IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: 4104245/2017 and Employer Contract Claim 4105055/2017 Heard at Edinburgh on 14 and 15 October 2019 at 10 am

Employment Judge J G d'Inverno, QVRM, TD, VR, WS

Mr D Hendrie	**Claimant** **Appears in person**
QA Vehicle Solutions Ltd	**Respondent** **Represented by** **Mr I Wells, Solicitor** **ELP Arbuthnott McClanachan, 98 Ferry Road, Edinburgh, EH6 4PG**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

(First) In the period 5th July to 31st December 2016 the claimant carried out work for the respondent under a contract for the supply of services in the capacity of an independent contractor and had no entitlement to "overtime".

(Second) The claimant's claim for arrears of wages/complaint in respect of unauthorised deduction from wages, in respect of overtime, is dismissed.

(Third) The claimant's claim for compensation in respect of accrued but untaken paid annual leave entitlement succeeds to the extent of five days in the amount of £512.15 being 5 (days) x £102.43 (net daily rate of pay).

(Fourth) The respondent's counter claim in respect of the value of the Kwik Fit invoice in the sum of £11.05 is dismissed.

(Fifth) The respondent's counter claim in respect of a labour charge incurred post the claimant's departure in the sum of £360 is dismissed.

(Sixth) The respondent's counter claim in respect of the purchase price of two satajet paint spray guns removed by the claimant from the respondent's premises on termination of his employment and retained by him succeeds in the sum of £909.60.

(Seventh) The sums due by the claimant to the respondent of £909.60 having been reduced *pro tanto*, in application of the doctrine of *compensatio*, by the debt of £512.15 owed by the respondent to the claimant, the claimant shall pay to the respondent the resultant net sum of £397.45.

REASONS

1. This case called for Final Hearing at Edinburgh on 14 and 15 October 2019 at 10 am. The claimant makes complaints, on termination of contract of non-payment of wages for:-

    - Days worked on 1 and 2 June 2017

- 11.8 days of holiday pay in respect of asserted accrued but untaken proportionate entitlement of paid annual leave outstanding and untaken as at the alleged date of termination of his employment 2 June 2017; and, for overtime allegedly worked and unpaid in the period 5 July 2016 to 1 January 2017 at an alleged overtime rate of 1.5 or £24 per hour in a gross amount (for overtime) of £6,720

1.1 In relation to overtime:-

- The claimant gives notice of a claim of 8 hours overtime allegedly worked on each Saturday in the month of August and of 2 hours overtime worked on each of 23 work days in that month

- In the month of September 2016 4 x 8 hours overtime in respect of each Saturday in September and 2 hours overtime for each of the 22 week days in that month

- 5 x 8 hours for the Saturdays in October 2016 plus 2 hours on each of the 21 week days in that month

- In the month of November 2016, 22 hours being 1 hour per week day in that month

- In the month of December 2016 22 hours being 1 hour per week day in that month

1.2 The claimant does not offer to prove the hours of overwork done on specific days but rather estimates the hours claimed asserting that they were minimum hours, and that the days in respect of which they are claimed were minimum days of overtime worked in the periods in question.

2. The respondent has entered appearance denying the claimant was employed by them prior to 1 January 2017 and, while accepting that from in or about 5 July 2016

up until 31 December 2016 the claimant had provided services to them at their Broxburn site,

(a) Asserting that he had done so in the capacity of an independent contractor.

(b) The respondent accordingly asserts that in that period the claimant had no entitlement to be paid what the claimant described as "overtime"; Rather, his contractual entitlement in that period was to be paid a regular monthly sum, a retainer, in return for the services provided by him, which sum he had received.

(c) That in that 2016 period the claimant had no entitlement to holiday pay being a self-employed contractor.

(d) Asserting that in the period of his accepted employment, that is from 1 January 2017 to 2 June 2017, the claimant had accrued a proportionate entitlement of 11.8 days paid annual leave against which he had in the period taken 10 days leaving a conceded balance of paid annual leave due to him of 1.8 days.

3. The respondent in addition advances a counter contractual claim comprising three elements:-

(a) The cost of replacing two satajet paint spray guns purchased by the company, at a cost of £909.60, for use by the claimant during his employment, but removed by the claimant along with his personal tools on termination of his employment.

