paid the Claimant on a monthly basis. He presented the Claimant with a document that purported to be an invoice from the Claimant to the Second Respondent. Mr Taylor created the invoices, presented them to the Claimant at the end of the month and requested that they be signed by the Claimant. The Claimant complied with that request and was duly paid by Mr Taylor. He was paid directly into his

bank account. He assumed that Mr Taylor was deducting the appropriate income tax and National Insurance contributions.

- 16.10 The Claimant's last pay from Mr Taylor was for a period ending on the 13<sup>th</sup> August 2017. The Claimant resigned on the 17<sup>th</sup> October 2017 because he had not been paid by Mr Taylor for work done since the 13<sup>th</sup> August 2017. His wages were unpaid from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017.
- 16.11 The Claimant's normal shifts of work for Mr Taylor's business lasted, on the balance of probability, for approximately 11½ hours (from 7am to 7.30pm). The Claimant was unpaid for 56 days of work over the period from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017.
- 16.12 No reason was given by Mr Taylor as to why the Claimant was unpaid over the period from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017.
17. There were two main issues in the case for the Tribunal to decide. The first question was whether the Claimant was employed by the First or Second Respondent or whether he was self-employed as contended by the Respondents in their Responses before they were struck out. The second question is whether the Claimant was owed wages at the time when he resigned on the 17<sup>th</sup> October 2017 and, if so, the amount of those wages.
18. When considering whether a person is an employee or not, the generally accepted starting point is the judgment of Mr Justice McKenna in the case of *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2QB 497 where he said:
- "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 ...".**
19. Since the judgment in *Ready Mixed Concrete*, the issue of "control" has shifted away from being the dominant test to being a factor to be considered when determining whether an individual is an employee or not. Also to be considered are issues of the organisation of the work, the individual's position in the enterprise and the economic realities of the arrangement. The modern approach tends to be to weight up all the factors (hence the expression the 'multiple test'). There may also be some assistance to be derived from how the parties themselves characterise the relationship though, ultimately, it is an objective test that the Tribunal is to adopt..

20. There are numerous authorities on the question of the employment status of an individual and on the different factors to be considered. The following authorities are particularly important and were born in mind by the Tribunal: *Lee v. Chung and Shun Shing Construction and Engineering Co. Ltd* [1990] IRLR 236, *Hall (Inspector of Taxes) v. Lorimer* [1994] IRLR 171, *Alstom Transport v. Tilson* UKEAT/0358/09, *Autoclenz Ltd v. Belcher* [2011] UKSC 41 and *Pimlico Plumbers Ltd v. Smith* [2017] EWCA Civ 51.
21. In the judgment of the Tribunal, the evidence showed that the Claimant was employed by the First Respondent under a contract of service. In deciding the point, the Tribunal took a broad approach given the obvious inequality of bargaining power between Mr Taylor and the Claimant and the fact that Mr Taylor was responsible for drafting all contract of employment and the purported invoices that he wanted the Claimant to sign at the end of each month. The contract of employment was never given to the Claimant but Mr Taylor ensured that the Claimant received the purported invoices that he created. Looking at the reality of the relationship, as revealed by the unchallenged evidence from the Claimant, the true agreement between the parties was that the Claimant was an employee of the First Respondent. Mr Taylor's attempts to portray the Claimant as an independent contractor was nothing more than a sham in the judgment of the Tribunal. In the judgment of the Tribunal, there was mutuality of obligation between the Claimant and the First Respondent. There was an obligation on the part of the First Respondent to provide the Claimant with work and an obligation on the part of the Claimant to do the work. The notion that the Claimant was providing his services to the one or other of the Respondents as a person in business on his own account was rejected by the Tribunal. The Claimant worked long hours for the First Respondent and lived in a caravan close provided to him by the First Respondent that was close to the First Respondent's premises. His hours of work were controlled and policed by the First Respondent, as was the work that he did as a car mechanic in the First Respondent's garage. For those reasons, the Tribunal was satisfied that the Claimant was the employee of the First Respondent.
22. The Tribunal considered whether the Claimant was an employee of Mr Paul Taylor, as opposed to the First Respondent, but the Tribunal was satisfied, on the balance of probability, that the Claimant was employed by the corporate guise under which Mr Taylor traded.
23. Having found that the Claimant was an employee of the First Respondent, the Claimant's claim against the Second Respondent was dismissed.
24. The next question was whether the Claimant was owed wages when he stopped working for the First Respondent on the 17<sup>th</sup> October 2017 and, if so, the amount of those wages. The Tribunal found that the Claimant was unpaid by the First Respondent for the period from the 14<sup>th</sup> August 2017 to the 17<sup>th</sup> October 2017. In respect of that period, the Claimant contended that he had worked 528 hours at a rate of £10 per hour. His claim, therefore, was for the sum of £5,280.00.



25. Given the Tribunal's findings of fact in respect of the Claimant's normal hours of work, the Tribunal suspected that the amount of hours of unpaid work over the relevant period was probably lower than the amount of hours that had actually been worked by the Claimant. The Tribunal nevertheless accepted the Claimant's evidence that he had worked for 528 hours over the relevant period (equivalent to approximately 9½ hours per day over the relevant period) and that he had not been paid for those hours of work. He is therefore entitled to the sum of £5,280.00 (gross) from the First Respondent in respect of unpaid wages.
26. The Tribunal having made an award to the Claimant in respect of unpaid wages and having found that when these proceedings were commenced the First Respondent was in breach of its duty to the Claimant to provide him with a written statement of the particulars of his employment, the First Respondent shall pay to the Claimant the sum of £1,956.00 representing four weeks' pay capped at £489.00 per week. The reasons are as follows.
27. The duty to provide the Claimant with a copy of the terms and conditions of his contract of employment is set out in section 1 of the Employment Rights Act 1996. Section 38 of the Employment Act (which applies to these proceedings) provides as follows:
- (3) If in the case of proceedings to which this section applies-**
    - (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and**
    - (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) ... of the Employment Rights Act 1996 ...****the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
  - (4) In subsections (2) and (3)-**
    - (a) references to the minimum amount are to an amount equal to two weeks' pay, and**
    - (b) references to the higher amount are to an amount equal to four weeks' pay.**
  - (5) The duty under subsection ... (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.**
28. For the purposes of these proceedings, the 'higher amount' is capped under section 227 of the Employment Rights Act 1996 at £489.00.
29. The Tribunal was satisfied that it was just and equitable to increase the award to the Claimant by the higher amount (namely, 4 weeks' pay). Its reasons for taking that approach were as follows. The Claimant was asked to sign a contract of employment by Mr Taylor when he started work in Mr Taylor's organisation in April 2017. There was nothing to stop Mr Taylor providing the Claimant with a copy of his contract of employment at that stage or at any time thereafter.

Instead, however, Mr Taylor decided not to provide a copy of the Claimant's contract of employment to him and then took steps, by creating the purported invoices for the Claimant to sign, to portray the Claimant as an independent contractor.

30. Against that background it was just and equitable to increase the Claimant's award by the higher amount. The Tribunal was also satisfied that there were no exceptional circumstances that would make the award under section 38 of the Employment Act 2002 unjust or inequitable.
31. Accordingly, there shall be judgment for the Claimant against the First Respondent in the sum of £7,236.00, comprising:-
  - (a) the sum of £5,280.00 (gross) in respect of unpaid wages; and
  - (b) the sum of £1,956.00 (4 weeks' pay capped at £489 per week) pursuant to section 38(3) of the Employment Act 2002.

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**Employment Judge David Harris**

Dated: 28<sup>th</sup> March 2019