**IN THE EMPLOYMENT TRIBUNAL**

**LONDON CENTRAL**

Claims 2204816/2018 and 2204819/2018

BETWEEN

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| DARIUS GIL | First Claimant |
| KRSYSTOF KIEREPKA | Second Claimant |
| And | |
| THE RITZ HOTEL | First Respondent |
| D WEBSTER LTD | Second Respondent |
| GUILD RESOURCES LTD | Third Respondent |
| CONSTRUCTION WORKERS GUILD LTD | Fourth Respondent |
| GUILD PAYMENT SERVICES LTD | Fifth Respondent |

Heard on 15 and 16 May 2019

Before Employment Judge J Burns

Representation

Claimants : in person

Respondents 2-5 Mr R Davey (Solicitor)

**JUDGMENT**

The claims are dismissed

**(AMENDED) REASONS – words shown in italics in paragraph 13 added by way of amendment under ET Rule 69, on Claimants' application dated 30/5/2019**

Introduction

1. These are claims for unfair dismissal and holiday pay. The issues were set out in a case management summary dated 18/10/2018, on which dated R1 was dismissed as a party to the proceedings.

2. I heard evidence from the Claimants and then from Cris Ley, in house solicitor of the Fourth Respondent and then from David Webster, owner and MD of the R2. The documents are in two files running to 725 pages. I received a

Respondent's Skeleton Argument and heard oral submissions. The Second Claimant was assisted by a Polish interpreter.

The facts

3. R4 provides construction services to clients. R2 is one such client. R2 provides maintenance and decorating services to the Ritz Hotel. R2 supplies those services through an intermediary, namely R4. R4 enters into contracts with skilled subcontractors such as the Claimants.

4. The Claimants were recruited by Mr David Webster for purposes of the performing the contract between R2 and The Ritz. He sent or referred the Claimants to R4. C1 entered into a contract with R4 on 15/11/2006 and C2 entered into a contract with R4 on 28/3/2011. The contracts between the Claimants and R4 are at pages 167 and 195. They described themselves as *Contracts for Services*. They provided that the Claimants would be subcontractors to whom R4 was not obliged to accept work, nor would the Claimants be obliged to accept it; that they should use their own initiative as to how the work was carried out; that they would be responsible for supplying their own tools and equipment; that the payments would be subject to deduction under the Construction Industry Scheme (CIS) which applied to income tax only and that the Claimants would be responsible for their own NI payments; that they would not be entitled to holiday pay or sick pay; and that they may in their absolute discretion send a substitute or hired assistant to perform the services in which case the Claimants as subcontractors would be responsible for paying the substitute.

5. The Claimants worked on a 5 day a week full time basis at the Ritz under the close supervision and direction of Ritz employees and in particular a Mr Peter Smoker. They were supplied with ladders and paint and other material but had to provide their own overalls and hand-tools such as brushes and rollers. They had to wear t-shirts with R2 logos on them in order to distinguish themselves as contractors supplied via R2, and from the employed Ritz workforce.

6. Each week they would fill in time sheets on stationary provided by R2 and hand them to Mr Webster or one of his employees who would in turn compile summary time sheets and send them to R4. R2 would pay R4 the sums payable by R4 to the Claimants and in addition pay to R4 VAT thereon at 20% and £18 per week plus vat per Claimant for R4s services to R2.

7. R4 would then pay to the Claimants the sums due to them on a weekly basis, operating CIS. Under this scheme R4 deducted 20% of the gross pay and paid it to HMRC on account of income tax payable by the Claimants, and the balance was paid to the Claimants.

8. R4 would issue the Claimants a weekly payslip. Monthly and yearly summaries were available for them on a website. The rate of pay was £125 per day and typically they would work a 5 day week and earn about £25000 per year gross of tax from this work.

9. Before starting to work at the Ritz the Claimants were already familiar with the CIS scheme and had worked on self-employed bases for other parties.

10. When working at the Ritz they continued on this basis, and submitted annual tax returns for this income, treating it as having been received by them on a self-employed basis, and deducting against it for tax purposes substantial claimed expenses and deductions such as rent, travel, costs of materials etc, - resulting in declared net income levels and tax payable considerable less than would have been the case had the payments to them been paid through the employee PAYE system.

11. The contractual arrangements were understood and accepted by the Claimants at the time. The arrangements gave them considerable tax advantages. In addition, the rates of pay they received were significantly higher under the rates which would have been applicable if they were employed.

12. R2 would bill the Ritz and be paid by it for the work done by the Claimants and also by other contractors provided indirectly by it to the Ritz .