(b) The value of "Kwik Fit work" (tyre balancing and valve replacement, in the sum of £11.05), allegedly carried out to the claimant's personal vehicle but charged to the respondent's account with Kwik Fit; and thirdly,

(c) In reimbursement of alleged external contractor costs, in the sum of £360, incurred to cover work due to be done by the claimant in his period of notice

Response to the Counter Claim

4. In response to the counter claim the claimant accepts that the respondents bought the two satajet paint spray guns and made them available for use by him during his employment. The claimant offers to prove that the satajet spray guns were a gift by the respondent to the claimant and thus became his personal property which he was entitled to remove with his personal tools at the end of his employment.

5. The claimant denies any knowledge of the carrying out of the alleged Kwik Fit work to his own vehicle. He puts the respondent to their proof in that regard.

6. Likewise, the claimant denies that any work of the sort in respect of which compensation is sought was carried out by a contractor because of his failing to work his notice. In the claimant's assertion he had given one month's notice but the respondent's Director Mr Quigley had, on 2 June 2019, intervened and told the claimant to leave the respondent's premises at that point, which he had done. On the above basis the claimant denies any liability in contract asserting that his employment was terminated on 2 June by reason of the respondent's express acts of telling him to go home and of his agreeing to do and of his doing so, and not by him in breach of contract.

The Issues

7. In the course of Case Management which proceeded at the outset of the hearing the claimant and the respondent's representative, ("parties"), confirmed the following as the issues requiring investigation and determination by the Tribunal at the Final Hearing.

Overtime

7.1 **(First)** – Employment Status. Did the claimant work for the respondent under a contract of service in the period 5 July 2016 to 31 December 2016 and thus, as an employee of the respondent, or alternatively did the claimant supply services to the respondent in that same period in the capacity of a self-employed contractor with no associated rights to accrue entitlement to paid annual leave, or for additional payment in respect of the services provided beyond the monthly remittance made by the respondent to the claimant in that period.

7.2 **(Second)** In the event, that the claimant was an employee of the respondent in the period 5 July to 31 December 2016 (which is denied by the respondent) at what basic hourly rate was the claimant entitled to be remunerated for his alleged contracted for 38 hour working week and at what overtime rate, if any was the claimant entitled, to be remunerated in the same period in terms of his Contract of Employment.

7.3 **(Third)** What hours of overtime were in fact worked by the claimant in the period 5 July to 31 December 2016 and on what dates were the respective hours worked.

7.4 **(Fourth)** How many said hours at said overtime rate, if any, has the claimant worked but not been remunerated for by the respondent and in respect of which the respondent has made either an unauthorised deduction from the claimant's wages in terms of section 13 of the Employment Rights Act 1996, or alternatively has retained payment in breach of contract.

Holiday Pay

7.5 **(Fifth)** Let it be assumed that the claimant's dates of employment with the respondent were from 1 January to 2 June 2017, to what proportionate paid annual leave had the claimant accrued entitlement as at the alleged Effective Date of Termination of his Employment 2 June 2017.

7.6 **(Sixth)** How many days paid leave had the claimant taken in the period.

7.7 **(Seventh)** How many days of paid annual leave entitlement remained outstanding and untaken by the claimant, as at the Effective Date of Termination of his Employment, and in respect of which he was entitled to be compensated and in what net amount.

Issues in the Counter Claim

Is the respondents entitled to be compensated in damages flowing from alleged breaches of contract on the part of the claimant in respect of:-

7.8 **(Eighth)** The value of the two satajet paint spray guns purchased by the respondents at a cost of £909.60 and removed and retained by the claimant on termination of his employment (£909.60)

7.9 **(Ninth)** The value of the Kwik Fit works allegedly carried out to the claimant's personal vehicle and charged to the respondent's business account at a cost of (£11.05); and,

7.10 **(Tenth)** The additional expense, incurred by the respondent's requirement to engage a contractor to cover for the claimant during his notice period, of £360;

Compensatio

7.11 **(Eleventh)** To the extent that the respondent is entitled to be compensated in damages for the above, against which of the sums due by the respondent to the claimant, if any, is the claimant entitled to operate *compensatio* so as to extinguish or reduce the same *pro tanto*.

7.12 **(Twelfth)** Let it be assumed that the total of any sum due to the respondent in counter claim exceeds the total of any sum due by the respondent to the claimant, in what amount if any is the respondent entitled Judgment.

Sources of Oral Evidence

8. The Tribunal heard evidence on oath or affirmation from the following witnesses:

For the Claimant
Mr D Hendrie, the claimant
Ms Laura Bradley, the claimant's partner
Mr Craig McInally, former employee of IT fleet
Mr Robbie Aitkens, former employee of IT fleet

For the Respondent
Mr Alan Arthur, Director of the respondent company
Mr Stephen Quigley, Director of the respondent company

Documentary Evidence

9. Parties lodged a Joint Bundle of Documents comprising some 70 pages and to some of which reference was made by parties in the course of evidence and submission.

