



EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Claimant Mr Jan Gregorczyk

Respondent Bili Management (UK) Limited

HELD AT: London Central on 2 and 3 May 2019

Employment Judge: Mr J S Burns

Representation

Claimant: Mr P Soszynski (Consultant)

Respondent Mr K S Clair (Solicitor)

JUDGMENT

1. The claims for unfair dismissal, holiday pay, notice pay and arrear pay are dismissed.
2. To the extent necessary the Claimant is permitted to amend his claim to add a claim for reimbursement of expenses, and this claim succeeds in the sum of £353.46
3. The Claimant shall pay the Respondent £353.46 costs for breach of the pre-trial directions.
4. The sums in the previous two paragraphs extinguish each other by set-off.

REASONS

1. This is a claim for unfair dismissal, notice pay, holiday pay, arrear pay and repayment of expenses.
2. The Claimant failed to comply with the pre-trial directions (see reasons for costs application below). I dismissed an application by the Respondent to strike out the claims because it was still possible to have a fair trial, as fairly conceded by Mr Clair. I dismissed an application first notified on 30/4/19 by the Claimant for witness summonses, as the application was made too late and I did not think the witnesses would greatly assist in any event, (because these witnesses were sought to establish the work-pattern of the Claimant, which pattern the Claimant was able to prove through his own evidence and which in the event was not a matter of dispute in any event)

3. I heard evidence from the Claimant and then from Mr Maxim Shvedov, who is the Estate Manager employed by the Respondent, and then from Mr P Soszynski, the Claimant's Tax adviser who was also representing the Claimant in the tribunal proceedings on a contingency-fee basis. I called the latter to give evidence because he claims to be a registered tax adviser who had acted for the Claimant in relation to his tax affairs since 2015 at the latest and I wished for clarification about how the Claimant had managed his tax affairs.
4. The documents were in two bundles namely a trial bundle held together by white string and running to 88 pages compiled by Mr P Soszynski and a bundle of 15 pages produced by Mr Clair. During the hearing the following additional documents were handed in : (i) copy bank transactions on Claimant's account 13190609 (copy on tribunal file marked "A"), Claimant's wife's company expenses "B"; Claimant's wife's company bank transactions "C"; mitigation bundle "D"; summary receipts on Claimant's bank account 1/6/18 to 1/5/18 "E"; supplementary bundle in plastic folder handed in by Respondent "F"; universal credit documents "G"; copy Claimants amended tax return 2017 "H"; copy Claimants amended tax return 2018 "I"; manuscript statement of Mr P Soszynski "J". I was also shown, but not given copies of, time-sheets and invoices in a work file in the possession of Mr Shvedov.
5. The Claimant is Polish and gave evidence through an interpreter who assisted the Claimant throughout the hearing.
6. The Claimant worked for the Respondent from 21/7/2015 to 12/7/2018. After 12/7/18 he was not provided with any work and he was unpaid. He purported to resign on 28/9/2019 and claims constructive dismissal. The Respondent denies that the Claimant was an employee and says he was guilty of misconduct in relation to his failure to account for expenditure on a company bank card.
7. The Respondent is a Family-Office company servicing the needs of the Patarkatsishvili family which is group of relatives living in three different dwellings in London, but originating from Russia, Georgia and the Ukraine.
8. The Respondent maintains a pool of several chauffeurs (typically four or five at a time) who drive the various company cars. The Claimant was a member of this pool.
9. The Claimant signed a contract dated 3/11/2015 which was stated to have effect from 12/7/2015. The Claimant is Polish and does not read English easily or at all. The contract is written in English. The contract stated in clause 5.1 that the Claimant was self employed, and in clause 11.1 "*The relationship of the Driver to the Company...will be that of independent contractor and nothing in this agreement shall render him an employee...*" and in Schedule 1 (ii) "*In providing Services the Driver will be an independent self-employed contractor...*"
10. Before signing the contract was explained to him by a Polish woman, namely Uliana. She asked the Claimant if he was registered with HMRC as self-

employed and he confirmed that he was. He realised that he had to be registered as such to enter into the contract and work for the Respondent. He realised at the time that the contract described him as self-employed, and that he was to work and be treated as a self-employed person under it.

