EMPLOYMENT TRIBUNALS

Claimant: **Mr A Tavahdi Kashi**

Respondent: **Optimal Engineering Design Limited**

Heard at: **Bristol** **On: 21 March 2019**

Before: **Employment Judge Mulvaney**

Representation
Claimant: In Person
Respondent: Mr M Foster

JUDGMENT having been sent to the parties on 22 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim dated 28 September 2018, the claimant brought claims of unlawful deduction from wages and for breach of contract against the respondent.

2. The respondent is a limited company, Optimal Engineering Design Limited, a company that the claimant contended he worked for either as an employee or a worker between April 2016 and July 2018.

3. I heard evidence from the claimant and from Dr Alaghar, the managing director of the respondent company. A witness statement was provided for Patricia

Glanville, payroll manager of the respondent's accountants but Ms Glanville did not attend to give evidence. In view of her non-attendance, this impacted on the weight that I attached to her evidence. The respondent, at the end of the proceedings, referred to another witness statement for Dr Alizadeh. However Dr Alizadeh's statement was not included in the Tribunal's papers and was not referred to in the course of the evidence so did not form part of the evidence considered by the Tribunal.

4. At the hearing, the respondent raised as a preliminary issue whether the Tribunal had jurisdiction to hear the claim, contending that it had been presented outside the three month time limit stipulated for complaints under s 123 ERA 1996 and for Breach of Contract claims brought under the Extension of Jurisdiction Order 1994. Although this had not been raised prior to the hearing, it was a jurisdictional issue and as such had to be considered by the Tribunal.

5. The issues that had to be determined by the Tribunal were as follows:

   5.1. Whether the claimant's complaints under the Employment Rights Act 1996 (ERA) and under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (ETEJO) had been brought within the requisite time limit;
   5.2. If so, whether the claimant was a worker or an employee. Complaints under s 13 ERA can only be brought by persons who have the status of workers or employees. Complaints under s4 ETEJO can only be brought by persons who have the status of employees.

6. The parties supplied witness statements and bundles of documents to which they referred in the course of their evidence. Supplementary documentation was presented by both parties at the start of the proceedings and was admitted by the Tribunal.

The Tribunal made following findings of fact:

7. The claimant's relationship with the respondent began in June 2016 when he met with Dr Alaghar and Dr Alizadeh and the three individuals agreed to collaborate with a view to securing contract for aerospace engineering projects in Iran as it appeared that sanctions against that country were being lifted. There was no evidence given of the claimant being recruited by the respondent and there was no letter of appointment or other document evidencing the relationship between the parties at this stage.

8. Following the meeting in June, the claimant began working on an occasional and part time basis in pursuit of the aims agreed at the meeting. There was no written agreement between the parties at that time. The claimant's evidence was that there was a general agreement that he would be paid for hours worked. The claimant said that Dr Alaghar subsequently agreed a figure for the claimant's pay of £30 per hour. Dr Alaghar's evidence was that it was agreed by the three

individuals that no one would be paid until after a contract had been won and until payment was received from a client. He said that the parties agreed to work collaboratively on seeking contracts in Iran, that each person would work towards that end and that their reward would come once a project or a contract was achieved. They would work under the umbrella of Dr Alaghar's company, the respondent, which would cover some expenses (for example flights to Iran) as a loan against future income from any project.

9. I did not accept the claimant's evidence that Dr Alaghar had agreed to pay the claimant for hours worked or that the sum of £30 per hour had been agreed at this time. The reasons that I preferred Dr Alaghar's evidence on this point were that the claimant did not ask for payment for work done and he had no record of this agreement having been made. He nevertheless continued to carry out work in furtherance of the agreed aims during 2016 and into early 2016. I found that he accepted the risk that he would not receive payment for work done if no contract was achieved.

10. I accepted Dr Alaghar's evidence of the arrangement that existed in 2016 to early 2017 as the actions of the parties were consistent with this arrangement. The claimant did not seek payment and did occasional part time work to further the enterprise that had been embarked upon. In addition, the claimant in correspondence that he had written to Dr Alaghar when they were discussing formalising the arrangement, did not indicate that he had a different understanding of the arrangement that existed prior to the agreement signed on the 9 May 2017.