Findings in Fact

10. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the issues before it.

11. The claimant who is a skilled spray coachwork painter began carrying out work at the garage site operated by the respondents in Broxburn on 5 July 2016.

12. The claimant was working in what was a business start-up by the respondents who commencing business had few, if any, clients for whom they were directly carrying out contracted work.

13. In the most part the claimant had initial discussions with the Director of the respondents Stephen Quigley.

14. The claimant not only carried out painting work but also assisted with the moving, pick-up and delivery of vehicles.

15. The respondent company could not afford to carry a significant number of employees in the early months of the start up given what they expected to be the unpredictability and varied level of work.

16. The respondent company agreed to pay the claimant a flat monthly retainer in exchange for which they expected the claimant to be available on the site on most days or to work offsite in the collection or delivery of vehicles.

17. The monthly payment received by the claimant was a fixed sum.

18. The respondent company did not agree with the claimant that he be remunerated by the hour nor did they agree any hourly rate with him or that he work particular hours.

19. The claimant, in his own mind and calculation, equated the monthly retainer payment agreed as broadly equivalent to working a 40 hour week at £15 per hour.

20. Payment made to and received by the claimant in the period 5 July to 31 December 2016 was a flat monthly retainer and was paid to the claimant regardless of whether he worked fewer or lesser hours in one month as opposed to another. It was possible that he could work less than 40 hours per week in any particular month and yet receive the same payment. It was possible that he might work more than 40 hours per week in any one month and receive the same payment. The claimant was not entitled to any additional payments in that period.

21. In particular, there was no agreement between the parties that the claimant would be paid for what he described as "overtime" nor was there any agreement as to any "overtime rate".

22. The claimant provided his own tools bringing them onto site and using them to carry out the spray painting work which he performed on site. When on site the claimant was allocated work by the respondent's Director Stephen Quigley. The respondent expected, in return for the monthly retainer paid the claimant, that he would come to the site on most days. He was at liberty to take time away from the site should he choose.

23. In the period 5 July to 31 December 16 the respondents had some employees in respect of whom they deducted Employees National Insurance contribution and PAYE, accounting for the same to Her Majesty's Revenue and Customs.

24. The claimant was not among those individuals in respect of whom, in the period 5 July to 31 December 16 the respondents operated PAYE and Employees National Insurance contribution collection.

25. In that period, the claimant did not submit time sheets showing the hours which he worked, to any Director or Manager of the respondent company. The respondent, for their part did not pass any note of hours worked by the respondent to their pay roll accountants. Payments to the claimant were not processed by the respondent's accountants as part of the employee pay roll in that period.

26. In the period 5th July to 31st December 2017 the claimant submitted no record of the hours which he worked for payment purposes nor, in the same period did he maintain or keep for himself any record of the hours which he worked, as between alleged basic hours and alleged overtime hours or at all. No such record was required to generate the payments made to him by the respondents in that period. The actual hours worked by him did not inform the amount of the payments made by the respondent to him in that period. Rather, he was paid at a flat monthly retainer rate being the same in each month regardless of the number of actual hours which he may or may not have worked.

27. In the period 5 July to 31 December 2016 the claimant was at liberty to carry out work on vehicles other than vehicles which formed part of the respondent's business work flow. He did carry out some such work in that period, in the respondent's premises and using the respondent's facilities, which the respondents did not object to.

28. On 11 November 2016 and 4 January 2017 the claimant received demands from Her Majesty's Revenue and Customs relating to outstanding Class 2 National Insurance contributions by him in the sum of £730.80. Those contributions were not due by the claimant in respect of any period during which he had carried out work for or been employed by the respondent. The claimant approached the respondent's Director Mr Stephen Quigley and asked that the respondent assist the claimant in paying the sum.

29. Having considered matters the respondent's Directors decided to pay the sum of £730.80 to the claimant to assist him and to allow him in turn to make settlement of his outstanding arrears of National Insurance contributions, which they did.

30. In the period 5 July to 31 December 2016, the respondents considered the claimant to be a person with potential to become a valued part of the business and wished to assist him.

31. At the end of October/beginning of November 2016 the respondents entered into discussion with the claimant with a view to changing the basis upon which he contributed his labour to the business. They did so with the aspiration that they try to identify with the claimant a commensurate package that accurately reflected the role which he had within and his potential contribution to the business.