11. Other relevant terms of the written contract were as follows:
12. Under clause 5.1(b) he was not permitted to subcontract the services to any person. He had to provide the services personally.
13. In clause 4.1 he was obliged to *devote such of his time attention and skill as may be necessary for the proper performance of his obligations*. His obligations were set out in Schedule 1 (i) *“To provide chauffeur services to the Patarkatsishvili family, their immediate relatives and to employees, consultants and executives of the Company, where necessary”*
14. In clause 7.2 the Respondent agreed to pay him £150 per shift. After late 2017 the pay rate went up to £165 per shift. A shift was a period of work of up to 12 hours. If the work exceeded that he would be paid overtime. In addition he was paid £15 per day for food and £200 per year as a clothing allowance. At Christmas he would get a bonus. The last such bonus at Christmas 2017 was £4000. He was paid gross of tax and national insurance contributions. He submitted time sheets every week and was paid monthly. The Claimant would be paid up to 7 days sick leave and 21 days holiday pay per year.
15. The Claimant was given custody and possession of a car owned by the Respondent and provided to him in order for him to do his work for the Respondent. He was responsible for keeping that car supplied with fuel and kept clean.
16. He was given a bank card for an account in the Respondent's name in order to make purchases for the car or family members. He attended work in a business suit for which he was paid a clothing-allowance.
17. He usually worked Monday to Friday from 7.30 am to about 5.30 or 6 pm. The hours and shift times would vary from day to day. Sometimes he would also work over weekends. The work pattern was similar to that of a regular full-time job.
18. During his work he would either drive members of the family around, or wait for further duties sitting in the car outside their homes. He would eat his lunch in the car. If he needed to use a lavatory he would go to MacDonalDs. Sometimes he would go into the family homes, but only when he was required to carry in shopping or other family purchases. Sometimes the family members would send him detailed shopping lists and similar instructions requiring him to go shopping on their behalf. This type of duty would be directed by the family members. About 95% of his work for the Respondent was work for one branch of the family, headed by Mrs Zhmotova. Occasionally he would work for another branch.

19. The family would take extended holidays in Cannes. The Claimant and other drivers would be flown down to Cannes and be put up by the Respondent in a hotel. When in Cannes he would carry on his work for the family who were taking their holidays in a villa nearby, and after the holiday drive the car back to London.
20. I find that there was no guarantee as to the number of shifts the Claimant would be provided with, and if he was not provided with a shift he would not be paid, (apart from the limited holiday pay).
21. In practice the Claimant decided when he would work by liaising with the other drivers in the pool as to which shifts he and the other drivers would work. Another of the drivers (namely Dariusz Lakomski who worked on the same terms as the Claimant) acted as the rota-organiser. I find that the Claimant was able to decide whether and if so what shifts he wished to work and that he could not be compelled to work any shift.
22. Equally, I find that the Respondent was not obliged to provide any minimum amount of work. In practice the work was usually regular and abundant, but if, for example, the family decided to go on holiday to a destination where they did not need the Claimant, for example Georgia or the USA, he would not be given work and not paid, nor would he expect to be. On those occasions he would be told perhaps one or two days in advance, or perhaps just when he was driving the family to the airport, that he would not be required for a while. These periods would be on average between 6 or 8 weeks a year.
23. The Claimant would be paid 21 days holiday pay but the remainder of the periods when the Claimant was not working was unpaid. This happened fairly regularly, typically during school-holidays.
24. The Claimant's earnings from the Respondent varied between about £3800 and £4500 per month. I was given the exact figures by Mr Shvedov from his file. In the last 12 months of regular work ie from 1/7/ 2017 to 30/6/2018 the Claimant earned £57060 including the bonus gross of tax.
25. In context the words "*...where necessary*" in Schedule 1 (i) as quoted above meant when the Respondent, acting on the advice and instructions of the family members for whom the services were provided, deemed it necessary. This was a zero-hours contract in the sense that the Claimant had no guaranteed shifts.
26. His work status as described in his contract was well-understood by and suited the Claimant. Despite his evidence to the contrary, I find that he had previously worked and continued throughout his work for the Respondent to work on a self-employed basis not only for the Respondent but for other organisations such as Uber and for his wife's separate chauffeur company JG Executive Limited.
27. After entering into the contract with the Respondent, the Claimant submitted monthly invoices for his fees and was paid monthly in arrears without deduction of tax or NI contributions and he and Mr P Soszynski told me that the

Claimant made annual returns to HMRC on the basis that his income from the Respondent had been received by him from self-employment.

