Case No: 3304672/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr Stucky

Respondent: A&S Appliance Servicing Limited

HEARD AT: Cambridge: 14 February 2019

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Stephanie Ulph (lay representative)
For the Respondent: Mr S Johnson (director and owner)

RESERVED JUDGMENT

1. By consent, the name of the respondent is amended to A&S Appliance Servicing Ltd.

2. At all material times, the claimant was a worker for the purposes of the Working Time Regulations 1998 ("WTR").

3. The claimant's complaints that:

    a. he was entitled to, and not paid, holiday pay in respect of his work for the respondent during the period 10 March 2017 to 26 January 2018; and
    b. the respondent has made unlawful deductions for his wages

    are well founded.

4. The respondent is ordered to pay the claimant the sum of **£1,413.46** as compensation pursuant to Reg 30(3)(b) of WTR.

5. The respondent is ordered to pay the claimant the sum of **£300** pursuant to s.24(1)(a) of the Employment Rights Act 1996 ("ERA").

6. The claimant's claim for unpaid notice pay is dismissed upon withdrawal.

REASONS

BACKGROUND

1. The claimant worked for the respondent company from 10 March 2017 until 26 January 2018. By a claim form presented to the tribunal on 2 April 2018, and following compliance with the EC procedure, he asserted that he was a worker entitled to holiday pay in respect of that period of work. In the response, it is asserted that the claimant was self-employed, and therefore not entitled to any holiday pay.

2. The claimant had a colleague, Mr McDonnell, who worked doing the same job for most of the same period of time, and who also brought a claim (No 3304101/2018) asserting that he was due unpaid holiday monies. That claim was also defended on the basis that Mr McDonnell was not a worker.

HEARING

3. The parties agreed that the claim, and Mr McDonnell's claim, ought to be heard together today.

4. I heard oral evidence from the claimant (represented by his partner, Stephanie Ulph), as well as Mr McDonnell. On behalf of the respondent I heard from Mr Johnson, who is director of the company.

5. It first seemed we would not be able to proceed with a substantive hearing. This was because none of the parties had received directions for preparation prior to today's hearing. They had not therefore exchanged either documents or witness statements. Neither Mr Johnson, the claimant nor Mr McDonnell had even drafted a statement of their own. No joint bundle had been prepared. Moreover, they did not even have extra copies of the documents they had brought with them to tribunal.

6. However, the parties were provided with an opportunity to look over and consider each other's' documentation, and to put together a short witness statement. They were also -despite their 'professional differences'- able to approach the hearing in a constructive and pragmatic way. As a result, following a short adjournment, it was possible to proceed with hearing the evidence, which was the parties' preference. Mr Johnson has now moved to Spain, and the claimant and his partner have moved some distance from Cambridge, to the West Country. Hence a relisting would have been logistically difficult for all concerned.

ISSUES

7. The parties (and, in respect of his case, Mr McDonnell) helpfully narrowed the issues, in that the figures regarding hours worked per week, money paid, and time off work were all agreed. It was also agreed as follows:
    a. The name of the respondent ought to be amended as above.
    b. There was no material difference, as regards worker status, in the facts of the claimant's and Mr McDonnell's respective cases. So, if Mr McDonnell was a worker for the purposes of the WTR, so too was the claimant (and conversely, if he was not, neither was the claimant).
    c. The claimant did not seek to argue today for the purposes of his claim that he was an employee (as opposed to a worker) of the respondent. Nor did he advance a statutory claim for unpaid notice (for which he would need to be an employee- see s.86 of ERA). That part of his claim was therefore dismissed on withdrawal.

FACTUAL FINDINGS

8. The respondent is in the business of providing service engineers in respect of maintenance of the various white goods. Most of its work comes via a contract with Curry's. The respondent uses somewhere between 5 and 10 maintenance engineers, depending on demand.

