EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Nicula	v	**Hiwatt Electronics Limited**

Heard at: **Sheffield** **On:** **7 August 2019**

Before: **Employment Judge Rostant**

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr J Gilbert, consultant**

JUDGMENT having been sent to the parties on 9 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Employment Tribunal on 11 April 2019, the claimant brought claims of unfair dismissal, unauthorised deduction from wages and breach of contract in respect of a breach of his contractual entitlements to notice. By a subsequent email to the respondent and to the Tribunal on 12 July 2019 the claimant indicated that he wished to amend his claim to include a claim for failure to pay holiday pay.

2. At a case management preliminary hearing before Employment Judge Buckley on 18 July 2019, Judge Buckley identified a number of preliminary issues and set them down for determination at a one day open preliminary hearing.

3. That matter came before me on 7 August 2019. At paragraph 1 of her case management summary, Judge Buckley identified the following preliminary issues.
   i. Whether or not the claimant is an employee for the purposes of bringing an unfair dismissal or breach of contract claim

   ii. Whether or not the claimant is a worker for the purpose of bringing an unauthorised deduction from wages claim

iii. Whether or not the claimant had the necessary two years of service for bringing a claim of unfair dismissal.

iv. Whether or not the claim should be amended to include a claim for unauthorised deduction in respect of the holiday pay claim and

v. To make appropriate case management orders.

4. At the hearing of the 7th August I heard from the claimant who represented himself and Mr D Atkinson the respondent's Managing Director. I had the benefit of a joint hearing file running to some 211 pages.

5. **The Law**

5.1. Section 230 of the Employment Rights Act 1996 defines an employee as an individual *"who has entered into or works under… a contract of employment"*

5.2. Subsection 2 of the same section defines a contract of employment as meaning "*a contract of service"*

5.3. Subsection 3 defines a worker as "*an individual who has entered into or works under a contract of employment" or "any other contract whether express or implied… whereby the individual undertakes to do or to 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 out by the individual"*

5.4. Section 94 of the Employment Rights Act provides that an employee has a right not to be unfairly dismissed by his employer.

5.5. Section 108 of the Employment Rights Act provides that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

5.6. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him.

5.7. Section 27 of the Employment Rights Act defines wages and Section 27(1)(a) includes in that definition holiday pay and also *"any fee, bonus, commission… or other emolument referable to his employment whether payable under his contract or otherwise"*

5.8. The Employment Tribunal Extension of Jurisdiction (England & Wales) Order 1994 provides that proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the

recovery of damages and the rest of that section limits that claim to a claim for damages for breach of contract.

5.9. The net effect of the foregoing provisions is that in order to pursue a complaint of unfair dismissal the claimant must be employed under a contract of employment for a continuous period of two years. In order to pursue a claim for breach of contract, a claimant must be employed under a contract of employment. In order to pursue a claim for unauthorised deduction from wages, including holiday pay, a claimant must meet the definition of a worker under Section 230 of the Employment Rights Act.

5.10. In this case it was common ground that Mr Nicula's contract with the respondent began on 1 July 2017 and ended on 31 January 2019 and it followed that whatever status he enjoyed under that contract, his claim of unfair dismissal was doomed to failure since he did not have the requisite period of service required by Section 108 of the Employment Rights Act to pursue a complaint of unfair dismissal. It followed that before I considered any of the evidence as to status I was able to tell the parties that the claim of unfair dismissal must fail.

The application to amend the claim

6. It was common ground that the claim form presented by Mr Nicula did not contain within it an application of unauthorised deduction from wages in relation to unpaid holiday pay. On 12 July 2019, Mr Nicula sent a statement of evidence to the Employment Tribunal. In paragraph 15 of that statement, Mr Nicula observed that paid annual leave is a legal right that an employer must provide and he set out his calculation of an entitlement to unpaid holidays in the sum of £4,300. This was the first time that there had been any mention of a claim for holiday pay. Under the same heading he set out his claim for unauthorised deduction from wages in respect of unpaid pay owing to him in the sum of £2,200 and also a claim for expenses in the sum of £300. Judge Buckley treated that as an application to amend to include a claim for unpaid wages in respect of holiday pay.

