EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr W L Hall	v	**CTH Joinery Solutions Limited**

Heard at: **Leeds** **on:** **20 August 2019**

Before: **Employment Judge Cox**

Representation:

For the Claimant: Mrs R Graley, lay representative

For the Respondent: Did not attend and was not represented

REASONS

1. Mr Hall presented a claim to the Tribunal alleging that he had been unfairly dismissed from his employment with CTH Joinery Solutions Limited ('the Company') as a joiner. He also claimed that the Company had made unauthorised deductions from his wages, breached his contractual right to notice of termination of his employment, failed to pay him accrued holiday pay due on termination of his employment and failed to give him a written statement of his main terms and conditions of employment.

2. At the Hearing, the Tribunal heard oral evidence from Mr Hall. The Company did not attend the Hearing but submitted several witness statements. These were from: Mr Chris Halifax, the owner and managing director of the Company, and his wife Mrs Chloe Halifax; Mr Liam Hobson, another employee of the Company; Mr James Hunt-Brown, Mr Stephen Halifax, Mr Joe Bastone, Ms Stephanie Bastone, Mr Ben Bamforth and Ms Lucy Bibby, who were customers of the Company; and Mr Reef Healy, Mr Halifax's barber. The Tribunal considered these statements. Mr Halifax's statement covered relevant matters but much of the other witnesses' evidence related to their positive views on Mr Halifax's character and business and was largely irrelevant to the issues that the Tribunal had to decide. In any event, as the Company's witnesses were not

present to be questioned on the accuracy of their evidence, the Tribunal gave their evidence less weight than the evidence of Mr Hall.

3. The Tribunal also considered two files of documentation submitted by Mr Hall and the Company.

4. Based on that evidence, the Tribunal made the following findings on Mr Hall's claim.

Employment status

5. As a preliminary issue, the Tribunal had to decide Mr Hall's employment status whilst he worked for the Company. His right to claim unfair dismissal, damages for failure to give notice and compensation for failure to provide a written statement of his employment terms all depended upon him being an employee of the Company. His right to protection from unauthorised deductions from his wages and accrued holiday pay depended upon him being an employee or a worker employed by the Company. The Company's position was that Mr Hall was a self-employed person who was neither an employee nor a worker.

6. Mr Hall began working for the Company in March 2018. Based on Mr Hall's evidence, the Tribunal finds that it was intended from the outset that Mr Hall should be an employee of the Company. In particular, no mention was made of Mr Hall being self-employed or of him having the right to send anyone to work in his place. Text messages between Mr Hall and Mr Halifax support this. So, for example, in a text message Mr Halifax sent Mr Hall on 25 January 2018, he said: "just having talks with my accountant about having a Second employee on the books, with regs and everything." Mr Halifax sent Mr Hall a text message on 15 February 2018 offering him employment in these terms: "So obviously you would get statutory holidays, 28 days including bank holidays. I'll get a contract wrote up for you. Have you got any requirements?? I can offer you £12.50 an hour and let's take it from there. How old are you? Currently anyone over 25 can drive the new company van." In September 2018, Mr Halifax texted Mr Hall to complain about some Instagram posts Mr Hall had made of work he had done otherwise than for the Company and said: "you are suppose to be an employee of CTH Joinery". Mr Hall responded that the photographs were not intended to generate work for himself and were of work he had done for his family.

7. The way in which the working relationship between Mr Hall and the Company operated was also entirely consistent with him being an employee. Mr Hall worked on the direction and under the control of Mr Halifax, either in the workshop or on site. If there was no joinery work, he cleaned tools, cleaned the workshop, made shelving for the workshop or tidied the wood stores and was still paid his weekly wage. He used his own hand tools, as is traditional for joiners, but otherwise used the Company's tools. He went to work in the Company van, which had Company branding on it. He submitted time sheets for the hours he worked and was paid at the agreed hourly rate of £12.50 per hour. His working hours were 8am to 16.30pm on Monday to Friday, and he worked

overtime if required. He was paid for the days' holiday he took. The Company deducted 20% from his wages, ostensibly for income tax and National Insurance contributions, although there was no evidence before the Tribunal that the Company had ever registered as an employer for PAYE purposes during the time that it was paying Mr Hall.

