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EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: S/4122376/2018

Held in Glasgow on 16 January 2019

Employment Judge: Frances Eccles

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Mr J McCafferty

**Claimant
In Person**

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Project Health and Safety Services Ltd

**Respondent
Represented by:-
Mr David McCrum –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is (i) the claimant was employed by the respondent as a worker in terms of Regulation 2(1)(b) of the Working Time Regulations 1998; (ii) the claimant was entitled to annual leave in terms of Regulation 13 of the Working Time Regulations 1998; & (iii) the Tribunal does not have jurisdiction to consider the claim for holiday pay.

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REASONS

E.T. Z4 (WR)

BACKGROUND

1. The claim was presented on 2 November 2018. The claimant sought payment of tax, national insurance and holiday pay. The claim was resisted. In their response accepted on 4 December 2018 the respondent denied that the claimant, as a self-employed contractor, was entitled to holiday pay. The claimant denied that he was self-employed. In his ET1, he claimed to be an employee. Before the Tribunal he claimed to be employed as a worker and sought payment of holiday pay. The respondent identified the preliminary issue of time bar and claimed that the Tribunal did not in any event have jurisdiction to consider the claim.
2. The claim was listed for a hearing. The claimant appeared in person. The respondent was represented by Mr David McCrum, Solicitor. Both parties provided the Tribunal with a bundle of documents. The claimant also provided the Tribunal with a written statement. The claimant gave evidence in support of his claim. The respondent called their Managing Director, Iain Hyslop to give evidence.

FINDINGS IN FACT

3. The Tribunal found the following material facts to be admitted or proved; the respondent provides health and safety consultancy and training services to clients across the UK. Their clients operate in the civil engineering, building and manufacturing sectors. The respondent has five employees, four of whom are Health & Safety Advisers.
4. The claimant worked for the respondent as a Health & Safety Adviser from 10 March 2017 to 3 May 2018. He did not enter into a written contract with the respondent. The claimant undertook health & safety inspections and provided training on behalf of the respondent. He was required to undertake the work personally. He worked for the respondent on most week days. He was allocated work on a weekly basis (A1 & 2) which he was obliged to complete by the end of each week. He did not work for anyone else. On occasions the claimant would swap site visits with another Health & Safety Adviser who was employed or otherwise worked for the respondent. Latterly such

arrangements had to be approved in advance by the respondent. On one occasion the daughter of a Health & Safety Adviser covered a site visit in his behalf. The Health & Safety Adviser's daughter was suitably qualified, and the arrangement was authorised in advance by the respondent. The claimant did not have authority to send anyone who did not work for the respondent to clients' sites. When visiting clients' sites, the claimant wore branded clothing and carried business cards provided by the respondent. He attended team meetings and weekly conference calls. He completed monthly reports (R2) detailing work undertaken for the respondent.

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10 5. The claimant submitted an invoice to the respondent for work undertaken during the previous week (R3). The respondent paid the claimant's invoices within a week of receipt. The respondent had three set rates at which they paid the claimant subject to the work undertaken; £150 for travelling and working at home; £175 for site inspections including investigations and £250
15 for providing training. The claimant was paid for expenses incurred while working for the respondent. He was based at home. He was provided with a laptop by the respondent. He provided his own car and mobile telephone. On occasions the claimant would use his own laptop while delivering training because it had more advanced software. The respondent paid for the claimant to attend training courses about work to be undertaken on their behalf. The
20 claimant was encouraged to attend social events with the respondent's clients and to network on their behalf at such events.

6. The claimant did not work for the respondent on 8 May and 16 November 2017 because he was on holiday. He was not offered work by the respondent
25 on 14 & 17 April; 5 to 7 & 10 to 12 July; 31 August; 21 to 22 & 25 to 26 September; 19, 21 to 22, 25 to 29 December 2017 & 1 to 5 January 2018. The claimant did not invoice the respondent for holiday pay. The claimant did not include in his invoices (R3) payment for the above holidays or days on which he was not provided with work.

30 7. The claimant did not work for the respondent on 2 April 2018 because he was on holiday. He was not offered work by the respondent on 20, 23 & 30 March

& 6 April 2018. The claimant did not include in his invoices (P3) payment for the above holiday or days on which he was not provided with work.