7. On any view that application, if it had been brought as a fresh claim, would be out of time, an application for unauthorised deduction from wages must be brought within three months of the deduction or the last in a series of deductions and Mr Nicula's last date for pursuing such a claim was therefore three months less a day (subject to any extension for early conciliation) beginning on 31 January 2019. A letter dated 12 July 2019 was therefore just under two months' out of time. Mr Nicula's explanation for the lateness of the application was that he had only just become aware of his entitlement to holiday pay. Mr Nicula has had no legal help in the course of preparing his claim to the Employment Tribunal and, whilst he has been employed before and received holiday pay in the context of that employment, and whilst he has carried on business as a self-employed person, I did not understand from his history that he had ever been engaged as a worker before, in circumstances for example where he paid his own tax and national insurance fees but had nevertheless enjoyed status of worker as opposed to being self-employed.

8. In deciding whether or not to grant the application for amendment I considered the Judgment of the Employment Appeal Tribunal in the case of **Selkent Bus Co. Limited v Moore 1996 ICR 836**. I therefore acknowledged that having concluded that in order to pursue this claim the claimant does need permission to amend, and that that amendment is a substantial one requiring the pleading of new facts, I must consider the applicability of the time limits. As already observed, if his claim had been brought as a separate fresh claim it would be out of time. However, as made plain in the Judgment of the Appeal Tribunal in **General Workers Union v Safeway Stores EAT 0092/07** the issue of time limit is not decisive. The Tribunal must carry out a balancing exercise as demanded by the case of **Cocking v Sandhurst Stationers Limited & Anor 1974 ICR 650**. The Tribunal must balance the injustice to the respondent in allowing the application as against the injustice to the claimant in not allowing the application and the question of time limits is only one factor in that exercise. In that context I note that although the claim is out of time it is not wildly out of time and the respondent was not able to point to any particular prejudice it would suffer because the claim was brought two months later than it should have been. Furthermore, I note that the claimant has already, in his claim form, brought a claim for unauthorised deduction from wages which depends upon his establishing the fact that he is a worker. If the claimant were able to establish the appropriate status for pursuing that claim then there appeared to be no dispute between the parties that he had not received any paid holiday and there would be no particular calculation complications or requirement for the respondent to establish whether the claimant had indeed taken any paid holiday. As against that, if the claimant were shut out from his right to pursue that claim, a right which I accept he would have pursued had he been aware of it at an earlier stage, the claimant stands to lose a substantial sum of money in holiday pay owing to him. In the circumstances, I take the view that the balance of prejudice here falls in favour of the claimant and the application to amend should be permitted despite the fact that in all likelihood had this claim been pursued as a separate claim the claimant would not have been able to show that it had not been reasonably practicable to bring the claim within the relevant time limit.

The claimant's status- employment

9. It is my conclusion that the claimant was not employed under a contract of employment. In so concluding I have considered the extensive case law on this point but most particularly **Hall (Inspector of Taxes) v Lorimer 1994 ICR 218** At the time that the claimant began his relationship with the respondent, the claimant ran a business called NMP Studios. That business did a variety of things. NMP Studios is a recording studio in Cable Street, London E1W, which the claimant leased. The studio premises were used for the conventional purpose of a recording studio with the claimant occasionally offering his services as Sound Engineer or even Producer, but at other times merely charging for the use of the studio space by musicians wishing to make a recording. The claimant also ran a retail business from NMP Studios selling amplification equipment and second-hand instruments. When claimant entered into a business relationship with the respondent it was a two-fold relationship. Part of the agreement was that the claimant could buy the respondent's amplification equipment at wholesale price to sell at retail price in the London studio. There are numerous examples of that relationship by way of invoices

from the respondent to the claimant, the invoices being charged to NMP Studios. The other part of the business relationship was that the claimant entered into an agreement to provide consultancy services to the respondent. Those consultancy services appeared to be broad ranging but included and were centred on marketing services for the respondent's business. There are numerous examples of invoices from NMP Studios to the respondent in which the claimant's consultancy services are charged to the respondent at the going rate of £100 a day. This was not a wage or salary but a payment for work done and invoiced as an when although, I accept that that settled down into pattern of some regularity.

