EMPLOYMENT TRIBUNALS

Claimant: **Mr M Galvez Vergara**

Respondent: **Ventura Property Limited**

Heard at: **London Central**

On: **17 July 2019**

Before: Employment Judge Quill (sitting alone)

Representation
Claimant: Ms Beech (union representative)
Respondent: Ms King (Director)

RESERVED JUDGMENT

The claim that Section 13 of the Employment Rights Act 1996 has been breached is well-founded.

The Respondent is ordered to pay the gross sum of £737.50.

REASONS

1. The tribunal was assisted by an interpreter Spanish, who interpreted for the Claimant during the hearing, interpreted his testimony, and the questions put to him, and who translated certain extracts from documents. All the other witnesses gave evidence in English.

2. In the early part of the Claimant's evidence-in-chief, on a small number of occasions, Mrs King, who speaks Spanish, suggested that the translation of a particular question or answer had not been accurate. I asked the claimant to speak more slowly when giving his answers through the interpreter, and there were no further disputes as to whether the translation had been accurate.

3. I received the claimant's skeleton argument which attached, and took account of the cases referred to. I also received a bundle of documents from the claimant side, which ran to 61 pages. The respondent relied on the documents

which had been attached to its ET3.

4. The claimant's bundle included a document written in English which was described as the claimant's witness statement. The claimant indicated that he had not read the document, but he had supplied the main points about his case to his representatives. I suggested that the document could be read out loud to him in Spanish so that I could ask him if he adopted it as his evidence, and could confirm it was true. However, taking into account the claimant's preferences, and those of the interpreter, I agreed that I would ignore the document and that the claimant's evidence in chief would be produced by way of his answers to his representatives questions, and those which I had.

5. The respondent called three witnesses. These were Mr Navarro, Mr Ventura and Mr Kusz. All three had produced written statements which were attached to the ET3. In the case of Mr Navarro, given the manner in which the claimant had given his evidence, and given the fact that there appeared to be a missing page from his statement, it was agreed that I would ignore the written document and that his evidence in chief would be given by way of his answers to the respondent's representatives questions, and those which I had. In the case of Mr Ventura and Mr Kusz, in order to save time, and with the agreement of the parties, their written statements were taken as their evidence in chief.

6. The hearing had been listed for three hours starting at 10 AM. To allow all the evidence to be heard, the tribunal and the parties agreed to continue sitting in the afternoon from 2 PM, after a one hour lunch break. Submissions concluded at approximately 3:40 PM, and therefore I indicated that I would write to the parties with my judgement.

7. In summary, the dispute was that the Claimant claimed to have been a worker engaged by the Respondent, at the rate of £150 per day, who was entitled to be paid that £150 for working on each of 7 days (Monday 5 November 2018 to Saturday 10 November 2018 inclusive, plus Monday 12 November 2018). The Respondent claimed that the Claimant was not a worker and that, in any event, the Claimant was only entitled to £150 per day for two days (Wednesday 7 and Thursday 8 November 2018).

8. The claimant is 60 years old. For his entire working life, in excess of 40 years, he has worked in construction. He has also undertaken other work from time to time, including cleaning, especially when he was recovering from an operation on his knees.

9. The respondent is a limited company in the business of property development and refurbishment. Mr Filipe Ventura is the managing director. Mr Max Navarro is not an employee of the company, but frequently works as a site manager and/or project manager as a contractor providing services to the respondent. Mr Krystian Kusz occasionally works for the respondent as a subcontractor doing work which includes tiling. The respondent had been hired to do some work on a site in Godolphin Road ("the site"). The work included, amongst other things, tiling a bathroom.

10. It was confirmed by the claimant's representative at the start of the hearing that the only claim being brought was in relation to section 13 of the Employment Rights Act 1996. As I mentioned to the parties at the outset, it was not my role to consider the quality of the work performed by the Claimant, or any alleged damage caused by the Claimant.

11. Section 13 states:

13.— Right not to suffer unauthorised deductions.
(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

12. "Worker" is defined by Section 230(3) of the Employment Rights Act 1996, which states:

In this Act "worker" (except in the phrases "shop worker" and "betting 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;
and any reference to a worker's contract shall be construed accordingly.

13. The respondent's position was that the claimant was a self-employed contractor. In other words, that he was not a "worker" due to the exception mentioned in Section 230(3)(b).

14. At the outset of the hearing, the Respondent's position was that the Claimant had held himself out as being in business on his own account, and that he had visited the site on 6 November 2018 in order to assess the job and to provide a quote. The Respondent's position was that they had accepted this quote. The quote was suggested as having been for £150 per day for an estimated 7 days work.

