EMPLOYMENT TRIBUNAL S

Claimant: Mr P Gilbourne

Respondent: JM Hill Building Services Limited

Heard at: Nottingham

On: Wednesday 25 September 2019

Before: Employment Judge Rachel Broughton (Sitting alone)

Representatives

Claimant: Miss A Johns - Counsel
Respondent: Mr J McCracken- Counsel

RESERVED JUDGMENT WITH REASONS

The Judgment of the Tribunal is that:-

1. The Claimant was an employee within the meaning of section 230 (1) of the Employment Rights Act 1996.

2. The Claimant was unfairly dismissed.

3. The Claimant is entitled to accrued annual leave under regulation 30 Working Time Regulations 1998 and under section 23 Employment Rights Act 1996.

4. The Claimants claim for wrongful dismissal is upheld.

5. There was a failure by the Respondent to comply with section 1 Employment Rights Act 1996 and an adjustment under section 38 of the Employment Act 2002 will be appropriate.

The case will be listed for a one-day hearing to determine remedy.

The Issues

1. Both parties were represented at the hearing by counsel. The following were agreed to be the issues to be determined by the Tribunal;

2. **The first issue** for the Tribunal to determine is the employment status of

the Claimant. The Claimant contends that during the relevant period; 1 November 2013 to 4 December 2018 he worked for the Respondent as an employee within the meaning of Section 230(1) Employment Rights Act 1996 (ERA 1996) or in the alternative as a worker within the meaning of section 230 (3) ERA and Regulation 2 (1) (b) of the Working Time Regulations 1998 (WTR). The Respondent's case is that the Claimant was not an employee or worker during the relevant period and thus he lacks the standing to bring the claims presented in his claim form namely claims of; unfair dismissal, holiday pay, failure to provide a statement of written particulars and a claim for notice pay. The Respondent case is that the Claimant was a self-employed contractor, being neither an employee or a worker.

3. **The second issue** for the Tribunal to determine is; if the Claimant was an employee and had two years qualifying service pursuant to 108 (1) ERA as at 4 December 2018, what was the reason for the termination of his employment under section 98 ERA and was it a fair dismissal. The Respondent does not seek to argue that if the Claimant had the status of an employee, he did not have the necessary qualifying service to bring a claim of unfair dismissal because of any breaks in his continuity of service pursuant to section 210 – 214 ERA.

4. The Respondent relies on the Claimant's conduct and/or capability as a fair reason for dismissal. It is accepted by the Respondent that it did not carry out a fair disciplinary procedure and in her submissions, Miss Johns conceded that there had been insufficient investigation undertaken such that she elected not to make submissions regarding the Claimant's claim for an uplift for alleged failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures under section 207A (2) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). Mss Johns accepted that in terms of issues in relation to remedy, the Respondent had not pleaded contributory fault and no application was made to amend the response to plead this.

5. **The third issue** for the Tribunal to determine is whether the Claimant is entitled to unpaid notice i.e. whether if he was an employee, he committed a repudiatory breach of the contract of employment justifying dismissal without notice. It is accepted that if the Claimant was an employee, he was dismissed summarily and that in the absence of an express contractual provision as to notice, the entitlement is to the minimum statutory notice pursuant to section 86 ERA namely to 5 weeks.

6. **The fourth issue** for the Tribunal to determine is whether the Claimant is entitled to be paid accrued but untaken annual leave pursuant to regulation 14 Working Time Regulations 1998 (WTR). It is not in dispute that the Claimant was not paid annual leave by the Respondent and nor was he offered paid leave. The Claimant was considered by the Respondent to be a self-employed contractor. The claim is pursued both as an unlawful deduction claim under section 13 ERA and/or a claim under regulation 30 Working Time Regulations 1998 (WTR). There is a dispute however as to the period over which any accrued but unpaid annual leave should be paid in the event the Claimant is held to be an employee or worker.

7. **The final issue** is a claim for a failure to provide the Claimant with a statement as required by section 1 ERA and he makes a claim for compensation under section 38 Employment Act 1992. It is accepted by the parties that the Claimant was not provided by the Respondent with a written statement of and therefore would be entitled to compensation if his status was that of an employee and his claim of unfair dismissal, unlawful deduction of wages or breach of the WTR succeeds

The Hearing

8. During the hearing I heard oral evidence from the Claimant. At the outset of his evidence, the Claimant explained that there were inaccuracies in the witness statement his solicitor had prepared. Mr McCracken was given leave to deal with those inaccuracies by way of supplemental questions. The inaccuracies essentially related to the payments the Claimant received. The Claimant's witness statement ran to 9 pages including an appendix.