11. The claimant relied on the fact that the company had paid for a flight to Iran for the claimant in November 2016 and that he had received assistance from Dr Alaghar in relation to a visa application in September 2016. However, I found neither of these facts on their own to constituted evidence of a worker or employee relationship between the respondent and the claimant.

12. It was the claimant's evidence that in early 2017 he sought payment from Dr Alaghar and that he provided details to Dr Alaghar of his working hours. He said that he did this by email to Dr Alaghar. However, he had not disclosed that email in these proceedings even though he said that he had it in his possession. There was therefore no evidence of it. If it had existed, it was a key document in the case. Dr Alaghar said that he had not seen that email. I did not accept that such an email had been sent, although I did accept that the claimant had asked Dr Alalghar to provide him with a sample time sheet so that he could record his hours and this was provided to him in early 2017. The email from Dr Alagahar to the claimant to which the sample time sheet was attached was dated 8 January 2017 and it made no mention of the claimant having made a claim for payment from the respondent.

13. In April 2017 the claimant and Dr Alaghar entered into discussions about a written agreement to evidence the collaboration arrangement and to agree the working and reward arrangements going forward. Some lengthy discussions took place between the claimant and Dr Alaghar some of which were digitally recorded. Unfortunately, there was no agreed complete transcript of those

recorded discussions and there was a dispute between the parties as to the correct translation of the recordings and so I have not based any findings on the disputed extracts.

14. On the 9 May 2017 Dr Alaghar and the claimant signed an agreement headed 'Agreement for Profit Taking Partnership'. This agreement was included in the bundle at pC7. The document makes no reference to an employee or employer relationship and I find its contents entirely consistent with those of a profit sharing partnership agreement. The agreement allows for payment of the partners for a particular engineering project or contract by reference to an hourly rate for hours worked and by profit share thereafter. The hourly rate of £30 was recorded at the end of the document. There was no reference in the agreement to payment to an individual save where the payment related to and/or derived from income received from a particular engineering project/contract.

15. The claimant contended that the agreement indicated that the £30 hourly rate applied to the work that he was doing from the commencement of that agreement from early 2017 onwards. As the claimant acknowledged that no project or contract had been achieved at that time, I did not accept that this understanding was consistent with the wording of the document.

16. In the event the claimant did not seek payment for the work that he did after this agreement was signed. His evidence was that he worked full time for the enterprise at that time in accordance with the terms of the contract. However, the time sheets that he relied upon and which were included in the bundle indicated that he only worked an average of 10 hours per week. The claimant did not explain why he claimed to be working full time when in fact he was only working the hours shown on his time sheets.

17. The claimant's evidence was that despite his contention that he should have been being paid, he agreed not to seek payment until the business achieved a contract and had funds available in order to show flexibility. There was no written evidence to substantiate the claimant's explanation for not seeking payment and I found tha the accepted the risk of the collaboration that if no contract or project was achieved, he would not be paid for work done. The claimant accepted that no contract or project had been achieved the relationship with the respondent came to an end in July 2018. I found that the claimant's actions in not seeking payment were consistent with the wording of the document he signed, i.e. that payment would only be made on a particular contract once a contract had been entered into and payment received.

18. In February 2018 the claimant ceased to work regularly for the enterprise and his claim for payment did not extend beyond 6 February 2018. In July 2018 Dr Alaghar told the claimant that he did not wish to continue the partnership with him and the relationship came to an end. The claimant then sought payment for 464 hours between 2016 and 6 February 2018 at £30 per hour amounting to £13,920.

19. During the period of time that the claimant worked for the enterprise, he worked from his own home using his own pc and mobile phone. He decided himself on

the number of hours that he would work and when he should do them. There was agreement between him and Dr Alaghar as to what he should do and some element of reporting back on work he had done. I did not find that this amounted to any sort of supervision or control but was more consistent with collaboration between partners. The claimant's evidence was that he did not take holiday or any sickness absence but, in his evidence, he did not suggest that there was any arrangement for such absences. The respondent's office was Dr Alaghar's home and so there was limited scope for becoming incorporated into the business.

Conclusions

20. In reaching my conclusions I considered all the evidence that I heard and the documents to which I was referred and considered relevant. I also had regard to the submissions of the parties.