28. It was only in January 2019, six months after he had stopped working for the Respondent, and in the context of his pending Tribunal claim (in which he has sought to present himself as having been the employee of the Respondent) that he claims he instructed Mr P Soszynski to submit returns and amended returns to HMRC which suggest that had received the Respondent's payments as salary in the course of employment. These recent claimed returns which are undated but which I was told were submitted in January 2019 make the obviously and deliberately incorrect statement that the payments he had received from the Respondent had been paid to him net of tax.
29. I reject the Claimant's evidence that he raised his employment status with the Respondent at any stage prior to his email of 28/9/2018, by which time he had already taken advice from Mr P Soszynski, who was also acting by then as his employment consultant.
30. In Readymix v Min of Pensions 1968 1 AER 433 the three-fold test for determining employment status was established namely; 1) mutuality of obligation- ie to provide work and to perform it 2) control/direction by master over work 3) the other factors do not contraindicate
31. The terms of the written contract are not decisive. For example in the case Autoclenz Ltd v Belcher and ors, 2011 UKSC 41 the Supreme Court upheld the Court of Appeal's decision that car valets whose contracts stated that they were self-employed were actually employees. In so holding, the Court clarified that express contractual terms inconsistent with employment status may be disregarded where they do not reflect the parties' actual agreement. Employers cannot draft their way out of employment status if that does not accord with the reality of the case. Courts and tribunals have much greater scope to look behind the written terms of a contract to provide labour or services than the ordinary common law rules of contract would allow. This rightly acknowledges the inequality of bargaining power between employer and worker. However clear evidence of employee status – such as control, mutuality of obligation and personal performance – will be required before an express contractual term that negates employment status can be disregarded.
32. In the instant case of the relationship had several features which are often associated with employment, for example (i) when working the Claimant had to provide the services personally, (ii) was subject to the directions of the family members, (iii) his equipment – car – was provided by the Respondent, (iv) the Claimant did not have any capital at risk (v) he had a (fairly) regular work pattern and (vi) he was provided with a food allowance and holiday and sick pay and an annual bonus.
33. On the other hand, there was no provision for notice on termination, and the billing, payment and tax arrangements and the fact that the Claimant could and did have other self-employed work of the same type before and during his relationship with the Respondent, point in the other direction.

34. There are pointers each way but I have concluded that the decisive consideration operating against a finding of an employment relationship is that there was no mutuality of obligation. As recorded above, I find that the Respondent was not under any obligation to offer work to the Claimant, and nor was he obliged to accept any such work. Nor do I find that the necessary mutual legal obligations had arisen out of the course of dealing.
35. I do not find that the written agreement was a sham. On the contrary it reflected the reality of the parties' agreement. The Claimant was happy to enter into it and understood it at the time, and he operated it to his own satisfaction throughout. It was only after his relationship with the Respondent broke down that he has sought to portray matters in a different light.
36. For these reasons I do not accept that the Claimant was employed by the Respondent. Accordingly, the tribunal does not have jurisdiction over the unfair dismissal claim and it must be dismissed.
37. In case I am wrong about the above conclusion, I have gone on to consider what the outcome would have been had I decided that the Claimant was an employee.
38. The relationship got into difficulties because the Claimant failed to account for his expenditure on bank cards provided to him by the Respondent for the purposes of his work. He was provided with a bank card in November 2016 to make payments on matters such as fuel, car cleaning, and shopping for the family. He was not supposed to use it for his own or other purposes. Expenditure on the card was charged back to and paid by the Respondent. He was told that he had to account for his expenditure on the card by retaining and handing over the appropriate receipts to the Respondent's administrative staff.
39. He appears to have complied at first. However, on 15/2/2017 Nieringa Paskeviciute, a PA employed by the Respondent, sent the Claimant an email as follows "*Thank you for the statements. I would like to ask you always to submit the statements with the receipts in the correct order. If the receipts could follow the transactions on the statements, (that) would be great. Please also always indicate which receipts are missing*". (copied in bundle F)
40. The Claimant's evidence about this was unsatisfactory and contradicted by the contemporaneous documentation. For example, he stated in his witness statement that he was not issued a card until 2017 and that he was not asked to retain and present receipts until June 2018. Both these assertions are plainly incorrect.
41. It appears that the Claimant was unwilling to comply with this reasonable instruction. He states in his own witness statement that he refused to do it, from July 2017 because (he) had been "*asked to do it on his days off*" and because "*the Respondent had access to the credit card account*". I do not find that any such refusals were either communicated to or accepted by the Respondent's accounts and administrative staff at the time.