9. I also heard evidence on behalf of the Respondent from Mr John Hill, the sole director of the Respondent. Mr Hill's statement ran to 11 Pages.

10. Present in the Tribunal as an observer only was Mr Hill's wife. Mrs Hill works for the Respondent as its Operations Manager and did so during the relevant period. It appeared from the evidence of both Mr Hill and the Claimant that Mrs Hill had relevant evidence to give the Tribunal regarding for example the training Mrs Hill arranged by the Respondent and which the Claimant attended, however although present Mrs Hill was not called as a witness by the Respondent.

11. In addition to the witness evidence I also had regard to the bundle of documents which included 142 pages (numbered to 114).

Preliminary Matters – The Hearing

12. At the commencement of the hearing an application was made by Mr McCracken to permit additional documents to be adduced by the Claimant and added to the bundle. An agreed bundle had been filed by the Respondent however the Claimant complained that there were documents contained within the bundle which had only been disclosed to him on the 21 September 2019. The documents which formed this disclosure were numbered 72 A to 72 AA and comprised 27 pages in total. The Claimant did not object to the inclusion of these documents. The Claimant had brought with him copies of his bank statements in a bid to rebut the Respondent's evidence relating to breaks and he was permitted to include the samples he selected.

13. The Claimant's additional documents were numbered 113 to 115 inclusive.

14. With regards to the relevance of the documents 72A to 72AA, Miss Johns was asked by the Tribunal whether the Respondent was introducing evidence regarding breaks with the intention of advancing a defence that there were breaks in the Claimant's continuity of service or relating to any issue relating to the existence or otherwise of an overarching i.e. 'umbrella arrangement' in place during any breaks in work. Miss Johns confirmed that the Respondent was not raising breaks in respect to either of those points but rather that these documents would be relied upon only to support the Respondent's contention that the Claimant was not paid a regular fixed daily rate by the Respondent and that the

payments he received fluctuated.

The Legal Principles

15. Before reaching my conclusions in relation to the issues before me, I have had regard to the law which I am required to apply when considering the matters for consideration.

Employee status – Section 230 Employment Rights Act 1996

16. An employee is defined by the provisions of Section 230(1) ERA 1996 as follows:

> *"In this Act employee means an individual who has entered into or works under or where the employment has ceased, worked under a contract of employment."*

17. A contract of employment is defined by section 230 (2) ERA as;

> *"In this Act "contract of employment" means "a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing."*

Was there a contract of employment?

18. The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them. Where there is a document which appear to set out the principal terms, this will be the starting point. Those terms should only be disregarded where they do not reflect the true agreement between the parties: **Autoclenz v Belcher [2011] UKSC 41).**

19. Where there is not an express contract of employment, then to find an employment relationship, the Tribunal must be persuaded that there was an implied contract of employment.

20. A contract can be implied only if it is necessary to do so: **James v London Borough of Greenwich [2008] IRLR 358).** For it to be necessary to do so, it must be needed to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which that business reality and enforceable obligations would be expected to exist.

21. When examining what happens in practice it is permissible to look at the established practice and expectations of the parties to consider whether they have hardened into legal expectations; **Addison Lee v Gascoigne UKEAT/0289/17/LA.** Where the nature of the legal relationship is not determined solely by the construction of written documentation, the determination of employment status requires the Tribunal to investigate and evaluate the factual circumstances in which the work was performed: **Clark v Oxfordshire Health Authority 1998 IRLR 125 CA.**

22. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 443 QBD**; Mr Justice MacKenna held as follows;

> *"(2) That a contract of service existed if (a) the servant agreed in consideration of a wage or other remuneration to provide **his own work and skill** in the performance of some service for his master, (b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the **control** of the other party sufficiently to make him the master, and (c) the other provisions of the contract were consistent with its being a contract of service (post, p. 515C-D); but that an obligation to do work subject to the other party's control was not invariably a sufficient condition of a contract of service, and if the provisions of the contract as a whole were inconsistent with the contract being a contract of service, it was some other kind of contract and the person doing the work was not a servant (post, p. 517A); that where express provision was not made for one party to have the right of control, the question where it resided was to be answered by implication (post, p. 516A); and that since the common law test of the power of control for determining whether the relationship of master and servant existed was not restricted to the power of control over the manner of performing service **but was wide enough to take account of investment and loss (post, p. 522F), in determining whether a business was carried on by a person for himself or for another it was relevant to consider who owned the assets or bore the financial risk** (post, p. 520G - 521A)"*

23. The above passage was called the 'classic description of a contract of employment' by Lord Clarke in the Supreme Court case; **Autoclenz Ltd v Belcher and ors 2011 ICR 1157 SC**.