8. The claimant did not accept work from the respondent from 7 May to 18 May 2018 because he was on holiday. The respondent requested that the claimant hand in his laptop to the office before going on holiday. The claimant was informed that the laptop was required by an employee while her laptop was being upgraded. The respondent had concerns about the claimant's work following feedback from their clients. They did not intend to provide the claimant any further work on his return from holiday. They did not inform the claimant of their intention to no provide him work.
9. The claimant was aware that the respondent had organised a team meeting on 18 May 2018. The claimant was not asked to attend the team meeting. The claimant was aware of a social event arranged to take place after the meeting on 18 May 2018. The claimant arranged to attend the social event.
10. The claimant realised shortly after his return from holiday that the respondent did not intend to offer him any further work. The claimant sought legal and accountancy advice. He felt very aggrieved by the manner in which he had been treated by the respondent. The claimant sought and received legal advice from the Citizens Advice Bureau about tribunal proceedings. He wrote to the respondent in June 2018 raising concerns about the respondent's conduct towards him. The respondent replied by e mail dated 8 June 2018 (P70A) confirming; "*As previously discussed should we require your services in future we will get in touch with you directly*". The claimant wrote to the respondent on 18 July 2018 (P71). In his letter, the claimant claimed to have been engaged by the respondent as an employee and to have been entitled to benefits including holiday pay. He sought a response within 4 weeks. On 22 August 2018 the claimant's Accountant wrote to the respondent (P73) confirming his understanding that the claimant was entitled to holiday pay. He referred to the claimant's intention to take the matter to an Employment Tribunal in the event that the respondent did not respond. On 4 September 2018 the claimant wrote to the respondent (P74). He requested that the issues

5 raised in previous correspondence be dealt with through the respondent's grievance procedure. He confirmed that failure on the part of the respondent to respond to his letter by 12 September 2018 would result in tribunal proceedings. Iain Hyslop, the respondent's Managing Director replied to the claimant by letter dated 6 September 2018 (P74A). He disputed that the claimant was an employee.

11. The claimant contacted ACAS about early conciliation on 14 September 2018. ACAS issued the claimant with an early conciliation certificate on 14 October 2018. The claimant presented his claim on 2 November 2018.

10 **THE ISSUES**

12. The issues before the Tribunal were as follows:-

(1) Was the claimant a worker within the meaning of Regulation 2(1) of the Working Time Regulations 1998 ("WTR")?

15 (2) If so, was the claimant entitled to annual leave in terms of Regulation 13 of the WTR and what, if anything, is due to him as holiday pay in terms of Regulation 16 of the WTR?

(3) If the claimant is due holiday pay, has the claim been presented to the Tribunal in time?

20 (4) If the claim was presented out of time, should the time limit be extended on the grounds that it was not reasonably practicable for the claimant to present the claim in time?

DISCUSSION & DELIBERATIONS

WORKER STATUS

25 13. In terms of Regulation 2 (1) of the WTR, a worker means "*an individual who was entered into or works under (or where the employment has ceased, worked under)- (a) a contract of employment or (b) any other contract, whether expressed or implied and (if it is express) whether oral or on 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”.

5 14. It was agreed that the claimant did not enter into or work under a contract of
employment with the respondent. The claimant sought to show that he
undertook to personally perform work for the respondent as a worker. In
support of his claim, the claimant referred the Tribunal to **Autoclenz v**
Belcher 2011 ICR 1157; Pimlico Plumbers Ltd v Smith 2017 ICR 657; Uber
10 **BV & Others v Aslam & Others 2018 EWCA Civ 2748** & HMRC guidelines
on the definition of a worker. The respondent sought to show that the claimant
was a self-employed contractor pursuing a business activity on his own
account. The respondent referred the Tribunal to **Windle v Secretary of**
State for Justice 2016 ICR 721