32. As a result of those discussions the respondents put a number of propositions and alternative offers to the claimant for his consideration.

33. The alternative options made available to the claimant are set out at pages 24 to 29 of the Joint Bundle.

    (a) Option 1 involved the claimant investing capital in the business, becoming a Director, drawing a salary as Director and thereafter sharing equally the profits/losses at the accounting year end.

    (b) Option 2 set out full time employee option with three variations.

        (i) The first variation involved an agreed hourly rate of £13.50 per hour plus entitlement to overtime to be paid at time and a half.

        (ii) The second variation involved a higher agreed contractual rate of £15 per hour with an entitlement to overtime at time and a quarter.

    (c) The third variation was a full time employment option with a base salary to be supplemented by a sliding scale of bonus payments linked to performance.

Option 3

34. Was a full time employment offer with an agreed basic and overtime hourly rate and no bonus scheme.

35. Having considered matters the claimant opted for the full time employee status option but negotiated with the respondents an increased hourly rate over the £15/hr offered, of £16 per hour to be complement by an overtime rate of time and a half but with no bonus element.

36. As of 1 January 2017 the respondents placed the claimant upon their pay roll sending instructions to their pay roll accountants to include the claimant from a start of employment date of 1 January 2017.

37. In the period 1 January to 2 June 2017 the claimant was a full time employee of the respondent. He was entitled to contractual remuneration of £16 per hour gross for a 5 day 40 hour week. He was entitled to be paid for authorised overtime worked at a rate of time and a half, in the same period.

38. In the period 1 January to 31 December 2017 the claimant received all of his contractual wages including wages for overtime. In the same period the claimant, together with other employees of the respondent was required to complete and did complete and submit time sheets to the respondent's Director/Managers on a weekly basis and in which were recorded the basic and dates and overtime hours worked by the claimant. Those time sheets were, in turn, passed to the respondent's accountant, for pay roll purposes, where they informed the gross and net monthly wages paid to the claimant and the Employer's and Employee's National Insurance contributions and PAYE deductions made from the claimant's wages. Those time sheets also recorded any holiday time taken by the claimant.

39. In the last week of May 2017 the claimant gave the respondent's Director Mr Quigley, notice of termination of employment. The claimant offered to work out a long notice period of two months in order to cushion the respondent from the effect of his departure. The notice period, statutorily implied in his contract of employment, being the period of notice which he required to give in order to terminate his employment, was one week.

40. At the time of first intimating his notice the respondent's Director Mr Quigley advised the claimant that he would not require to work a two month notice period and that a period of one month would be acceptable from the respondent's point of view. The claimant worked the first two days of his notice period on 1 and 2 June 2017 for which days the claimant had not, as at the commencement of the hearing, received payment.

41. Payment for those days 1 and 2 June was conceded as being due and payable by the respondent who had offered to make payment to the claimant upon confirmation/provision by the claimant of Bank Account details.

42. The claimant confirmed his Bank Account details to the respondent's representatives in the course of the hearing and on 16 October 2019 the respondent's representative and the claimant respectively confirmed to the Tribunal the payment to and receipt by the claimant of the sum of £389.24 in respect of net entitlement to unpaid wages for 1 and 2 June 2017 plus 1.8 days of holiday pay also conceded by the respondent as due to the claimant.

43. On 2 June the respondent's Director and the claimant had a further conversation in the course of which the respondent's Director informed the claimant, given that he had a new job to get ready for, that "he could just go now". The claimant agreed to do so. He arranged to have his tools uplifted and left the respondent's premises with his last day in work being 2 June 2019.

44. The claimant reasonably interpreted the respondent's Director's statement as being a proposal that he, the claimant, be released from the remainder of his notice period and that his employment with the respondent terminate there and then on 2 June.

45. The claimant was reasonably entitled to understand the words spoken by the respondent's Director as meaning that.

46. Per contra, the words spoken by the respondent's Director on 2 June did not, as asserted by him in evidence, bear an objective construction that what was being communicated was that the claimant had permission to leave the premises at that particular point in the afternoon on 2 June but was expected to return and work on the following and subsequent days of his previously agreed notice period.

47. The claimant's Contract of Employment terminated, by mutual agreement, on 2 June 2017. In those circumstances the claimant was not obliged to work beyond 2 June 2017 and his departure from the claimant's premises on that date did not constitute a breach of contract on his part. Equally the claimant had no entitlement, in those circumstances, to receive pay in lieu of notice in respect of the balance of his notice period not worked by him.