15. In his evidence, the claimant asserted that he had seen an advert, and this had led him to contact Mr Navarro.

16. In his evidence, Mr Navarro said that he did not remember exactly what led to him and the claimant discussing the tiling work which was needed at the site, but he did accept that an advert for that work had been placed. Mr Navarro accepted that he had not seen any advertisements placed by the claimant advertising any alleged business operated by the Claimant. Mr Navarro was authorised by the respondent to make binding arrangements between the respondent and the claimant in relation to the tiling work at the site (as Mr Navarro and Mr Ventura each accepted in their testimony).

17. The claimant's bundle contained three pages of printouts from WhatsApp exchanges between the claimant and Mr Navarro. The earliest of these was 30 October 2018 and the latest was 29 November 2018. These communications were in Spanish. The claimant's bundle also contained three pages of what was said to be English translations of the communications. Given that the claimant was unable to confirm the accuracy of the translations, I indicated that both parties should work from the Spanish version and that the interpreter would read out the English translation of any message which was referred to in a question or an answer.

18. The respondent also wished me to look at its own version of these exchanges. The respondent indicated that its version was preferable, because the claimant's version did not include of photographs and other multimedia documents. However, the respondent did not have copies for the claimant's representative or the witness table or the judge. I therefore indicated that we would use the version in the claimant's bundle, but that the respondent was free to put questions to the witnesses about the attachments. It was clear where an item had been omitted because the file name of that item was included, and or because the transcript specified that an item had been omitted.

19. It was common ground between the claimant and Mr Navarro that they exchanged WhatsApp messages and also had at least one telephone

conversation on 4 November 2018. The subject under discussion was the possibility of the claimant working at the site. Mr Navarro had originally supplied the address of the site to the claimant on 2 November 2018. The claimant had been unable to attend the site the following day, Saturday, 3 November 2018. The exchange of messages on 4 November 2018 discussed whether the claimant was registered with "CIS". In other words, with the government's Construction Industry Scheme.

20. The claimant's opinion was that once he had clarified to Mr Navarro that he, the claimant, was unfamiliar with this scheme, Mr Navarro had indicated that the respondent could help him to apply. Mr Navarro's opinion was that the claimant had been unsure about the scheme and so he had supplied additional information to the claimant to make clear that he was not talking about health and safety certificates/training, but about CIS. Mr Navarro's opinion was that he, Mr Navarro, had made it plain to the claimant that the claimant could only work for the respondent if the Claimant was registered with CIS.

21. While it was the respondent's position that the claimant had represented to them that he was registered with CIS, my finding is that that is not the case. Possibly, there may have been some mutual misunderstanding. In any event, having reviewed the WhatsApp exchanges and heard from both witnesses, my finding is that there was no contractual term by which the Claimant was required to be a member of CIS prior to starting work, and there was no representation by the Claimant that he was already registered with CIS.

22. According to the claimant's evidence, the result of the communications on 4 November 2018 was that the claimant attended the site for the first time the following day, Monday, 5 November 2018. He says that on 5 November 2018 he was shown what needed to be done in the bathroom and he said he would do the work for £150 per day. He says that no set timescale was agreed, but rather Mr Navarro would review his work and decide whether the arrangement would become long term. The claimant states that he started work that same day, 5 November, and this is therefore one of the days for which he claims £150. He asserted that the first two days work mainly consisted of preparatory works, and clearing the bathroom of what he described as rubbish.

23. Mr Navarro's evidence differed in several key respects. Mr Navarro stated that the claimant did not attend the site at all on 5 November 2018, but came for the first time on Tuesday 6 November. Mr Navarro agreed that at the meeting the claimant requested £150 per day and that this pay rate was agreed. Mr Navarro also accepted that there had been no set time period for the tiling work, and that the claimant had suggested that Mr Navarro review the Claimant's work for the first few days to see if it was good enough. However, Mr Navarro's evidence was that the claimant did not start work on that first day. Rather he said that the claimant left and came back the following day, 7 November 2018, to start work.

24. The claimant and Mr Navarro both agreed that the claimant was not responsible for supplying any of the materials or the tools that would be used by the claimant when doing the tiling work.

25. The evidence of Mr Ventura was that he had been at the site on either 5 or 6 November 2018, but he was not certain which of those dates it was. However, at the time that he attended the claimant was not on site working in the bathroom. Rather the bathroom was in a state of readiness for the tiling work to commence, but the work had not yet commenced.