15 15. The Tribunal considered the nature of the relationship between the parties.
This required the Tribunal to have regard to all the circumstances. Unlike the
case of **Autoclenz**, there was no written contract. From the evidence before
it, the Tribunal was satisfied that there was a contract between the parties in
terms of which the claimant was provided with work by the respondent that he
20 felt bound to accept and for which he was paid at rates set by the respondent.
There was no evidence before the Tribunal of any occasion when the claimant
declined to undertake work provided to him by the respondent. There was a
clear expectation that the claimant would undertake the work provided to him
by the respondent and that he would do the work personally. The Tribunal
25 was not persuaded that because another Health & Safety Adviser had on one
occasion obtained permission from the respondent for his suitably qualified
daughter to visit a site on his behalf that the claimant had the right to provide
a substitute. There was also no persuasive evidence of the claimant having
an unfettered right to refuse work. As in the case of **Pimlico Plumbers**, he
30 worked almost continuously with the respondent until the relationship came
to an end. This was not a case in which the claimant could be described as
having worked casually or intermittently for the respondent. There was no

evidence of him working for anyone else or seeking other work. He wore the respondent's branded clothing when working and carried business cards provided by the respondent. The respondent paid for him to attend training. They provided him with a laptop. The above factors were consistent with the claimant being a worker.

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16. The Tribunal also took into account factors that were inconsistent with the claimant being a worker. There were occasions when the claimant was not provided with work by the respondent. A number of these coincided with holiday periods such as Easter and Christmas. The claimant did not expect to be paid on the days when he was not provided with work but did complain before the Tribunal about last minute cancellations. The Tribunal did not accept the respondent's position that there was no mutuality of obligation between the parties. The Tribunal was persuaded that the respondent when offered work by the respondent, the claimant felt bound to accept it. Once the respondent stopped providing him with work the claimant treated the contract as at an end. The Tribunal was not persuaded that because the claimant was based at home and provided his own car and mobile telephone that he was a self-employed contractor as opposed to a worker. It was not in dispute that he was provided with a laptop by the respondent and used his own laptop for training purposes because it had more advanced software. The relevance of the claimant's wife providing him with support with his administration was unclear. There was no evidence that she was an employee of any business undertaking carried on by the claimant.

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17. The Tribunal also had regard to the method of payment. The claimant provided the respondent with invoices and was responsible for paying tax and National Insurance contributions. The Tribunal was not persuaded that this was inconsistent with being a worker. The claimant did not seek to show that he was an employee who would normally be paid through the employer's payroll, net of the above deductions. The claimant was paid at regular intervals. He was paid at rates set by the respondent.

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18. In the case of **Windle**, the Court of Appeal held that the absence of mutuality of obligation between assignments should be taken into account when determining employment status. The Court of Appeal emphasised the importance of considering all relevant factors when assessing the nature of the contract between the parties. In the present case, the Tribunal did not find that there were any significant periods during which the claimant did not work for the respondent. The Tribunal did not find that the periods when the claimant was not working for the respondent were indicative of a degree of independence in the relationship that was inconsistent with the claimant being a worker. As emphasised in **Windle**, the relevance of each factor will depend on the particular facts of the case.
19. In all the circumstances of this case, the Tribunal was persuaded that the claimant was a worker within the meaning of Regulation 2(1)(b) of WTR.

HOLIDAY ENTITLEMENT

20. Having concluded that the claimant was a worker in terms of Regulation 2(1)(b) of WTR, the Tribunal went on to consider whether he was entitled to annual leave and in particular whether he had a claim for outstanding holiday pay.
21. In terms of Regulation 13 of WTR the claimant, as a worker, was entitled to annual leave while working for the respondent. Regulation 13A (3) of WTR provides that a worker is entitled to be paid for annual leave of up to 28 days for each holiday year. The Tribunal did not understand it to be in dispute that if the claimant was found to be a worker that the holiday year began on 10 March and on each anniversary of that date.
22. The claimant was unclear before the Tribunal about what he sought from the respondent by way of holiday pay. The Tribunal found that he had taken two days' holiday during the holiday year 10 March 2017 to 9 March 2018 and 11 days during the holiday year beginning on 10 March to 20 May 2018. Beyond this the Tribunal was unable from the evidence and representations provided to quantify the claimant's claim for holiday pay. The Tribunal was satisfied that

the claimant, given his status as a worker, should have been paid for the holidays identified above under Regulation 16 of WTR.