42. I find that the Respondent (mainly through its PAs and accountant but at last by Mr Shvedov) regularly requested and then chased the Claimant about his failure to provide suitable receipts for his expenditure over an extended period starting in February 2017, and that he consistently failed to comply, creating delays and making a series of promises which he failed to fulfil and finally (in September 2018) coming up with an implausible and probably false excuse that he could not do so because the receipts had been stolen earlier in the year. Some of these communications were oral, and others by email.

43. The course of the escalating events caused by this issue included the following:

- 20/7/2017 text message requesting “*expenses from January*” (69)
- 2/10/2017 text message pointing out that receipts are missing
- 9/4/2018 text message “*When will you bring your receipts?*”
- 13/5/2018 C reports card stolen. It is stopped and he is issued with a new card.
- mid June 2018 Neringa blocks Claimant’s new card because of mounting concerns that claimant has failed to account for expenditure.
- 22/6/2018 “*there are no bank statements of yours since July 2017*” (55)
- 28/6/2018 Neringa escalates matter to Mr Shvedov “*just to let you know Jan hasn’t submitted his card statements since last July 2017. He’s been reminded a few times without no results. I have blocked his card for now. I’ve been told he is on holiday while the card is being in use. You might want to speak more about that with Dariusz first*” (Bundle F)
- C promises Mr Svedov that he will be able to produce all the receipts “*by August*”
- 12/7/2018 “*I assume you will be sending receipts for the bank statements...*” (54)
Claimants last day of work as the family have flown (without him) to Cannes
- 17/7/2018 “*you suggested that we will receive your receipts with the statements on Monday 16th. We still haven’t received it. It has been a while since Neringa has been chasing you for it. This is an urgent request. Please make sure you send it to us!*” (88)
- 30/7/2018 C had been due to fly to Cannes to take over rostered chauffeur duties from 1/8/2018. However, the Respondent told him not to go because another driver already there would do the work instead. (52). The reason for this was escalating concern by the Respondent about the fact that the Claimant had not accounted for his expenditure and a consequent loss of trust in the Claimant.
- 3/8/2018 Ninel Bepomostsnova (a new PA) send message to C “*Today is 3/8/2018 and there is no sign of any paperwork from you. Can you please explain the reason for this constant delay?*” (51)
- 6/8/2018 message from Ninel “*Can you please reply to my email below?*” (50)
- 28/8/2018 C finally replies to Ninel “*...I will be back (from Poland) on 3/9/2018*” (50)
- 29/8/2018 email from Mr Shvedov to C “*I remember we agreed at our meeting that you would come back with receipts for your company bank card transactions. You said you would be ready to go through the paperwork in August which is now. Please advise*” (Bundle F)