26. There were a series of messages from Mr Navarro to the claimant, each with a multimedia attachment omitted. One was at 0836 on 5 November 2018. Seven were at 1154 on 5 November 2018, one was at 1217 on 5 November 2018, and three were at 1541 on 6 November 2018. Mr Navarro's evidence was that he had sent various photographs to the claimant to explain what should be done on-site. He said this was before the Claimant started work.

27. On 7 November 2018, at 1014 the claimant sent a WhatsApp message to Mr Navarro and it was common ground that this attached the picture shown at page 50 of the bundle, which was of an electrical connection. Mr Navarro stated that this image had been received by him on the first morning on which the claimant had been working on site. Furthermore, Mr Navarro asserted that he was alarmed at this message because the claimant should not have had any queries about this connection because it was, according to Mr Navarro, a standard item which he would have expected anybody with experience in the construction industry to be familiar with.

28. It was put to Mr Navarro that his written statement indicated that the claimant had asked a question which could be translated as "*what's this*?". However the WhatsApp exchange did not appear to be in the form of a question. Mr Navarro stated that on receipt of the claimant's text message he had telephoned the claimant and it was during that telephone call that the claimant had asked what to do with the connection. This would have been a telephone call in addition to the WhatsApp reply which Mr Navarro sent at 1015. It was submitted by the respondent that it was more likely than not that the message about the connector was sent on the claimant's first day of work.

29. Mr Navarro's evidence was that on each of 7 November and 8 November 2018, he attended the site in the morning before 9am to grant access to the workers, but did not stay on site all day overseeing them. The evidence of both Mr Navarro and Mr Ventura was that on 9 November, early in the morning, they looked at the work done on the bathroom and a decision was made that the work was of such a poor standard that the claimant should not continue. Mr Ventura indicated that he left it to Mr Navarro to communicate this to the claimant, and that he Mr Ventura was not present at the time of any phone call. Mr Navarro's evidence was that he contacted the claimant straightaway and informed the claimant not to attend the site that day or at all thereafter. Mr Ventura stated that the following day, the Saturday, the site was locked on his instructions and nobody worked. This was so that arrangements could be made for a replacement tiler to attend the following week.

30. The claimant's evidence was that he did work on Friday 9 November and again Saturday 10 November and also Monday 12 November.

31. The respondent's final witness was Mr Kusz. He gave evidence that he attended the site on 13 November 2018 in order to provide a quote to the respondent in relation to tiling the bathroom. He said in his written statement and also in his oral answers that the claimant was also present on 13 November 2018. It was not suggested that the claimant was working at that time but rather that he was collecting his belongings, and/or discussing money with Mr Ventura.

32. The WhatsApp exchanges contained nothing for 8 or 9 November 2018. On 10 November 2018 in the evening there were some exchanges in relation to the invoice that the claimant should draw up in relation to the respondent. Mr Ventura said that this exchange was a mistake and that Mr Navarro had confused the claimant with another contractor. However my finding is that that is not the case and that as of the evening of Saturday, 10 November 2018, Mr Navarro, acting on behalf of the respondent was in discussions with the claimant in relation to payment arrangements for the work which the claimant had done that week.

33. It is also notable that the suggestion by Mr Navarro was that the invoice should refer to removal services. My finding is that this supports the Claimant's case that before starting the tiling work, he did two days of preparatory work.

34. There were further WhatsApp exchanges on 11 November 2018 and again on 12 November 2018.

35. My finding is that the claimant did in fact work on 9 and 10 and 12 November 2018. He was informed as of 12 November 2018 that his services were no longer required and that he should not return to the site. The evidence of the WhatsApp exchanges, and Mr Kusz, matches the claimant's version of events more closely than it matches the version given by Mr Ventura and Mr Navarro.

36. It does seem clear that, for whatever reason, Mr Ventura and Mr Navarro were genuinely dissatisfied with the claimant's work and sought to make alternative arrangements to have the tiling done. My finding is that they treated this as an urgent priority and arranged for Mr Kusz to attend as soon as possible, on 13 November 2018, in order to see if he could put things right. Furthermore, if the claimant had items at the property which he needed to collect, as stated by Mr Kusz in oral testimony, then that seems more consistent with the claimant having worked until 12 November rather than finishing on 8 November. Finally, while I accept that it is at least possible that the exchange of messages on 11 and 12 November 2018 simply related to arrangements for the claimant to attend the site to collect his belongings, they seem more consistent with a new instruction, given for the first time, that the claimant was no longer required at the site.

37. In relation to the days of 5 and 6 November 2018, in the claimant's favour there is the fact that the messages of 4 November 2018 seemed to ask him to come early the following day and there was nothing in the messages to indicate a cancellation of that arrangement. On the other hand, both parties did agree

that they had telephone conversations on 4 November 2018 as well as the WhatsApp exchanges.