TIME BAR & JURISDICTION

23. In terms of Regulation 30 of the WTR a worker may present a complaint to an
5 Employment Tribunal that his employer has failed to pay him under
Regulation 16 of WTR. In terms of Regulation 30(2) of WTR, the Tribunal does
not have jurisdiction to consider the complaint unless it is presented before
the end of the period of three months beginning with the date on which it is
alleged the payment should have been made or within such further period as
10 the Tribunal considers reasonable where it is satisfied that was not reasonably
practicable for the complaint to be presented before the end of that period of
three months.

24. The claimant did not identify a date on which he claimed that the payment of
15 holiday pay should have been made. The Tribunal concluded that had the
respondent complied with their obligations under the WTR that payment for
annual leave should have been made to the claimant by 28 May 2018. This
was the date by which the claimant would have sought payment for his final
holiday had he submitted an invoice in accordance with his pay arrangements
20 with the respondent.

25. The claim was presented on 2 November 2018, more than three months after
the date on which the claimant should have received payment of his holiday
pay. The Tribunal therefore considered whether it was not reasonably
25 practicable for the claimant to have presented the claim (or notify ACAS of
early conciliation) before 27 August 2018.

26. The Tribunal was not persuaded that in all the circumstances that it was not
reasonably practicable for the claimant to present his claim in time. The
claimant took advice from Citizens Advice Bureau and his Accountant. He
30 was in contact with the respondent about his employment rights from early
June 2018. The claimant did not dispute that he had sought legal advice

5 following the termination of his relationship with the respondent. He wrote to the respondent in June 2018 raising concerns about the respondent's conduct towards him and again on 18 July 2018 (P71) claiming the right to holiday pay. He sought a response within 4 weeks. The claimant did not hear from the respondent. On 22 August 2018 his Accountant wrote to the respondent (P73) about the claimant's entitlement to holiday pay. He referred to the claimant's intention to take the matter to an Employment Tribunal. The claimant sought and received legal advice from the Citizens Advice Bureau. The claimant did not identify any impediment that prevented him from presenting his claim in time. He referred to advice that he should give the respondent time to respond. The Tribunal did not consider this to have made it not reasonably practicable for him to have presented his claim in time. The Respondent referred the Tribunal to the case of **The Governing Body of Sheredes School v Mr B Davies UEAT/0196/16** in which the claimant had instructed solicitors in relation to a claim of unfair dismissal which was presented out of time. In the present case, the claimant did not instruct solicitors, but the Tribunal was satisfied from the evidence before it that in all the circumstances the claimant knew or ought reasonably to have known that time limits applied to bringing a claim to the Tribunal. There was no persuasive reason advanced by the claimant as to why it was not reasonably practicable for him to have presented the claim in time.

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27. If the Tribunal is wrong and it was not reasonably practicable for the claimant to have presented the claim in time, it would not have been persuaded that in all the circumstances that the time limit should be extended to 2 November 2018. On 4 September 2018 the claimant wrote to the respondent (P74). He requested that the issues raised in previous correspondence be dealt with through the respondent's grievance procedure. He confirmed that failure on the part of the respondent to respond to his letter by 12 September 2018 would result in tribunal proceedings. Iain Hyslop, the respondent's Managing Director replied to the claimant by letter dated 6 September 2018 (P74A). He disputed that the claimant was an employee. Notwithstanding the response he received from the respondent, the claimant did not contact ACAS until 14 September 2018. ACAS issued the claimant with an early conciliation

certificate on 14 October 2018. The claimant did not present his claim until 2
November 2018. The claimant did not provide the Tribunal with a reasonable
explanation for this further delay. In all the circumstances, had it not been
reasonably practicable for the claimant to present his claim within the statutory
time limit, the Tribunal would not have considered it reasonable to extend the
period to 2 November 2018.

CONCLUSION

28. In all the circumstances, the Tribunal concluded that the claimant was a
worker entitled to payment for annual leave. The claim was brought out of
time. The Tribunal did not conclude that it was not reasonably practicable for
the claimant to have presented his claim in time and therefore no extension
of time has been granted. The Tribunal concluded that it does not have
jurisdiction to consider the claim for holiday pay.

Employment Judge: Frances Eccles
Date of Judgment: 26 January 2019
Entered in register: 29 January 2019
and copied to parties