13. Hence there was a chain or circle leading from the Ritz through R2 to R4 and then to the Claimants who in turn worked at the Ritz, and the Claimants had no actual express contract with any Respondent other than R4 *during the relevant time under consideration in this judgment. (For the avoidance of doubt C1 had previously signed a contract directly with R2 on 27/3/2006 but this had been superseded by the C1/R4 contract on 15/11/2006).*

14. While working at the Ritz both Claimants carried out other self-employed contractor work on the side, mainly over weekends, for third parties.

15. There were about 4 or 5 weeks a year,- typically two weeks over Christmas and a couple of weeks in the Summer - when the Claimants did not work at the Ritz and were not paid by R4. There was no maximum holiday they could take but in practice they did not feel able to take longer than about four weeks away from the Ritz because they feared that if they did their services would be dispensed with.

16. The Claimants were well-integrated into the work force at the Ritz and participated in staff events there. They had Ritz access cards which were of the same type as those issued to regular employees of the Ritz and different from the security passes issued to temporary contractors. They had to clock in and out and when Peter Smoker was not there to supervise them they would not work.

17. In practice at the Ritz the Claimants would not have been able to simply appoint a substitute or send along a hireling in place of themselves. They had each been individually selected by Mr Webster in the first instance as clean hardworking suitably qualified contractors and then interviewed and approved by Peter Smoker as person suitable to work and be trusted at The Ritz. Had the Claimants simply decided to send someone else such person would not have been accepted unless and until he had himself had been separately approved by Peter Smoker and then recruited separately by means of a new contract between that new worker and R4.

18. On 15/11/2016 R4 sent letters to each of the Claimants informing them that all of R4's rights and obligations were being transferred to a company called Guild Resources Ltd with effect from 9/12/2016. I reject the Claimant's evidence that they were sent draft new contracts to sign at this time.

19. A company number 098598775 was called Ricon Resources Ltd until 5/12/2016 when it changed its name to Guild Resources 1 Ltd and on 22/12/2016 it changed names again to Guild Resources Ltd. This is R3.

20. A further company number 10439306 was called Guild Resources Ltd until 22/12/2016 when it changed its name to Guild Payment Services Ltd. This is R5.

21. Given these changes it is confusing to say the least which company the letters dated 15/11/2016 was referring to.

22. However, it is common cause and I find that the intention of the letters was not notify an assignment of the contracts between R4 and the Claimants to R3, and from 12/2016 onwards the Claimants knew they were being paid and their working arrangements administered by R3.

23. In early 2018 the Ritz started scaling back its maintenance and decoration programme and did not require so much work to be provided by R2. Mr Smoker told Mr Webster to dispense with the Claimants' services. As a result R2 acting through Mr Webster summarily terminated R2's relationship with C2 on 16/3/2018 and with C1 on 11/5/2018 and the Claimants ceased getting any further payments from R4 shortly after those dates.

Law

24. The essential requirements of an employment contract are (i) control by the employer (ii) mutuality of obligation and (iii) personal performance.

25. A worker as defined in section 230(3)(b) ERA 1996 is an individual who has contracted (other than under an employment contract) to do 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.

26. Where the terms of a contract do not represent the true intentions or expectations of the parties not only at the inception of the contract but at later stages, Tribunals have scope to look behind the written contracts to determine what the true agreement was.

27. However, in cases in which work is provided through a multi-party supply chain arrangement it is unnecessary to imply an employment or other contract between the worker and end user if the arrangements are explicable and accounted for by some other genuine agency or similar contract elsewhere in the supply chain.

28. Under the WT Regulations workers are entitled to take four weeks holiday and be paid for it. Section 23 ERA 1996 limits claims for holiday pay (brought as a

deductions from wages claim) to the period of two years before the claim was brought.

29. A claim for a series of deductions cannot be brought for an historic deduction prior to a gap exceeding three months.

30. I was referred by the Claimants to the ETA decision Mr Timbulas v The Construction Workers Guild Ltd UKEAT/0325/13/GE on 5/12/2013. That was an appeal dealing with points which are irrelevant for present purposes, but it is apparent from the judgment that at first instance (ie at the Watford ET) a judge had decided that Mr Timbulas (who may or may not have been on the same type of contract with R4 as were the Claimants in the instant case), was entitled to holiday pay from R4. It must follow from that that the ET had concluded that as against R4, Mr Timbulas had been a worker. However, there was no appeal against that element of the first instance decision, which I have not been shown in any event and I do not find that Timbulas is authority in any form for the matters I have to decide.