24. The courts have established there is an 'irreducible minimum' of; control, personal performance and mutuality of obligation and control; Lord Justice Stephenson in **Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612.**

25. However, a wide range of other factors outside the 'irreducible minimum' may also be taken into account and may even give rise to a finding that there is no employment contract in place even where the 'irreducible minimum' are present.

26. It may be possible for someone who is an independent contractor providing his services as part of his own independent business to agree to terms which meet the 'irreducible minimum' on a particular project but when looked at, it is not an employment relationship.

27. In determining whether an employee has employee status it is not a mechanical exercise of running through items on a checklist, the object is to paint a picture from the accumulation of detail; **Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171.** The factors **may** include;

- Remuneration and how it is paid; regular wage or submission of invoices for defined work done
- Arrangements for payment of tax and NI
- Provision of benefits such as holiday pay, sick pay, medical expenses etc

- To what extent is the individual treated in a member of staff e.g. participation in training, staff events, nature of the ID issued and access to premises
- Provision of capital and degree of risk

- Provision of tools and equipment
- Application of company policies including disciplinary and grievance
- Whether there is a traditional structure of employment of self-employed contractor status in the trade

28. Where there are gaps in the work there may be a question over whether in between projects there is an overarching or umbrella contract or whether there is no contract of employment outside of individual assignments or periods of work. This is often relevant to the issue around whether the individual has the necessary continuity of service to bring a claim or not, albeit the gaps may amount to only 'temporary cessations of work' and thus continuity preserved in between any breaks.; **Cornwall CC V Prater [2006] IRLR 362.**

Worker Status – Section

29. The Definition of worker is contained in section 230(3) ERA and Regulation 2 (1) (b) WTR;

> "…*an individual who has entered into or works under (or, where their employment has ceased, worked under):-*
>
> > *(a) a contract of employment;* ***or***
> > *(b) any other contract whether express or implied (if it is express) whether oral or in writing, whereby the individual* ***undertakes or performs 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"*

30. The 'limb b' definition of a worker consists of the following three elements as set out by Elias P in **James v Redcats (Brands Ltd) [2007] ICR 1006 EAT;**

a) A contract to perform or undertake to do work or services
b) An obligation by that individual to do the work personally
c) The other party must not be a client or customer of a business run by the individual (i.e. the individual is not in business on their own account)

31. The first requirement is that there is a contract, an intention to create a legally binding relationship.
The distinction between mutuality of obligation to determine whether a given contractual agreement between parties is a contract of employment or not, requires a consideration of something more than simply whether there is a legally binding agreement (which is what we are concerned with when considering the first element of the worker test) and this was clarified by the His Honour Judge David Richardson in **Plastering Contractors Stanmore Ltd v Holden UKEAT/0074/14/LA** at paragraphs 21:-

> "*The first question which an Employment Tribunal must consider when it applies the statutory definition is whether there was a contract between the putative worker and employer at all."*

And referred to the following words of Elias P in Redcats;

> "83*: Since when working she is plainly providing a service, the two potentially relevant questions are whether she is obliged to perform the service personally and whether she is doing so in the course of a business. The fact that there is no contract in place when she is not working – or that if there is, it is not one which constitutes a worker –* ***tells us nothing about her status when she is working.*** *At that point there is a contract in place. If the lack of any mutual obligations between engagements precluded a finding that an individual was a worker when carrying out work pursuant to an engagement, it would, severely undermine the protection which the minimum wage legislation is designed to confer".*

32. In relation to the obligation to perform work personally, it is well established now that a *limited* right to of the individual to provide a substitute is not inconsistent with the existence of an obligation to work personally; **Pimlico Plumbers Ltd v Smith [2018] I.C.R 1511**

33. The fact that a legal right to provide a substitute is never exercised in practice does not of itself, mean it is not a genuine right; **Express and Echo publications v Tanton [1999] IRLR 367**. Further, a right to substitute may not remove the dominant purpose of the contract being one of personal performance where this is limited to situations where the individual is unable rather than simply unwilling to work as observed by Elias P in Redacts:

> "*The critical feature here is that the substitute is to be provided when the individual is unable to provide work. That is narrower than the phrase "unable or unwilling" which was the term used in the Tanton case, as the EAT recognised in the MacFarlane case. If I need not perform the work when I am unwilling, then there is never any obligation of any kind to perform it. It is entirely my will and therefore my choice. But if I can only be relieved of the duty when I am unable, then I must do the work personally if I am able*".