48. The monthly payments paid by the respondent to the claimant in 2017 were paid gross and without deduction of Employee's National Insurance contribution or PAYE. The obligation to account to the revenue in respect of tax and National Insurance contribution sat with the claimant. The claimant, in that period did not so account to the revenue.

49. In or about February of 2017 the claimant became aware of his outstanding liability to make payment of Income Tax and National Insurance contributions. He approached the respondent's Directors and asked that they make payment of those sums on his behalf thus discharging the liability. The respondent's Directors, wishing to assist the claimant because they regarded him as a valuable asset in the business, agreed to do so. They took advice from their accountants as to the most tax efficient way of discharging the liability. Their accountants advised that the matter would be most efficiently addressed by their processing a back payment of wages to the claimant in a gross sum sufficient to allow for deduction and accounting to the revenue, on the face of the company's books, for an amount of Employee's National Insurance contribution and PAYE equivalent to the liability and thus, to discharge it on the claimant's behalf. The respondent did so showing the payment and making those deductions in and against the claimant's March 2017 pay slip.

50. In the course of giving his evidence the claimant acknowledged an obligation on his part to repay the respondents in respect of that tax and National Insurance which had, on the one hand been retrospectively paid to Her Majesty's Revenue and Customs by the respondent on his behalf but in respect of which he had made no deduction, provision or accounting for his loss sums paid to him in 2016. That matter however was not before the Tribunal for determination.

51. When leaving the respondent's premises, the claimant removed, along with his own tools, two satajet paint spray guns. He removed the spray guns without the knowledge or consent of the respondent. The guns had been purchased by the respondent at a cost of £909.60, in 2017 for use by the claimant during his employment. The guns belonged to the respondent. The respondent had not made a gift of the guns to the claimant. The guns did not belong to the claimant. There was no basis in fact and in law disclosed to the Tribunal upon which the claimant would be entitled to believe that property in the guns had passed from the respondent to him such as to entitle him to retain the guns as his property and to remove them from the respondent's premises.

52. The claimant removed the spray guns from the respondent's premises in breach of contract there being implied into his Contract of Employment with the respondents a clause that he would not appropriate to his own use and or remove from the respondent's premises property belonging to the respondent. The respondent is entitled to being compensated in damages by the claimant in respect of the cost of replacement guns, the guns having been purchased as new in the six month course of the claimant's employment. The appropriate measure of damages in contract, in respect of that breach, is the purchase price of the guns namely £909.60 (being the sum payment of which will put the innocent party in the position that they would have been in but for the breach).

Holiday Pay

53. The claimant's holiday year ran from 1 January 2017 to 31 December 2018. In the part year worked by him as an employee of the respondent the claimant accrued a proportionate entitlement to 11.8 days of paid annual leave. In the same holiday period he took a total of 5 days paid leave and, as at the Effective Date of Termination of his employment, 2 June 2017, he had an accrued but untaken 6.8 days of paid annual leave entitlement. He was entitled, as at that date, to be compensated at his net annual daily rate of pay for those outstanding days; that is 6.8 (days) x £102.43 (net per day) or £696.52. On 16 October 2019 the claimant received and acknowledged receipt from the respondent of, amongst other amounts, the sum of £184.37 attributed by the respondents to payment of 1.8 days holiday pay. As at the date of judgment the claimant is accordingly entitled to be compensated by the respondent in the sum of £512.15 in respect of his outstanding 5 days of accrued but untaken and uncompensated paid annual leave entitlement.

54. Shortly following the claimant's departure the respondents received an invoice from "Kwik Fit" in the sum of £11.05 and which bears on its face to be in respect of a valve replacement and wheel balancing carried out to the claimant's personal vehicle. The respondent maintains a counter claim against the claimant in respect of that sum.

55. On the 4th or 9th of June 2017 (the holograph date on the copy invoice produced being unclear), that is either two days or seven days after the claimant's last day of employment, the respondents incurred a labour charge of £360 in respect of which they maintain a counter claim against the claimant. The respondent asserts that the cost was one caused by the claimant leaving their employment on 2 June 2017 in breach of contract, that is prior to the expiry of the notice period which he had given and they had accepted.

Summary of Submissions

56. By way of submission parties respectively reiterated their positions as stated at the outset of the hearing subject to the respondent's undertaking, given at the bar and

accepted by the claimant that they would make payment to the claimant on the following day of the net sums due in respect of wages for the 1st and 2nd of June 2017 and in respect of the conceded 1.8 days accrued but untaken paid annual leave entitlement.