10. Both the claimant and Mr Atkinson understood that nature of their relationship not to be one of a contract of employment. The claimant understood that he was to be paid for his services which, although not closely defined, were sales, marketing and artist relations. Although the understanding of the parties as to the nature of the relationship not decisive it is indicative as to the true nature of the relationship between the parties and neither party understood that they were entering into a contract of employment as was clear from the evidence they gave at the hearing. Furthermore, it was evident that the claimant's relationship with the respondent was untypical for a contract of employment in the sense that the claimant had a commercial relationship with the respondent as a purchaser and reseller of its products and that he therefore benefitted from the work that he did for the respondent in marketing their products, whenever he sold their products at a retail value from the studio. In other words his services for the respondent were not only rewarded by his fee but, indirectly, by whatever advantage he might gain from the promotion of their equipment as a retailer of that same equipment.

11. The claimant also understood that there was no requirement for him to work on any particular day and the only consequence of him not working was that he would not receive payment. Nor was I pointed to any evidence to suggest that the respondent had contracted with the claimant that he work a minimum or set number of days and that there was therefore any obligation to supply a certain level of work. The fact that the claimant did indeed work often and regularly does not by itself show that there was a mutuality of obligation entailing that level of work being supplied and carried out.

12. The claimant and the respondent arranged that payment to the claimant would be made by way of the claimant invoicing on regular occasions for the work done and that the claimant would account for tax and national insurance himself. Indeed, at one point the claimant asked that that situation be changed and that he actually "go on the books" (his phrase). His reason for that was that he wished to regularise the relationship into one of employment. The respondent declined to make that change. That, if it was needed, was further evidence of the fact that the claimant understood the position between himself and the respondent not to be one of employment under a contract of employment but rather to be something less than that.

13. Once again, although the arrangements for tax and national insurance are not conclusive they are a further indication of the nature of the relationship. The respondent did not consider itself obliged to deduct tax or national insurance from the claimant's wages at source as it would have had the claimant being an employee and the claimant knew that he was obliged to account for that income

for tax, which he did as part of the income of NMP studios alongside the other sources of income for that business.

14. The claimant was in no way constrained from carrying out work for others and indeed did so as described above. The limitation to that was that it was understood that he would not directly compete in the manufacture and sale of his own equipment. The claimant understood that he was not entitled under the contract to a pension, holiday pay or sick pay and at no point was it suggested that he be required to adhere to the respondent's policies and procedures as they applied to staff engaged in the manufacture of the equipment.

15. Finally, there was an almost total lack of control by the respondent over the way in which the claimant carried out his work. The claimant was employed by the respondent for his expertise and market knowledge and it was largely left up to him as to how he arranged his working day. It is the case of course that the respondent referred sales and other queries to the claimant by way of forwarding emails but the order in which the claimant dealt with those emails and the way in which the claimant chose to respond to any particular queries was entirely up to the claimant, that is not to say that the claimant had complete discretion since the claimant did not have total freedom to strike whatever deal he thought was appropriate, rather the claimant had parameters to work in when reaching sales arrangements with potential customers.

16. The claimant had no regular workstation at the respondent's and no fixed days or hours of work and on the evidence before me on any particular day he might well carry out business on behalf of NMP Studios as part of the retail or other operations mixed in with providing consultancy services to the respondent also under the name of NMP Studios.