34. The Court of Appeal in Pimlico Plumbers summarised the applicable principles as to the requirement for personal service and the right to substitute. In summary; an unfettered right to substitute, or a right limited only to showing that the substitute is qualified, would subject to exceptional facts, be inconsistent with personal service. A right to substitute only where the individual is unable to perform the work, or subject to the consent of someone with absolute and unqualified discretion to withhold consent would subject to exceptional facts, be consistent with personal performance.

35. In Pimlico the Supreme Court held that where an individual is entitled to use assistants or specialist sub-contractors in carrying out a job, this is not inconsistent with an obligation of personal performance;

> "*24. Mr Smith's contracts with Pimlico, including the manual, gave him no express right to appoint a substitute to do his work. There were three passing references in the manual to his engagement of other people, of which the most explicit was the reference, quoted at para 19(f) above, to his requiring "assistance". The evidence was indeed that some of Pimlico's operatives were accompanied by an apprentice or that they brought a mate to assist them.* ***But assistance in performance is not the substitution of***

> ***performance***. *Equally the tribunal found that, where a Pimlico operative lacked a specialist skill which a job required, he had a right to bring in an external contractor with the requisite specialism. But again, since in those circumstances the operative continued to do the basic work, he is not to be regarded as having substituted the specialist to perform it"*

36. Even if in individual is obliged to perform work personally he will not be a worker if the other party to the contract is a client or customer of his profession or business.

37. Subordination may assist in distinguishing a worker from someone truly self-employed however it is not a freestanding characteristic of a worker.

38. The courts must try to determine whether the essence of the relationship is that of a worker or an independent contractor who is in business on his own account, even if only in a small way: **James v Redcats.**

39. It has been held helpful to apply the integration test i.e. to consider whether the individual markets his services to the world as an independent person or whether he is recruited by the principal to work as an integral part of the principal's operation.

40. In in **Cotswold Developments Construction Ltd v Williams UKEAT/0457/05** DM paragraph 53;

> "*The paradigm case falling within the proviso to 2 (b) is that of a person working within of the established professions; solicitor and client, barrister and client; accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of a customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such, Thus viewed it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand , or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."*

41. **In Pimlico Plumbers** Lord Wilson *addressed the issue stated as follows:*

> "47. *In support of its contention that it was a client or customer of Mr Smith, Pimlico makes four substantial points:-*
>
> *(a) Without prejudice to his overall obligation (which Pimlico has to accept for this purpose) to make himself available to accept work, if offered, for up to 40 hours each week, Mr Smith was entitled to reject any particular offer of work, whether because of the location or timing of it or for any other reason.*
>
> *(b) Subject to that overall obligation, Mr Smith was free to take outside work albeit not if offered by Pimlico's clients. In a concluding paragraph the tribunal observed that he did not elect to take outside work; but, as Pimlico*

rightly objects, the analysis must be of his contractual entitlement rather than of his election not to exercise it.

(c) Pimlico reserved no right to supervise, or otherwise interfere with, the manner in which Mr Smith did his work.

(d) There were financial risks, as well as advantages, consequent upon Mr Smith's work for Pimlico. He was bound by the estimate for the price of the work which he had given to the client. Pimlico did not pay him, not even for any materials which he had supplied, until the client had paid it; if a client paid more than one month late, its payment to him was halved; and, if a client failed to pay within six months, it paid him nothing, not even for his materials, and irrespective of whether the client made payment thereafter. If a client complained about his work, even about work done by another Pimlico operative whom he had substituted to do it, it was Mr Smith who was responsible for remedying it and who received no payment referable to it until he had done so.

On the other hand, there were features of the contract which strongly militated against recognition of Pimlico as a client or customer of Mr Smith. ***Its tight control over him was reflected in its requirements that he should wear the branded Pimlico uniform; drive its branded van, to which Pimlico applied a tracker; carry its identity card; and closely follow the administrative instructions of its control room.*** *The severe terms as to when and how much it was obliged to pay him, on which it relied, betrayed a grip on his economy inconsistent with his being a truly independent contractor. The contract made references to "wages", "gross misconduct" and "dismissal". Were these terms ill-considered lapses which shed light on its true nature? And then there was a suite of covenants restrictive of his working activities following termination.49. Accurate though it would be, it would not be a proper disposal of this issue to describe this court's own conclusion to be that Pimlico cannot be regarded as a client or customer of Mr Smith. The proper disposal is, of course, for it to declare that, on the evidence before it, the tribunal was, by a reasonable margin, entitled so to conclude".*

42. I shall turn now to the issue of the alleged dismissal and the legal principles which apply;

Unfair Dismissal – section 98 Employment Rights Act 1996

43. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 (2) ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98 (4).