Conclusion

31. The Claimants have never clearly stated which Respondent was the claimed employer. In their witness statements they have adduced numerous details of the type which might have formed the basis of an argument that the Ritz (ie R1) was the true employer on an implied contract basis. These include the facts such as their extended period of work at a single work place, integration into the workforce at The Ritz, control by Peter Smoker and the supply of materials by the Ritz, and in practice that the Claimants they had to supply personal service at the Ritz because of the practice of the Ritz to allow only security-cleared and approved contractors to work there.

32. However it was been agreed by the Claimants earlier, namely at the hearing on 18/10/2018, that they were not employed by the Ritz ,and it was for this reason that the Ritz was dismissed from the case.

33. Even if that had not happened, I would not have found that the Claimants were employed by the Ritz. The Ritz had no obligation to provide work to the Claimants and the Claimants had no obligation to work at the Ritz. The Ritz never paid the Claimants. The Claimants did not have any contract with the Ritz of any description. The Claimants work there is fully explicable by the contracts which the Claimants had entered into with R4, read in the context of the other contracts in the supply chain identified above. There is no need to imply a contract with the end user.

34. I have considered whether R2 could be the employer. There was very little day-to-day control of the work by R2. It was Peter Smoker who did the controlling. There was no contract between R2 and the Claimants and the work they did is again fully explicable by reference to the other contracts.

35. Turning to the arrangements with R4, there was no control by R4 of how or whether the Claimants did their work. Furthermore, mutuality of obligation and personal service was clearly excluded under the express terms of the agreement. It is submitted by the Claimants that these terms did not reflect the reality of how the Claimants did their work. For example they had to turn up to work at the Ritz and they could not in practice send a substitute to do their work there, and, when there, they had to work under the close supervision of Peter Smoker, in a similar manner to the way they would have done had they been employed by the Ritz.

36. I accept that this was the situation. However these are incidents of how the end-user operated, as per the whims of Peter Smoker and the policies and practices of the Ritz, and are matters about which R4 had nothing to say or do and which were inevitably beyond its reasonable control in a situation such as this.

37. These features of the Claimants work were not any part of their contractual obligations to R4, as opposed to features of the work place in which they had chosen to perform the services contemplated by the contracts with R4.

38. As between the Claimants and R4, and for purposes of the contractual rights and obligations under the Claimants' contracts, the Claimants were free to send substitutes and to withhold services and work as they saw fit. If they did so and were able to carry on working and submitting time sheets to R4, R4 would carry on paying them.

39. I do not find that the R4 contracts with the Claimants were shams in any way. They reflected the true intentions of the parties, namely R4 and the Claimants, insofar as they pertained to matters which were of contractual significance as stipulated by those contracts.

40. The fundamental point of those contracts was to provide a mechanism for the Claimants to work on a self-employed basis under the CIS scheme, receiving regular and reliable payments while their work for third parties continued, but at enhanced self-employed rates subject to limited deductions, allowing them then to make tax returns in which additional substantial expenses arising from their self-employed businesses could be deducted so as to minimise, and in some cases, claim back tax. These contracts suited the Claimants very well until their work at the Ritz was ended. Only then and subsequently have they sought to

claim that they were employees and entitled to holiday pay which the contracts themselves clearly stated they were not entitled to.

41. I find that contracts with R4 were not contracts of employment.

42. I do not find that the Claimants were employees at all.

43. I also find that the Claimants were not workers for purposes of the WTRs. They did not, as against R4, have to provide personal service or work at all. If they provided services either themselves or through others to a third party in the course of a self-employed business, then R4 would pay them. They had expressly contracted on terms which preclude them contending that they are workers in the absence of a finding that the contracts were shams, and for the reasons given I do not find that they were a sham.

44. Hence the claims must be dismissed.

45. For the sake of completeness I record that (i) I find that the R4 contracts were assigned and transferred to R3 in about December 2016 either as a consequence of the letters dated 15/11/2016 or as a matter of the Claimants affirming the purported assignment by continuing to work and receive payments from R3 subsequently. Hence if I had found any Respondent liable in this case it would have been R3; and (ii) had I found that the Claimants were workers entitled to holiday pay I would have awarded against R3 pay in lieu of the holidays recorded in the Claimants' witness statements from 30/12/2016 onwards (there being a gap in excess of 3 months before that date) and in addition the full pro rata WTR entitlement in the unexpired portion of the last holiday year, at the rate of £125 per day.

Employment Judge Burns

Re- signed on 3 June 2019

This amended version sent to parties on:

10 July 2019

For the Tribunal