Applicable Law, Discussion and Disposal

57. With the exception of basic pay due for the two days of his notice period worked by him, the claimant's claim is for alleged non-payment of overtime and accrued but untaken paid annual leave entitlement. Both those matters are linked to and dependent upon the relevant employment status applicable to the claimant respectively in the periods 5th July to 31st December 2016 and 1st January to 2nd June 2017. It is a matter of agreement between the parties that the claimant's employment status in the latter period, that is 1st January to 2nd June 2017 was that of employee. The claimant, for his part, maintains no claim for overtime in respect of that latter period. The respondents assert that in the former period, that is 5th July to 31st December 2016, the claimant was a self-employed contractor. If that indeed was his employment status he had no entitlement to be paid overtime wages in that period and, having proved no other contractual entitlement to payments in addition to those already received by him, his claim for overtime must fail. It is also the case that if the claimant was a self-employed contractor in that period, he had no entitlement, and therefore accrued no entitlement, to paid annual leave in that period.

58. The issue of whether a person who does work for another does so under a contract for the provision of service, that is as a self-employed contractor, or alternatively does so under a contract of service, that is as an employee, or again as a "Worker", is a matter of fact for determination by the Tribunal. A number of factors may serve to indicate the nature of the relationship between the parties. In the instant case, in relation to the disputed period, all of the indicators, bar one, are more consistent than less with the claimant being a self-employed contractor rather than an employee.

59. In the period the claimant in fact received a uniform monthly payment which did not vary according to the number of hours he worked.

60. The claimant neither submitted a record of his hours worked to the respondent nor did he maintain for his own purposes, or at all, any such record of hours worked whether basic or overtime or as between basic and overtime.

61. There is no evidence of the claimant having agreed either a basic time hourly rate and or an overtime hourly rate with the respondent in or applicable to the period.

62. The respondent who did employ some other individuals in that period did not treat the claimant as an employee for the purposes of generating payroll payments nor did they operate PAYE or deduction of Employee's or Employer's National Insurance contributions in respect of the claimant. The payments which the respondent made to the claimant they made gross without such deductions leaving it to the claimant to account to Her Majesty's Revenue and Customs for the same.

63. The claimant, for his part, brought onto the respondent's site his own tools and used these to carry out the work which he did. The respondents did not have and did not supply to the claimant tools. While, in return for the monthly retainer paid to him, the respondents did have expectation that the claimant would make himself available to carry out work for them on site on most days, the claimant was at liberty to take time away from the site as he considered appropriate and to dictate his start and finish time on any particular date. In the period in addition to carrying out work for the respondent, the claimant was at liberty to carry out work on other cars which did not belong to the respondent nor was the work generated as part of the respondents' business. In the period the claimant did so with the respondents' knowledge and consent while using the respondents' premises for that purpose.

64. The indicator which appears inconsistent with the claimant being a self-employed contractor is that, in the subsequent period of the claimant's undisputed employment with the respondent, the respondent, in response to a request by the claimant that they did so on his behalf, made payment to the revenue in discharge

of a liability on the part of the claimant to account to the revenue for tax and National Insurance contributions relating to the period 5th July to 31st December 2016. The respondents did so, on the advice of their accountants, via the mechanism of processing through their books a "back payment of wages" relating to that period.

65. That action, taken by the respondent is, at first glance treatment which is consistent with the respondent regarding the claimant as an employee in that period. It is, however, not conclusive of the matter in respect of which the onus of proof sits with the claimant particularly so in the light of the explanations given by the respondent's Directors and the retrospective nature of the action and the majority of the indicators point to the claimant being a self-employed contractor in that period.

66. Separately, the evidence of the respondents' Directors, which I accepted in this regard, was that they had not engaged the claimant as an employee in that period for the reason that in the start up months of the new business it could not afford to carry a large number of employees and their preference was to secure the services of the claimant on a standard monthly retainer until such times as they might bring forward various proposals for consideration by the claimant for the regulation of parties' relationships going forward. Those proposals when they were made towards the end of the period in dispute included options as varied as the claimant investing capital in the business and becoming a Director and thus sharing in its profits and losses, through part basic payment part bonus employee options, to, as ultimately elected for by the claimant a full time employee basis which included an entitlement to overtime.

67. The claimant, for his part, although maintaining that he was an employee did not in fact speak to any agreement between himself and the respondents of either a basic hourly rate or an overtime rate in relation to the period. His evidence, rather, was that the rate of £15 per hour, at which he quantified his claim, was one which he had worked out by reverse engineering the monthly payments the respondents had agreed to make to him against a basic 40 hour week on the one hand and, in

relation to an overtime rate, he simply stated that it was standard practice in the industry to pay overtime at time and a half.