44. Section 98 (4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer);

a) Depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for

dismissing the employee; and

b) Shall be determined in accordance with equity and the substantial merits of the case.

45. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; **Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden 2000 ICR 1283 CA** .

46. Mr Justice Browne- Wilkinson in his judgement in **Iceland Frozen Foods Ltd v Jones ICR 17 EAT** set out the law in term so the approach Tribunal must adopt as follows;

a. "The starting out should always be the words of section 98 (4) themselves

b. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the member of the Tribunal) consider the dismissal to be fair

c. In judging the reasonableness of the employers conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of three employers

d. In many (though not all) cases there is a band of reasonable responses to the employees conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.

e. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

47. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL** firmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98 (4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed.

If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing;

> ”*in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;”*

Conduct

48. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show;

- It believed the employee guilty of misconduct
- It had in mind reasonable grounds upon which to sustain that belief
- At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances

49. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden.

Capability

50. Capability is defined in section 98 (3) (a) ERA as ‘*capability assessed by reference to skill, attitude, health or any other physical or mental quality’*.

51. Employers should follow a fair procedure before dismissing an employee for incapability and this will normally involve; a) a proper investigation of the employee’s performance and the problem b) warning of the consequences of a failure to improve c) a reasonable chance to improve.

Increase in Compensatory Award

52. In the event there is a finding of unfair dismissal the tribunal may increase the compensatory award pursuant to section 207A TULR (C) A where; a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies b) the employer has failed to comply with the Code in relation to the matter and c) the failure was unreasonable. The employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award it makes to the employee by no more than 25%.

53. Section 124A ERA provides that the section 207A uplift applies to the compensatory award only.

Holiday Pay

54. The claim is for unpaid holiday during the whole of the relevant 5-year period. The Claimant only has the right to bring this claim if his employment status was that of either an employee or a worker.

55. The claim is brought both as a claim under section 23 ERA in respect of an unlawful deduction of wages and a claim under regulation 30 of the WTR, both claims are available to employees and workers.

Wrongful dismissal

56. Dismissal without notice is wrongful i.e. a breach by the employer, unless the employer can show that summary dismissal was justified.

57. It is for the employer to prove that the employee committed the misconduct (or other breach) in question. It is not enough to apply the unfair dismissal test of whether the employer reasonably believed that the employee had so acted. The burden of proof rests with the employer.

58. **British Heart Foundation v Roy UKEAT/0049/15 (16 July 2015 unreported) Langstaff J;**

> *"6. Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal think subjectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred."*

59. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct/ gross negligence, the Tribunal must be satisfied that the employee committed the misconduct /gross negligence and that it was sufficiently serious to amount to a repudiation: **Shaw v B and W Group Ltd EAT 0583/11**

60. The employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract to amount to a repudiatory breach: **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698 CA.**

61. A delay in accepting the breach may be taken as affirmation of the contract and waiver of the breach unless the employer makes it clear that they are reserving their position: **Cook v MSHK Ltd 2009 EWCA Civ 624 CA.**

Written Statement

62. The remedy for a breach of section 11 ERA is a reference to the Tribunal to determine what ought to have been included in order to comply with section 1 and however tribunals cannot clarify or interpret ambiguous terms.

63. A tribunal can make an award of compensation under section 38 Employment Act 2002 where a successful claim is made out under any of the jurisdictions in schedule 5 which includes unfair dismissal and a breach of the WTR. An award under section 38 is not dependant on a claim having been brought under section 11 ERA for a breach of section 1; it is sufficient that the tribunal make a finding that the employer was in breach of section 1 at the time the main proceedings were begun.

64. The amount of compensation is the minimum amount of two weeks' pay and a tribunal may if it considers it just and equitable in the circumstances award the higher amount of four weeks' pay: section 38 (2) (3) and (4). The tribunal does not have to make an award if there are exceptional circumstances which would make an award unjust or inequitable. A weeks pay is calculated in accordance with section 220 – 229 ERA.

The Evidence

65. Before turning to the findings of fact I will deal firstly with my assessment of the credibility and reliability of the witnesses.

66. I was satisfied that the Claimant was a witness of truth who gave a credible account of the circumstances surrounding his work with the Respondent. The Claimant was not evasive and on occasion gave answers which were not always helpful to his case. Where the Claimant could not recall details, he admitted to that. The Claimant showed no hostility or hard feelings toward Mr Hill at any point either in his answers or in his tone or demeanour. I am able to place reliance on the Claimant's account in determining the issues before me.