8. The Tribunal's conclusion that Mr Hall was an employee is also fully supported by the transcript of an audio recording of a conversation that took place between Mr Hall's mother, Mr Hall and Mr Halifax on 21 September 2018. Mrs Hall had asked to speak to Mr Halifax because Mr Hall had been notified by HMRC that he was due a tax refund, and the documentation supplied showed that the Company had not been paying tax or National Insurance contributions on his behalf. Mr Hall had also been asking Mr Halifax repeatedly for wage slips, which he had not supplied. She was very concerned about this on her son's behalf and wanted to challenge Mr Halifax about it. During the meeting Mr Halifax acknowledged that he was only now on the point of registering with HMRC under the PAYE scheme, and so he had been deducting tax and National Insurance from Mr Hall's wages without being authorised to do so. In his witness statement, Mr Halifax said that there were relevant sections missing from the audio recording. The Tribunal does not accept that. The transcript of the audio recording reads as a seamless account of a conversation, at least as it relates to Mr Hall's tax situation.

9. The Company submitted documents in evidence that purported to be a letter of appointment of Mr Hall as a sub-contractor dated 2 March 2018 and "self-employment CIS statements" and "self employment CIS remittances" dated from April to October 2018. Mr Hall's evidence, which the Tribunal accepts, was that he never saw any of these documents at the time. Further, the Tribunal accepts Mr Hall's submission that these documents were fabricated by the Company to support its case that he was self-employed from March to October 2018. Mr Hall lives in a house called Old Lea Farm. On 14 September 2018, Mr Halifax texted Mr Hall asking for his address. In his text in response, Mr Hall misspelt the name of his house as Old Lee Farm. This misspelling appears in all the documents relating to self-employment which allegedly date back to March 2018.

Unfair dismissal

10. At the meeting on 21 September Mr Halifax gave Mr Hall a contract of employment to sign. This document acknowledged that Mr Hall was an employee of the Company but only from 21 September 2018. Mr Halifax wanted Mr Hall to say that he had been self-employed up until then. This appears to have been on the advice of the Company's accountant, Mr Robert Milton. Mr Milton had written to Mr Halifax saying: "Easily fixed. From March to date we treat him as a self employed consultant. His earnings will be such that he will not need to file a tax return. And you will still be able to claim the payment to him as a deductible business expense. And we just put him on the payroll

NOW. Because were so happy with his self employed consulting work, we want him as a full time employee. Sorted! SWALK. Evil Genius."

11. Under Section 1 of the Employment Rights Act 1996 (the ERA), Mr Hall was entitled to a written statement of his main terms of conditions of employment. That included a statement of the date his employment began. Mr Hall was not willing to sign the contract Mr Halifax offered him because the start date was inaccurate. It should have been 5 March 2018 when he began working for the Company. If he accepted in writing that he was an employee only from 21 September then he would remain liable for income tax and National Insurance contributions as a self-employed person up until that date even though the Company had already deducted sums from his wages in respect of income tax and National Insurance contributions.

12. On Friday 28 September Mr Halifax told Mr Hall that his solicitor had said that if Mr Hall had not signed the contract by the following Monday, 1 October, he could no longer work for the Company. On that Monday Mr Halifax and Mr Hall had a meeting. Mr Hall told Mr Halifax that he would not sign the contract as the start date was wrong and he would be liable to pay further tax and National Insurance contributions. On his own evidence, Mr Halifax told Mr Hall that this was the only contract on offer and that there were no alterations he was willing to make. Mr Halifax's evidence was that he ended by telling Mr Hall that he would not be offering "any contract whatsoever". This clearly amounted to Mr Halifax dismissing Mr Hall.

13. Mr Halifax's evidence was that he was unhappy with Mr Hall's attitude and performance and that they discussed this at length at their meeting on 1 October. Even if that was the case, based on the evidence it heard and read, the Tribunal is satisfied that the principal reason that Mr Halifax decided to dismiss Mr Hall was because he was unwilling to sign the draft contract, because he was in effect alleging that the Company had infringed his statutory right to a written statement that recorded the date that his employment began. That made his dismissal automatically unfair under section 104(1)(b) ERA.

Compensation for unfair dismissal

14. Mr Hall sought compensation for his unfair dismissal rather than re-employment by the Company. As he had not been employed for a complete year, he did not claim a basic award. In assessing his compensatory award, which is to compensate him for his losses sustained in consequence of the dismissal, the Tribunal used Mr Hall's average net earnings during his employment by the Company, which was £474.22. The Tribunal has assessed Mr Hall's loss for the period from 1 to 7 October separately below, under his claim for damages for failure to give notice. For the period from 8 October 2018 to the date of the Tribunal Hearing, a period of 45 weeks, his net loss of wages amounts to £21,339.90. Since his dismissal Mr Hall has earned £3,000 from self-

employment. His net loss to the date of the Tribunal Hearing is therefore £18,339.90.

15. From the date of the Tribunal Hearing onwards, Mr Hall's loss of earnings will diminish because since May 2019 he has been drawing a wage from his new enterprise as a self-employed joiner. At the time of the Hearing this was around £250 per week less than what he was earning with the Company, but is likely to increase over time. The Tribunal has adopted the broad approach of assuming that he will replace his income from the Company gradually over the coming 12 months and has assessed his future loss as amounting to half his current net loss of £250 per week for that period. That gives a figure of £6,500 for future loss.