17. Whilst I have no doubt at all that there was a contractual arrangement between the claimant and the respondent the arrangement being that the claimant provided certain consultancy services in exchange for remuneration of £100 per day, I am satisfied for all of the reasons outlined above that the arrangement does not fit the mould of a contract of employment.

Was the claimant in business on his own account?

18. This was a harder question for me to answer. I note that NMP Studios is not a limited company and is therefore not a separate legal person, it is in fact simply a trading name for the claimant. So, although it establishes a degree of arm's length distance between himself and the respondent, it is not the sort of distance that would be supplied by the existence of a separate legal personality standing between the claimant and the respondent. There is no evidence at all that the claimant sought to offer his consultancy expertise elsewhere and although the business of NMP Studios as a retail organisation or a provider of record space continued entirely independently that could almost be regarded as a separate business entirely, the only point at which the claimant ever sought to compete with the respondent was in a new venture which resulted in the claimant's engagement with the respondent coming to an end when the claimant began to market amplification equipment of its own design and manufacture. Up until that point, his consultancy services were offered to the respondent exclusively, and importantly, on the basis that nobody else could offer that service.

19. The history of the claimant beginning his relationship with the respondent is simply put but instructive, Hiwatt as a business went into abeyance on the death of its founder. For a while it appears to have been continued by the founder's son, manufacturing and selling under the brand 'Hiwatt', amplification equipment based on his father's designs but without the legal rights so to do. The business was put on a proper footing by Mr Johnson and his partners. Hiwatt has a long-standing reputation as a supplier of high quality amplification equipment and the new business wished to market old and new designs taking advantage of the brand name and intellectual property. The claimant had long-standing familiarity with the Hiwatt product having, for a while, worked for the founder's son, and was perfectly placed to use his product knowledge and expertise to help the nascent company market its goods. Moreover, the claimant and Mr Johnson were known to each other, having played in a band together. There was no question of the marketing work for which the claimant was engaged being done by anyone other than the claimant, who had the necessary knowledge and expertise, and no evidence that the relationship between the claimant and the respondent was that of client and professional. The claimant did have professional expertise but (at least as regards the services he was supplying to the respondent) it was of a very limited and specific nature, applicable really only to the respondent's amplification equipment, which he knew intimately well. There is certainly no evidence for example that the claimant had carried on in business as the provider of marketing services to other organisations selling amplification equipment prior to his relationship with the respondent.

Was the claimant a worker?

20. Once I had satisfied myself that the claimant was not employed under a contract of employment and was not self-employed it became a relatively straightforward matter to conclude that the claimant met the definition of 'worker'. The claimant could not substitute his services and was therefore providing services to the respondent of a personal nature. There was undoubtedly a contract between them and the evidence shows that there was a regularity and frequency of contact that establishes that that was a contract under which both parties understood that the claimant was regularly and frequently available to provide those services. That contract entailed a mutuality of obligation so that for each day on which the claimant agreed to work for the respondent it was understood that he would carry out that work and would receive his fee for same on invoice. The fact that the claimant did not ask for holiday pay or sick pay might be indicative of the fact that the parties did not understand that the relationship to be one under which the claimant was entitled to that or it might simply indicate the claimant's ignorance of the existence of the middle status of worker and the rights that attend to having such status. I am satisfied that the latter is the case as is exemplified by the late application to amend the claim to include a claim for holiday pay. In the end Mr Johnson's own evidence that he would not have been happy for the claimant to substitute his services for another is the key factor in my decision that the claimant satisfies the definition of worker and for those reasons I find as I have.

21. The consequence of my decisions are that the claim of breach of contract must fail since the claimant was not employed under a contract of employment. Had the claimant had two years contracted relationship with the respondent, his

claim for unfair dismissal would have failed in any event because that contract was not one of a contract of employment. However, the claimant is entitled to pursue his claim for unauthorised deduction from wages by virtue of the fact that he was engaged as a worker within the definition of section 230, and is entitled, following amendment to pursue his claim for failure to pay holiday pay.

Employment Judge Rostant

Dated 13 September 2019