67. Mr Hill was at times hampered by his inability to recall detail and because he had not been directly involved in how certain arrangements operated day to day, for example it had been Mrs Hill who had organised certain training events which the Claimant had attended. There were also significant inconsistences in his evidence for example;

> i. he stated at paragraph 34 and 35 of his witness statement that the Claimant did not wear the Respondent's uniform although he accepted that he did wear a high visibility jacket with the Respondent's logo on it. In cross examination he conceded that the Claimant had also been provided with other items of clothing with the Respondent's logo on them.
>
> ii. he referred to in his statement at paragraph 48 to having the right to substitute another qualified labourer to attend in the Claimant's place and that the Claimant "*did, on occasion hire in assistance for work he accepted and then charged me for their time separately to his own*".

However, in cross examination when it was put to him that if the Claimant arranged for someone to assist him the Claimant would take money out of his own wages to pay them, Mr Hill accepted that; "*he would pay them, they would work for him and he would have a price and pay that person*".

iii. at paragraph 32 of his statement Mr Hill alleged that the Claimant "*has in the past advised me that he was unable to accept work from me on account of other work he was doing"* however, he was unable when cross-examined to provide any details of occasions when the Claimant had told him that he could not work for the Respondent due to having other work. The only occasion Mr Hill mentioned in his oral evidence was an occasion when Mr Hill was building his own home which Mr Hill thought may have been in around 2016 and 2017 (albeit he attempted to seek assistance from Mrs Hill while was giving his evidence to recall the date). Mr Hill accepted that he did not have work for the Claimant to do and it was Mr Hill who suggested the Claimant find other work during a short period while Mr Hill was waiting for other projects/assignments to come in.

68. My assessment therefore is that the evidence of Mr Hill was less reliable than the evidence of the Claimant.

Relevant Findings of Fact

69. The Respondent is a building works and construction company. It is based in Mansfield, Nottingham and Derbyshire. It is a small family owned business. Mr Hill is the sole director, his Wife Mrs Hill works in the company as the Operations Manager. The undisputed evidence of Mr Hill is that there are currently seven employees which includes an administrator, health and safety officer, two apprentices and a director for roofing. Mr Hill's evidence is that the Respondent engages sub-contractors who are specialist building contractors and labourers who they engage on a self-employed basis.

70. The undisputed evidence of the parties is that the working relationship as between the Claimant and the Respondent commenced on the 1 November 2013 and ended on 4 December 2018.

71. The Claimant had been working as a tiler on a project in or around November 2013 when Mr Hill met him and offered him work.

72. With regards to how the parties described the Claimant's position with the Respondent, I was referred to a document at page 33 of the bundle. This is an email which the Claimant recognised as one he had sent to Tomlinson's, a building company which subcontracted work to the Respondent. The email sets out concerns by the Claimant that he may have been exposed to harmful fibres. Within this email the Claimant identified himself as "sub-contracting for" the Respondent. The Claimant accepted that he considered himself self- employed during the relevant period, it was only after 4 December 2018 that he questioned whether he had been an employee or worker after this was raised with him by a former employee of the Respondent (who had been employed in an administrative role) and his daughter, who has studied law.

73. Although the parties operated on the understanding that the Claimant was self-employed, the label the parties attached to their working relationship was not always consistent with this in practice.

When working sites for a local authority council, the Claimant was provided with and required to wear, an 'Employee' ID badge (document 70). The badge identified him as an employee of the Respondent. When carrying out work for certain other building companies the Respondent again required the Claimant to identify himself as an employee of the Respondent.

74. It is not in dispute that there was no written document recording the terms of the engagement as between the Claimant and the Respondent. The arrangement was only verbal. There was no evidence presented by Mr Hill that he made any attempt to obtain advice on what the Claimant's correct employment status may have been.

75. With regards to the contractual position as to pay; it was accepted that work fluctuated and some months were extremely busy and other months not so busy as is the nature of construction work. The pay the Claimant received from the Respondent varied. However, there was a set arrangement regarding remuneration in that a daily rate was agreed between the parties of £120. This was later varied by agreement between the Claimant and Mr Hill to £130 per day. On certain projects however the Claimant was not paid a daily rate but paid based on the square meterage of tiling/fencing etc to be carried out. The price was agreed between the main contractor/client and Mr Hill. Mr Hill negotiated the price for the job which then determined the rate of pay the Claimant would receive. The Claimant did not tender for the work or put in an estimate, he was told what Mr Hill had agreed with the client.

76. The Claimant was able to recall details about certain specific occasions when he was paid a price rather than a day rate. He accepted that there may have been other work over the 5-year period which was priced according to the volume of work rather than based on a fixed price but he could not recall any other specific occasions. Mr Hill was not able to recall any other specific assignments either. The Claimant's evidence was that the majority of the work undertaken was on the basis of the fixed daily rate and this is supported by invoices the Claimant provided to the Respondent and which appear within the bundle at pages 41 to 69.