9. Mr Stucky had no written contract. He was told by Mr Johnson he would be guaranteed five days' work per week, at £400 a week. This work paid £10 per hour. He was trained up by the respondent at the start of his work. He was given work to do week to week via a diary which was filled in by the respondent's administrative staff. The respondent provided him with all the tools he needed, as well as a van. He was free to use his own tools as well, but he relied on the respondent for major items such as the dip tank which was used on the job to remove limescale etc. from some white goods. He was required to wear a company uniform. In fact, the logo on that uniform was not the company's name but "A&S Complete Cleaning Solutions" (which was Mr Johnson's trading name for related private work).

10. Sometimes he was paid by "A&S Complete Cleaning Solutions" for his work for the respondent. However, the parties agreed that this made no material difference to the single relevant contracting party i.e. the respondent.

11. He was paid at the end of each week, after he had signed off an invoice which was prepared for him by the respondent. No tax or NIC deductions were made. The hours

he did per week varied. On average, he worked 37.5 hours p.w (i.e. £75 gross p.d.). He travelled to destinations such as Oxford, Birmingham, and Stevenage. Petrol for such journeys was paid for by the respondent. If he had work booked in, he could not have the day off. He never asked anyone else to do the work for him in respect of shifts he had been allocated. In fact, he would not have been able to provide a substitute worker in the event that he had been already diarised to do any specific work. However, he was at liberty, *before* having been booked to do work for a particular day or week, to say he would not be available for such time. As a result, there were 9 weeks when he did not attend work by choice between 10 March 2017 and 26 January 2018 (46 weeks). He only worked for the respondent throughout that period. And in fact, he was subject to various restrictions which purported to bar him from competing with the respondent.

12. He was given training by the respondent in use of the dip tank, because the respondent did not want (as Mr Johnson put it) to use "any Joe Bloggs" for it. Though unsupervised when at a customer site, he was told by the respondent where to go and what to do each day. He was not paid in respect of the days when he did not work.

13. He was expected to pay his own tax on the money he earned. He said (and I accept) he only recently became aware he might be a worker (or employee).

14. The respondent did not pay the claimant the sum of £300 (gross) in respect of the last days the claimant worked and which were due to him. The respondent said it had held this money back in respect of "mess" (mostly, lurcher dog hair) which Mr Stucky had left in the company van- albeit Mr Johnson conceded that the cleaning of the van (which the claimant had not had a chance to carry out before the respondent reclaimed it) would have cost no more than about £60-£70.

15. Mr Johnson said that the respondent had incurred the cost of replacing the claimant with someone else, too. (It appears that the claimant's work at the respondent came to an abrupt halt in the context of an altercation between the claimant and Mr Johnson. So, Mr Stucky would say that any 'abrupt halt' was of Mr Johnson's doing.) However, Mr Johnson candidly accepted that he had no detail or proof of any such loss (which I suspect would have been hard out make out in any event).

16. There was no provision in accordance with Part II of ERA which enabled the respondent to withhold wages or offset monies owed by Mr Stucky (and the respondent has not brought a contract claim in the context of these tribunal proceedings).

THE LAW

17. Pursuant to Reg 2 of WTR, "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.

18. The following principles are of assistance in determining who is a "worker" for WTR purposes:
    a. Whereas the term 'employee' is restricted to a person under a contract of employment (thus excluding not only the self-employed, but also anyone who fails to establish the necessary contract of employment), the term 'worker' is designed to be more inclusive, covering potentially the ambiguous middle ground and only excluding those who are clearly self-employed.
    b. It is useful to consider the dominant purpose of the relationship. If the dominant feature of the arrangement was that the person was to provide personal service then, even if the prerequisites of employment are missing, the person is likely to be a worker. See **James v. Redcats (Brands) Ltd** [2007] IRLR 296, EAT.
    c. Consideration of who is a worker involves the same sort of factors as are considered in deciding who is an employee, but with a boundary pushed further in the putative worker's favour. **Byrne Bros Ltd v. Baird** [2002] IRLR 96. So, factors such as subordination, control, tax position, the 'label' attached by the parties, assignment of risk, payment method, source of equipment, provision of uniform, restrictions on competition; treatment of expenses, work patterns and hours etc are all part of the relevant factual matrix.
    d. The correct test is whether the contract provides the services to be rendered by an independent contractor, or whether the service provider consents to work under control of another, and is therefore a worker. **Jivraj v. Haswani** [2011] ICR 1004, SC.
    e. Where a genuine right to substitution existence, there is no personal service and there cannot be worker status. **Community Dental Centres Ltd v. Sultan-Darmon** [2010] IRLR 1024..