16. Mr Hall gave no evidence about his expenses in obtaining a new job or setting up his new business so the Tribunal is unable to award any compensation in respect of that. The Schedule of Loss prepared by Mr Hall's former solicitor claimed an uplift under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 for the Company's failure to comply with the ACAS Code of Practice on disciplinary procedures. As the reason for Mr Hall's dismissal did not in fact relate to a disciplinary matter, the ACAS Code did not apply and no uplift can therefore be awarded. The Tribunal also considers it inappropriate to award Mr Hall any compensation for loss of his statutory rights since he did not work for the Company for sufficient time to acquire general protection from unfair dismissal and he has in any event decided to become self-employed.

17. Adding the figures for loss to the date of the Hearing and future loss together, the Tribunal reaches a total compensatory award of £24,839.90.

Unauthorised deductions

18. Under Section 13 ERA, it is unlawful for an employer to make unauthorised deductions from a worker's wages. Any deduction under statutory authority does not amount to an unauthorised deduction (Section 14(3)). Mr Hall's claim for unauthorised deductions from wages related to the deductions the Company made from his wages each week for income tax and National Insurance contributions and unpaid wages for two weeks' work.

19. The Tribunal was provided with evidence of the payments the Company made into Mr Hall's bank account. He was unable to identify the precise amounts he was paid in cash in the weeks of 24 April and 4 May 2018 so the Tribunal has assumed that each of these payments was the average weekly figure he received over the course of his employment with the Company, namely £474.22. On that basis, the total amount of payments Mr Hall received from the Company was £13,278.15. That figure was net of the 20% deductions the Company made for tax and National Insurance contributions so the nominal gross figure was £16,597.68. The Company in fact had no statutory authority to

make those deductions because it was not during Mr Hall's period of employment registered as an employer for PAYE purposes. The Tribunal therefore finds that the 20% deductions made each week amounted to unauthorised deductions from Mr Hall's wages amounting to £16,597.68 - £13,278.15 = £3,319.53.

20. Mr Hall worked two weeks for which he was not paid. In the week beginning 17 September he worked 40 hours. His hourly rate of pay was £12.50 and so he was due £500. In the week beginning 24 September he worked 40.25 hours and so was due £503.12. As the Tribunal does not know whether the Company is now registered for PAYE purposes, it calculates the amount of these deductions without taking into account income tax and National Insurance contributions.

21. The total award the Tribunal makes for unauthorised deductions from wages is therefore £3,319.53 + £500 + £503.12 = £4,322.65.

Notice pay

22. Mr Hall was dismissed on 1 October without the one week's notice of termination to which he was contractually entitled. Grossing up his average net weekly wage £474.22 gives a figure of £592.78. The Tribunal awards Mr Hall that sum as damages for failure to give notice of termination.

Accrued holiday pay

23. Mr Hall worked a five-day week and was employed by the Company for 30 weeks. Under the Working Time Regulations 1998 (WTR), he was entitled to a total of 5.6 weeks' holiday over a full year. His total holiday entitlement during his employment was therefore 30/52 x 5.6 = 3.23 weeks. Mr Hall took a week's holiday in the week beginning 4 June 2018. He also took 28 May and 27 August 2018 as paid holiday. Based on the time sheets the Company produced, he also did not work on 2 April and 7 May. Mr Hall's evidence was that he could not remember if he had been paid for full weeks in those weeks but he did confirm he did not remember being paid less than his normal wages. The Tribunal finds that he was paid for those two days' off. The total amount of holiday he took during his employment was therefore 1.8 weeks. That left 1.43 weeks' holiday entitlement outstanding on termination of his employment. Under Regulation 14 WTR, he was entitled to a payment in respect of that accrued but untaken leave. Mr Hall's week's pay was £592.78. The Tribunal therefore awards him 1.43 x £592.78 = £847.67.

Failure to provide a written statement

24. In breach of Section 1 ERA, the Company failed to provide Mr Hall with a statement of his main terms and conditions within a month of him beginning

employment. Under Section 38 of the Employment Act 2002, the Tribunal has power to award two weeks' pay in compensation for this or, if it considers it just and equitable in all the circumstances, the higher amount of four weeks' pay. The Tribunal considers that in the circumstances of this case the higher award of 4 weeks' pay is appropriate, given that Mr Hall effectively lost his job because he was asking for an accurate statement. 4 weeks' pay at £592.78 a week gives a total of £2,371.12. The Tribunal awards that sum.

Employment Judge Cox

25 September 2019