38. In the respondent's favour, there is the fact that the issue about the electrical connection is more likely to have arisen on the first day of work rather than the third day. It is also plausible that a face-to-face meeting between the parties to discuss the job, prior to the job actually commencing, would take place.

39. On balance, I find the Claimant's version more plausible and I accept the Claimant's account that he did start work on 5 November, and that he also worked the following day, 6 November. In answering questions, Mr Navarro indicated that the conversation between him and the Claimant when the Claimant first attended the site essentially consisted of Mr Navarro giving instructions to the Claimant. My finding is that Mr Navarro was not under the impression that the Claimant was running a business and giving a quote. There was no reason for the Claimant to leave the site after having been given instructions, only to return the following day. My finding is that the Claimant started work straight away.

40. Furthermore, my finding is that Mr Navarro is mistaken in thinking that the Claimant did not attend on 5 November. Mr Navarro is thinking of 3 November. It is common ground that the Claimant failed to attend the site on 3 November. My finding is that the Claimant did not miss a further appointment on 5 November. Had he done so, he might not have got the work. In any event, had he missed the appointment, it would be strange that there was no mention of this in the Whatsapp communications.

41. I accept the Claimant's evidence that he was mainly doing removal/clearance work on the first couple of days. This is seemingly corroborated by the Whatsapp exchange. This is the explanation for (a) the fact that Mr Navarro was still giving instructions for how to do the tiling work (including sending photos by Whatsapp) on the Monday and Tuesday and (b) the fact that the issue with the connector did not arise until the Wednesday and (c) the fact that Mr Kusz's opinion was that not many days tiling work had been done before he became involved.

42. Therefore, it is my finding that the claimant worked on 5, 6 7, 8, 9, 10 and 12 November 2018. Furthermore, it was common ground that the agreement was that the claimant would be paid £150 per day.

43. My finding is that the claimant was not in business on his own account. The respondent was not a client of any business operated by the claimant. The evidence of the claimant and Mr Navarro was fairly similar in relation to how they came to be in contact with each other. Effectively, it was accepted by Mr Navarro that it was at least possible that the claimant had been responding to the advert which Mr Navarro admitted had been placed. My finding is that Mr Navarro did not believe that the claimant was operating a business. It was clear to Mr Navarro, based on the WhatsApp exchanges, that the claimant was not familiar with the CIS scheme. While I accept that membership of the CIS scheme is not compulsory, and it is only one factor to be taken into account,

the claimant did not have any business name or business email address or business stationery and he did not keep business accounts. He was not holding himself out to the Respondent as a self-employed independent contractor, and there was no evidence that he had previously done so in relation to any other clients either.

44. Furthermore, my finding is that the arrangement was that the claimant would do the work personally for the respondent. There was no suggestion to the contrary by any of the respondent's witnesses. It was not suggested to the claimant during his evidence that he was free to send a substitute.

45. There was no written contract between the parties, and no agreement that the Respondent could make deductions from his wages if his work was poor, and/or if the Respondent was required to hire someone else to finish the tiling.

46. For these reasons my finding is that the claimant was a worker and that he has suffered deductions from wages that were not authorised. The agreed amount which he should have received was £150 x 7, which is £1050 (gross). In fact, he received £312.50 (gross). So the difference is £737.50 (gross).

47. Section 23(2) of the Employment Rights Act 1996 states:

    (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
    (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
    (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
    (3) Where a complaint is brought under this section in respect of—
    (a) a series of deductions or payments, or
    (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

48. ACAS early conciliation commenced on 12 February 2019 and ceased on 27 February 2019, and the claim was issued within a month, on 26 March 2019.

49. Therefore, the claim was in time provided the date on which payment was due was 13 November 2018 or later.

50. There was a lack of clarity about when the Claimant was paid the £250 (net) sum, and also when the Respondent paid the PAYE on that.

51. In any event, I am satisfied that the Claimant was entitled to be paid for up to and including Monday 12 November 2018, and that the date on which payment was due (for the 12 November work, at least) did not fall until the end of that week. If there was any payment made to the Claimant on or before 12 November, then it was only a partial payment and only in relation to the work done from 5 November to 10 November 2018. Thus the failure to pay at all for

12 November, as well as the unauthorised deductions for the period 5 November to 10 November 2018 constitute a series of deductions, the last of which was on or after 13 November 2018, and therefore the claim in time.

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Employment Judge Quill

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Date 13 August 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

14 August 2019

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FOR EMPLOYMENT TRIBUNALS