- 30/8/2018 Ninel sends a list of specific queried transactions in 2018 (48) and asks for receipts “*for over a year period*”. Claimant replies in relation to some but not all queried transactions, providing unsubstantiated explanations and no receipts (47)
- 4/9/2018 Mr Darius Lakomski texts C that he is suspended from work until he supplies the requested information. C complains to Nina about this – stating that “*this is unfair as the company have online access to the credit card account and all information are on the credit card statement*” (46) Mr Shvedov emails C stating that C has not been suspended “*as there is no guarantee of any certain number of working hours in our agreement. It is down to the family to decide how much work you are required to do at any particular time*” and explaining “*it is only natural that we cannot give you as much work now as your work would often require a company bank card that you no longer hold. This will remain the case until such time when the bank statement reconciliation process can be completed. You are welcome to communicate with Ninel, our accountant regarding provision of any receipts or other evidence as required by our accounts. ...*” (45)
- 10/9/2018 Ninel emails “*the description of the transactions are not sufficient without providing receipts (unless it was cash to members of the family)*” (44)
- 14/9/2018 C emails Ninel with further information about queried transactions , but no receipts. He states for the first time that in July 2018 his car was “*burglarised*” and the receipts were taken then. (44)
- 27/9/2018 Alex (husband of Mrs Zhmotova) texts Claimant inviting him to come into the Respondents Mayfair Office “*and talk*”. (65) Claimant does not take up the invitation
- Claimant, who has taken advice from Mr P Soszynski, sends email purporting to resign from his claimed employment and that he has been unfairly dismissed because of the Respondent’s claimed repudiatory breach consisting in it having suspended him and not paid him since mid-July (42)

44. Subsequently, the Respondent claimed that the Claimant had failed to account adequately for over £3000 of expenditure on the bank cards he had been issued and the Respondent reported the matter to the police, who however concluded that the case was not one which they wished to pursue. As at the date of the Tribunal hearing the Respondent continues to maintain that the Claimant has failed to account or provide any acceptable explanation for payments exceeding £3000.

45. In an employment contract, in order for a Claimant to establish constructive dismissal he must establish a breach of contract by the employer. The breach must be fundamental and repudiatory and going to the heart of the contract – ie sufficiently serious to have justified the employee resigning immediately. The test is whether the employer’s conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and can walk out of his job without prior notice. The breach of contract can be of an express or an implied term. There is a term implied by law in all employment contracts that an employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The implied term will be breached only where there is no

reasonable or proper cause for the employer's conduct. The test as to whether there has been a breach of the implied term is an objective one. The motives of the employer are not determinative or relevant. If conduct, objectively considered, is calculated or likely to cause serious damage to the relationship between employer and employee, a breach of the implied term may arise.

46. In the instant case there was no contractual term requiring the Respondent to provide work, so the Respondent not providing work after 12/7/2018 was not a breach of contract. I make no finding that the Claimant in fact misappropriated any money. However, the Respondent acted reasonably and within its rights in deciding not to give the Claimant any more work until he complied with the reasonable request that he account adequately for the substantial sums which he had failed to explain or provide receipts for. The Claimant acted unreasonably by delaying and prevaricating over a very long period. The Respondent was very patient but finally ran out of patience. It had good reasons for viewing with suspicion his late excuse that a burglar had stolen the receipts in July 2018. If that was the reason, why had he not handed over the receipts prior to July in response to the many requests made before then, and why hadn't he told the Respondent about this when the alleged burglary occurred? The Claimant knew he was required to engage with the accountant and explain himself. He failed to do so. He also failed to take up the opportunity to discuss the matter with Alex, a senior and prominent member of the family and one with whom the Claimant had been on good terms, and who was plainly willing to discuss matters with the Claimant if he chose to do so, but the Claimant declined.
47. For these reasons, even if I had found that the Claimant was an employee, I would not have found any breach of contract by the Respondent allowing the Claimant to rely on constructive dismissal. Furthermore, had I found that he was dismissed unfairly, I would have found 100% contributory fault on his part, so disentitling him to any compensation.
48. For the sake of completeness, I add that I am not satisfied either that the Claimant has proved his losses. I have seen a summary from his bank statements (E) in which he is recorded as having received a total of £58732 since 1/6/2018 (excluding sums paid by the Respondent). It is claimed that from these gross receipts expenses of £43224 must be deducted (B). However, I was told that these expenses are those of his wife's company, and not of the Claimant personally. Hence it is unclear why the Claimant should be entitled to deduct them in calculating his profits. I accept that the Claimant and his wife have been receiving Universal Credit for some months, and that usually some kind of "proof" of (few) means is required before such credit is granted. However this is no substitute for the Claimant properly and clearly proving in the tribunal what his income position has been. He has had an opportunity to do so but has instead at a late stage in the proceedings simply produced a raft of bank entries.
49. I also add that I am not satisfied that the contract has been operated legally by the Claimant from a tax point of view. At the end of the first day of the trial I asked for disclosure and information which would show me what returns the Claimant had made and what tax he had paid during his work for the