21. I considered first the jurisdiction point. S 23(2) ERA provides that a complaint of unlawful deductions from wages must be brought within 3 months beginning with the date of payment of wages from which the deduction was made. Complaints under s 13 ERA which sets out the right not to suffer unauthorised deductions can be brought by both a worker and an employee.

22. The claimant confirmed at the hearing that his complaint of unlawful deductions was limited to the period up to the 6 February 2018 as shown in his time sheets. The claimant's claim was not presented until the 28 September 2018 and the claim was therefore significantly out of time even allowing for any extension under the Early Conciliation Procedures. The claimant provided no explanation for the delay in submission of his claim and in the light of the fact that he was corresponding with Dr Alaghar during that period, I am not satisfied that it was not reasonably practicable for the complaint to have been presented in time.

23. I concluded that the complaint of unlawful deduction from wages was submitted out of time and it was dismissed, the Tribunal having no jurisdiction to hear it.

24. I then considered whether the claimant had a complaint of breach of contract under the Extension of Jurisdiction provisions. Such complaints can only be brought by employees for claims that arise out of or are outstanding on the termination of employment. (Article 3(c)). It would appear that such a claim, if established, would be within the three month time limit based on the end date of the relationship; it having ended in July 2018.

25. The definition of employee is set out at s 230(1) ERA and provides that an employee is an individual who has entered into and works under a contract of employment. S30(2) ERA provides that a contract of employment means a contract of service or apprenticeship whether express or implied and if express whether oral or in writing.

26. I considered on the facts found whether the claimant had established that he was an employee of the respondent on the basis of the above definition and I concluded that he had not.

27. Prior to the agreement signed on the 9 May 2017, there was no evidence of any contract existing between the claimant and the respondent. The claimant did some work in pursuit of a joint enterprise but there was no evidence that this was at the direction of or under the control of the respondent. There was no agreement as to payment for work done, the claimant apparently accepting that payment would be made only if and when a contract or project was achieved, a risk he accepted.

28. The contractual agreement which evidenced the relationship between the claimant and the respondent from the 9 May 2017 onwards was the document at C7 which was entitled Agreement for a Profit Taking Partnership. There was no other written agreement between the parties. That agreement had been the subject of lengthy discussion between the claimant and Dr Alaghar rior to signature and was agreed and signed after those discussions took place. The actions of the parties subsequent to concluding that agreement were consistent with its terms. No payment was made to the claimant for work done by him subsequent to that date as no payment was due to him prior to a contract or project being secured and no contract or project was achieved prior to the end of the arrangement.

29. In respect of the tests that are applied to determine whether there might have been an employment relationship notwithstanding there being either no express employment contract or an agreement to the contrary I did not find, applying the relevant tests that there was any indication of an employment relationship. There was no mutuality of obligation. There was no obligation on the claimant to provide work and no obligation on the respondent to pay for work done. The claimant accepted the risk that he might carry out work for which he would receive no benefit if no contract was achieved. There was no control by the respondent over the claimant's work. He carried it out in his own time and although there was some measure of agreement as to how the work might be done this was more consistent with collaboration between the parties than control by the respondent. The claimant worked from home using his own equipment. There were no arrangements for holiday or sickness absence, no disciplinary or other procedures that applied.

30. I concluded that the arrangement between the parties was as set out in the Partnership Agreement. Although the claimant may have misunderstood its provisions and although he may now consider it to have been unfair, it was I found nevertheless the basis of the working relationship between him and the respondent. This was not a relationship of employer and employee and as such the claimant's claim for breach of contract under the Extension of Jurisdiction provisions does not succeed and is dismissed.

31. After I had given judgment dismissing the claims, the respondent made an application for costs contending that the claimant had brought a claim which had no reasonable prospect of success. I concluded that in the light of there having been a number of recent developments in the law concerning the status of workers and employees, it was not necessarily apparent that the claim had no reasonable prospect of success. The respondent had given costs warnings to the claimant in correspondence but had only referred to the question of whether the claimant was an employee and not to the question of whether he was a worker. The respondent did not rely on the out of time point in relation to the unlawful deduction claim (a claim which can be brought by a worker) and had not raised that issue until the day of the hearing. I concluded that in the circumstances I would make no costs award against the claimant.

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Employment Judge Mulvaney

Date: 4th April 2019