68. For the above reasons I conclude that the claimant has failed to discharge his burden of proof and has failed to establish, on the balance of probabilities and on the preponderance of the evidence presented, that he was an employee, or indeed a worker although that status was not pled by him in the alternative, in the period 5th July to 31st December 2016. He accordingly had no entitlement to overtime payment in that period and his claim for the same fails and is dismissed.

69. Separately and in any event, let it be assumed that the claimant had established that he was an employee in the disputed period and further that he had agreed contractual entitlement to overtime, his claim would have failed separately for reason of his inability to specify, and thus prove, the number of hours worked by him, the days upon which he worked them and or the relevant overtime rate applicable, it not being open to the Tribunal to quantify his claim for him on the basis of his general evidence that he worked more than what would be equivalent to a five day 40 hour week (hours) on most days. The difficulty which the claimant was likely to encounter in proving his losses was a matter in respect of which he was put on notice by Judge Macleod at paragraph 25 of his judgment on the respondents' application for strike out issued to parties on 20th June 2019.

70. I thereafter dispose of the remaining Issues **(Second)** to **(Twelfth)** as follows.

71. Standing the claimant's failure to establish employment status in the disputed period Issue **(Second)** being what basic and or overtime rate was applicable in the disputed period, falls away, as do Issues **(Third)** and **(Fourth)** which related respectively to the number of basic and overtime hours worked and, as already stated above are separately issues in respect of which the claimant would have failed to discharge his burden of proof.

Issue (Fifth), (Sixth), and (Seventh) - Holiday Pay

72. The claimant having failed to establish employment status in the period 5th July to 31st December 2016, accrual of entitlement to paid annual leave on his part commenced only as at 1st January 2017 that is on commencement of his "employment" with the respondent. That being so, parties were agreed that his accrued proportionate entitlement in the period and part holiday year from 1st January to 2nd June 2017 is indeed that maintained by the respondent namely 11.8 days. Against that entitlement the claimant concedes that he took five days paid annual leave in the period but denies that he took any more and in particular denies that he at any point took a continuous period of five days leave. I accepted the claimant's evidence in that regard. The onus of proof sits with the respondent in respect of their assertion that the claimant took an additional five days paid leave. They in fact offered no proof of that. Their evidence, at its highest. amounted to the observation that such a position would be consistent with the fact that they did not hold within their records time sheets submitted by the claimant for the week commencing 1st April 2017. The respondents have failed to prove that the claimant took an additional five days leave. Accordingly, I am satisfied in the circumstances that the claimant had, at first instance and as at the Effective Date of Termination of his Employment 2nd June 2017 an entitlement to be compensated for 6.8 paid annual leave days. As found in fact the respondents have, in the interim period made payment to the claimant and the claimant has accepted payment in compensation for 1.8 of those days and I accordingly enter judgment, on this issue, in favour of the claimant in respect of balance of compensation being 5 (days) x £102.43 (net pay per day), in the sum of £512.15.

Issues in the Counter Claim

Issue (Eighth) 2 x Satajet Paint Spray Guns value £909.60

73. It is a matter of concession on the part of the claimant that the guns were purchased by the respondent for use by him in the business. To that extent the initial onus of proof regarding ownership of the guns by the respondent does not require to be discharged. The claimant, however, offers to prove more, namely that having purchased the guns the respondents made a gift of them to him as distinct from merely making them available to him to use during the course of his

employment; such as to transfer ownership in the guns from themselves to the claimant and thus to entitle him to remove them from the respondent's premises on termination of his employment, without their knowledge or consent and to thereafter retain them as his personal property. The onus of proving such a gift sits squarely with the claimant. There is a presumption in law against donation other than as between family members. The evidence advanced by the claimant in this regard is that of the intervention of Stephen Quigley, a Director of the respondent, in discussions which he, the claimant, was having with the supplier of the guns (a trade rep) regarding a price in which Stephen Quigley said something to the effect of "don't bother we'll cover that, it's a drop in the ocean compared with what we owe you".