Respondent, and I asked for this material to be brought the following day. The next day Mr P Soszynski, who was not only the Claimant's lay representative at the tribunal, but who has also been the Claimant's tax-adviser since 2015 at the latest, arrived late on the second day (at 11.15am) with various documents including claimed amended tax returns for 2017 and 2018, which he stated had been lodged with HMRC in January 2019, but no other tax information for the Claimant. In particular I was not shown any return for 2016, and I was not shown the originals of the tax returns for 2017 and 2018. Neither Mr P Soszynski or the Claimant were able to tell me clearly what income was declared and what if any tax has been paid by the Claimant. The Claimant said he didn't know what tax he was liable for but he was in arrears with his tax and had been paying it off at the rate of £400 per month. He was however unable to give any details of this agreement nor produce a copy of it.

50. From 21/7/2015 to 12/7/2018 the Claimant was paid gross fees and bonuses at the rate of about £50000 to £57000 per year by the Respondent, and he would have incurred almost nil deductible expenses in earning this income seeing that all expenses in relation to his earning of that income were paid by the Respondent. He should have been declaring to HMRC income at a level which would have incurred tax and national insurance contribution liabilities well in excess of £10000 per year. I am far from satisfied that he has done so and in the light of his failure to give me disclosure of this information in response to my request I am not satisfied that he has been conducting his tax affairs lawfully. On the available information it appears to me more likely than not that he has been using the self employed structure of his contract as an opportunity to avoid paying tax and NI contributions. Hence I would not be willing to grant him a remedy on the contract in any event, under the illegality doctrine.
51. It is agreed that the Claimant was not paid after 12 July 2018 but as he did not work he had no right to be paid, so his claim for arrears fails.
52. As a matter of contract the Claimant was entitled to 21 days holiday but agreed that he had taken and been paid all of this in 2018 before the relationship ended. Hence the claim for holiday pay fails.
53. The Claimant was not entitled to notice or notice-pay as he was not an employee and he resigned from the contract in any event.
54. It was accepted during the course of the hearing that the Claimant after the card was blocked spent £353.46 of his own money on petrol and was not reimbursed for this by the Respondent as he should have been. I allowed the Claimant permission to amend to add this claim and find that it is due.

Costs application

55. Mr Claire made a costs application for £500 based on two hour's solicitors work at his charging rate of £250 per hour for extra legal work caused to the Respondent by the Claimant's failure, through Mr P Soszynski, to comply with the directions. In particular, he had failed to comply with the direction that he prepare and serve a trial bundle by 4/4/2019. Instead he waited until 30 /4/2019 before doing so. This caused considerable inconvenience and delay in

finalising the witness statements and in preparation for trial. The Respondent's supplementary bundle contains the additional correspondence and attendances by Mr Claire which arose from this unwarranted delay. I am satisfied that it must have caused Mr Claire at least two extra hours work.

56. At the hearing on 14/3/2019 Mr P Soszynski had volunteered to prepare and serve the bundle and agreed that he could do so by 4/4/2019. He should not have done so if he could not comply. I accept that there was two day's lateness in the Respondent providing its disclosure but this in no way justifies the delay of the bundle until 30 April. I find that there is no good excuse. I issued a written warning on 14/3 that if the directions were not complied with a costs order might be made. I regard the Claimant's conduct of the litigation to be unreasonable in this respect. I have already noted the Claimant's financial position above. I find it appropriate to make a costs award, but limited to the amount which the Respondent owes the Claimant for his petrol expenditure.

Employment Judge J S Burns
4/5/2019
London Central

For Secretary of the Tribunals

Date sent to the Parties: 10 May 2019