77. The Claimant's case is that he had no control over the Respondent's pricing for work, he did not consider himself in a position to negotiate. He agreed to work a day rate of £120 and then 4 years later he spoke with the Respondent about what he described as a 'pay rise' to £130, which the Respondent agreed to.

78. The Claimant submitted invoices to the respondent recording the work undertaken and the payments due to him. He received from the Respondent documents called 'Subcontractor Monthly Statements', these confirmed the CIS deductions and payments due. The Subcontractor Monthly Statements disclosed by the Respondent at pages 73 to 105 covered the period 5 May 2016 to 5 January 2019, the Respondent did not disclose any statements prior to 5 May 2016. The statements disclosed show that the Claimant received a statement and payment for every month over that almost 3-year period (albeit the payments varied).

79. It is common ground between the parties that if the Claimant worked overtime, he received no additional payment.

80. Mr Hill during cross examination stated that he had personally advanced money to the Claimant and was referred to document 72E in the bundle. Mr Hill denied it was an advance but rather a loan to assist the Claimant. Mr Hill was referred then to the document at 72 U which is a text message from the Claimant to Mr Hill stating; "*sorry to bother you boss, but was hoping you could lend me £500 and stop it from my wages*". Mr Hill conceded that it was in fact an advance payment for work to be carried out. The advance of wages were paid to the Claimant to assist him during a period when there was less work available for him to do. It was put to Mr Hill in cross examination that these advance payments showed that both sides anticipated a continuing working relationship to which Mr Hill stated;

> "yes, Pete's been good, I would use him again"

81. The Claimant would work on one or more projects at the same time. If he completed work on one site, it was accepted that the Respondent could and would, require him to travel to another site to carry out work and that this would be covered within his daily rate.

82. Mr Hill would contact the Claimant and let him know what work was available and the work that had to be done was set out in a specification provided by the client. The Claimant had no involvement in the specification that was prepared and his day rate did not vary depending on the nature of the work done.

83. The Claimant's evidence was that he was never told that he could not reject work when offered to him but that once he started driving the company vehicle he would not be able to turn down work because he needed to deliver the materials to site for the Respondent. His evidence was that the vehicle was purchased in 2015 and he was insured to drive it from that time. When questioned further on this point about whether he could turn work done, he stated that he would have been concerned that there would be "consequences", in terms of being offered further work and that it could have "lead to issues" by which he explained he meant the impact on the project. The Claimant's evidence was that if asked to work at an alternative site, he would have felt he had to go.

84. There was only one other occasion when the parties agreed the Claimant was not provided with work by the Respondent and this was in 2016 or 2017. During this period Mr Hill was building his own house. There was not much work for the Claimant and he worked elsewhere for a short period of time. Mr Hill offered the Claimant work on the building of his own house but invited him to find other work; as the Claimant put it, he told me; "if you can find other work that would help". The Claimant found other work for what he says was a week or perhaps a week and a half. Although Mr Hill's evidence was that there were other occasions when the Claimant had worked for some else over the 5-year period, the Claimant denied this and Mr Hill could not provide any details of who the work was for, when those occasions occurred and could produce no documents or other supporting evidence.

85. I shall now address the specific findings in relation to the issue of employment status;

Employment Status

Fuel and Vehicle

86. The Claimants evidence was that he was almost always paid a fixed day rate from the Respondent apart from certain contracts. He referred to fencing work in Burton on Trent when he was paid a price per metre, work carried out work in Lincoln at Tempest Street and Victoria Park in Leicester when he was partly paid a day rate but the tiling work was paid on a price per square metre rate.

87. The Claimants bank statements showed the following payments;

i. 5 March 2018: payment into his account of £19.98 from the Respondent and a payment in of the same amount on the 6 March to Toolstation. The Claimants evidence was that he would pay for materials for work he was doing for the Respondent and purchased them from Toolstation, he would send a photograph of the receipt from his phone of and would receive reimbursement direct from the Respondent (document 112).

ii. 8 March 2018: Payment of £93.52 from the Respondent to the Claimant. A payment was taken from the Claimant's bank account on 8 March 2018 to ASDA petrol for the same amount ie £93.52. The Claimant's evidence was that this payment was to reimburse him for petrol he had paid for, to fill up the pickup truck owned by the Respondent which the Claimant drove to site (page 113).

iii. 15 March 2018: The Claimant received a payment of £55.54 from the Respondent to reimburse him for fuel for the pickup vehicle (page 113).