f. Even if there are gaps during which the worker does not provide their services to the employer, this does not mean they are not workers when working. See for example **Addison Lee Limited v. Gascoigne** UKEAT/0289/17. There, during the period when the drivers were logged on to the app, it was found that there was a contract with mutual obligations to work which had implicitly been offered and accepted.

g. **Pimlico Plumbers Ltd v Smith** [2018] ICR 1511 is another recent case in which 'worker' status was considered. There, the company used as its workforce 125 'contractors', including the claimant. They wore its uniforms, drove its marked vans and were represented to customers as its workforce. They were directed to customers by the company, who invoiced for the work. On the other hand, they were described in the agreement as self-employed, they had to look after all matters of their tax and NI, they provided their own tools and equipment, they were responsible for the quality of their work and had to be insured. The agreement stipulated a maximum working week over five days, but there was no obligation on either side to give or perform work; although there was some flexibility in who did what work, there was no formal substitution provision. Moreover, during his engagement the claimant considered himself to be self-employed, looked after his own tax affairs and registered for VAT. The tribunal held that he was a 'worker'. Such finding was upheld on the facts, on appeal to both the Court of Appeal and the Supreme Court. The work that was *in practice* expected of the claimant, the amount of *de facto* control exercised over him and the existence of a restraint of trade clause should the claimant leave were all considered to be material factors by the Court of Appeal.

h. See also **Addison Lee Ltd v Lange** UKEAT/0037/18 (14 November 2018, unreported). There, the standard contract went out of its way to deny employee or work status and it was the case that drivers could choose when to work. However, the evidence showed a generally high level of activity in practice, which was essential for the service to operate; moreover, the arrangement was that once drivers had logged on they had to have a good reason for refusing an offered assignment. The ET held that they came within worker status whenever the computer was turned on (and that there was in any event an overarching umbrella contract between them and the firm). The employer's appeal was rejected.

19. As regards wage deductions, the ERA only entitles an employer to deduct wages, in whole or in part, in the circumstances described at sections 13 and 14 ERA. Sections 15 and 16 of that Act also set out the very limited circumstances in which a worker

can be obliged to make payments to the employer. (There is no suggestion that any of those exceptions apply on the facts of this case).

APPLICATION TO THE FACTS

20. In my judgment, and applying the above principles to the instant facts, the claimant was clearly a worker for the respondent for WTR purposes, at least whilst he carried out his duties for the respondent. He had a contract personally to do work. The requisite level of subordination was present. He was told what to do and where to go. He was provided with the tools of the trade, a van, petrol and a uniform (and the fact that it was not emblazoned with the respondent's logo is, in my view, not damaging to his 'worker status'- perhaps all the less so given the nexus between the logo and the respondent). He was unable to avoid a shift, or provide a substitute, once he had been allocated work. He worked only for the respondent, in what was in effect a full time role. The limited factors potentially pointing away from worker status (e.g. parties' 'label', apparent absence of disciplinary/grievance policy) do not sufficiently counterbalance the numerous factors pointing to that status.

21. The WTR therefore entitle him as a worker to 28 days per year. He averaged 7.5 hours a day, thus £75 p.d. He was at the respondent for 46 weeks, but had 9 weeks hen he chose not to attend. So, 28 x 35/52 x £75 = £1,413.46.

22. Mr Johnson did not dispute that the claimant had done £300 worth of work in the last week before the relationship came to an end. For the reasons set out above, I do not think the respondent had any basis enabling it legitimately to withhold that money. It follows that Mr Stucky is entitled to it, pursuant to section 23 of ERA.

Employment Judge Michell, Cambridge

18.02.19

JUDGMENT SENT TO THE PARTIES ON

.....02.05.19.....

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FOR THE SECRETARY TO THE TRIBUNALS