74. The claimant did not put to Stephen Quigley in cross examination the assertion that he had spoken such words or words to that effect nor did he put to him the proposition that he had made a gift of the guns to the claimant. In any event, let it be assumed that Stephen Quigley did speak such words, they fall far short of what would be required to establish a gift. As a matter of fact the respondent purchased the guns and the alleged words spoken by Stephen Quigley are equally consistent with their doing so in order that the guns would be available to the claimant for use in the business rather than the claimant being put to the expense of purchasing such new guns, as part of his personal tools, to use in the business. On this issue the onus of proof (of donation), is one which ultimately sits with the claimant and the claimant has failed to discharge that onus. It follows that when he, at the end of his employment, removed the guns from the respondent's premises with the purposes of retaining them, he did so in breach of contract. I find that the respondent's counter claim in this regard succeeds and that the claimant is liable to compensate the respondent in damages therefore. The measure of damages in contract is a sum of money the payment of which will put the innocent party (in this case the respondent) in the position that it would have been in but for the breach. The guns were purchased by the respondents as new and had only been used by the claimant in the respondent's business for a few months. I consider that damages are accordingly measured appropriately in the purchase price paid by the respondents, namely £909.60.

Issue (Ninth) sums invoiced by Kwik Fit (£11.05)

75. The only evidence produced by the respondent in support of this claim is the Kwik Fit invoice itself. While it is the case that that invoice bears on its face to have been issued in respect of work done to the claimant's personal vehicle neither the invoice itself or the work to which it bears to relate was otherwise spoken to in evidence. The claimant's evidence, which the respondent was not in a position to challenge in cross examination, is that no such work was carried out to his vehicle at or about that time and neither was his vehicle in the Kwik Fit premises for any other purpose at or about that time. The claimant's liability in contract either to reimburse the respondents or to compensate them in damages for breach of contract under Issue **(Eighth)** can only arise in circumstances where the respondents prove, on the balance of probabilities that the claimant did instruct that the work be carried out on his own vehicle and that the work in question was so carried out. The production of the invoice by itself does not serve to establish either of those matters of fact. I accordingly dismiss that element of the respondent's counter claim.

Issue (Tenth) The cost of engaging a Contractor to carry out work in the days following the Claimant's departure from the business on 2nd June 2017 (£360)

76. The claimant was not really in a position to challenge the respondent's evidence in this regard. However, let it be assumed that an independent contractor was engaged at a cost of £360 to carry out work which, had the claimant still been employed by the respondents, would have been carried out by him, no liability on the part of the claimant arises unless it is established that the claimant was absent from the premises and thus unavailable to carry out the work, in breach of contract. The date on the handwritten copy invoice produced is either the 4th or the 9th of June 2017 that is either two days or seven days after the claimant's departure. While it is the case, as found in fact above, that the claimant initially gave notice which would have extended his employment beyond the 2nd of June 2017, it is also the case that I have found on the evidence presented that the termination of the

claimant's employment on 2nd June occurred by way of mutual agreement arising out of the conversation between the respondent's Director Mr Stephen Quigley and the claimant. Mr Quigley accepted in evidence that he had said to the claimant on the afternoon of the 2nd June that given that the claimant had another job to prepare for he "should just go now". The claimant had said in evidence that in agreeing to do so he had understood Mr Quigley to mean that he should go from the premises at that point for good i.e. not work any further part of his notice. The respondent's Director accepted in evidence that he had spoken those words. I found wholly unpersuasive Mr Quigley's explanation that what he had communicated to the claimant in speaking those word was that the claimant should leave the premises at that point on that day but return on the following and on subsequent days and to continue to work out the balance of his notice. Regardless of what Mr Quigley may in fact have believed he was communicating I am satisfied that the claimant's understanding of what was said to him and what he agreed to was, upon an objective construction and applying to the words their normal English language meaning, the correct one. Having held that the claimant left the business on 2nd June 2017 by mutual agreement and not in breach of contract, it follows that he has no liability for the cost incurred by the respondent in having an outside contractor carry out work that the claimant would have carried out had he been still employed. I accordingly dismiss that aspect of the counter claim.

77. I have found in favour of the claimant in the amount of £512.15 in the principal claim and in favour of the respondent the sum of £909.60 in the counter claim. Both debts are liquid and ascertainable. Each arises in contract and out of the same contract between the parties. The doctrine of *compensatio* is accordingly engaged with the debt owed by the claimant to the respondent of £909.60 operating to reduce *pro tanto* and extinguish the debt of £512.15 owed by the respondent to the claimant. The operation of the doctrine results in a net balance due by the claimant to the respondent, under the counter claim, of £397.45 in which net sum I enter judgment in favour of the respondent.

Date of Judgement: 30th October 2019
Employment Judge: JG d'Inverno
Date Entered in Register: 4th November 2019
And Copied to Parties