88. Mr Hill confirmed in his evidence during cross examination that if the Claimant was working and paid for petrol for the company vehicle the Respondent would reimburse him for the cost of the petrol. The Claimant did not pay for his own travelling expenses.

89. The Claimant had the use off the pickup truck, he parked it at his home and sold his own personal vehicle because he considered he no longer required it. These facts were not in dispute.

90. The Claimant was not charged for the use of this company vehicle. The document at page 72A is a certificate of motor insurance for the pickup truck; the registered owner of the vehicle is the Respondent and there are four named drivers including the Claimant and Mr Hill. The Claimant's evidence is that for a period he and Mr Hill were the only named drivers and that the vehicle was bought in possibly 2015. Mr Hill denied that only he and the Claimant had ever been the only named drivers however the insurance certificates disclosed by the Respondent only relate to the period 2018 and 2019. Mr Hill confirmed that there was no reason why he could not have included the previous insurance certificates within the bundle.

91. What is not in dispute is that the Claimant had extensive use of the company vehicle which he parked at his home, he did not pay for fuel to get to site nor was he charged any fee for the use of the vehicle.

92. I find on the evidence that the Claimant was supplied by the Respondent with a vehicle, insurance cover and fuel to carry out the work at no cost to the Claimant.

Right of substitution

93. The Claimant's evidence was that he first met with Mr Hill when the Claimant was doing agency work in Scunthorpe and the Respondent was the principal contractor on site. The Claimant denied that he had approached Mr Hill looking for casual work, his evidence was that Mr Hill mentioned to him that he had work on a social housing contract and offered him work. It is not in dispute that the Claimant was working on a self-employed basis as a tiler when he met Mr Hill.

94. The Claimant's evidence was that Mr Hill had never told him that he could never work for someone else, however he had regular work from Mr Hill and therefore did not seek work elsewhere during those 5 years (other than the one occasion in 2016 or 2017). There was a period of a couple of weeks when he did not work due to personal reasons, he did not arrange a substitute to cover his work.

95. The Claimant accepted when it was put to him in cross examination that in theory he could send someone else to do his work but expressed doubt over how it would work in in terms of insurance cover and that this had never happened in practice. It was not explored with the Claimant whether he understood he required the consent of the Respondent and to what extent therefore this was an unqualified right.

96. The Claimant was referred to document 72 F which refers to "smit". It was agreed that this was a reference to Daniel Smith who worked for the Respondent. The Claimant explained that there had been a couple of occasions when if he was doing fencing work for which he was being paid per square metre, he had taken someone with him to help him finish the job and he would pay them out of the payment he received from the Respondent. The Claimant was not describing a situation where he was sending someone in his place to carry out the work but having an assistant to help him complete a job that he paid directly.

97. Mr Hill did not deny that there had never been any discussion with the Claimant about him having the ability to arrange a substitute rather than arrange for assistance, but his evidence was that as a subcontractor the Claimant would have known. Mr Hill's evidence was that in that situation he would "check his friend to see if he was a competent worker" and if not, he would not have agreed to the substitute but would have given the work to another subcontractor. Mr Hill's evidence was that this never happened in practice but his own evidence was that it was if the Claimant had asked to send a substitute, it was not an unqualified or unfettered right, Mr Hill would have assessed the individual and retained the right not to accept him/her.

Tools

98. The Claimant accepted that he had his own tiling tools which he would take to site.

99. The Claimant was taken to page 72K in the bundle and accepted that this related to a tile cutter he had hired; the invoice was sent to the Respondent from Toolstation and the sum was then deducted by the Respondent from the Claimants "wages" as shown at the document at page 72s. The Claimant's evidence was that this was for tiling work at his own home, that he was tiling his lounge but that if he was doing work for the Respondent, they would pay for the hire of the tools he required. It was put to the Claimant by Miss Johns that this equipment was for a job the Claimant was carrying out for the Respondent however, the Respondent did not identify which job for the Respondent the tools were alleged to have been hired for.

100. The Claimant's evidence is that he had tile cutting tools but after the initial tiling work with the Respondent at the outset of their working relationship, he did very little tiling, he started to carry out mostly general construction work; ground work, fencing and labouring and when he did this work, he used the Respondent's tools. The evidence of Mr Hill was that the Claimant had his own 'general tools'; 'brushes, rakes, shovels' but any 'specialist tools' would be hired in by the Respondent who would pay for the hire. Mr Hill did not agree that the only tools the Claimant had of his own were his tiling tools and that he would keep his general tools in the Respondent's unit.

101. The documents clearly showed the hiring of tools reimbursed by the Respondent and I do not find it credible that the Claimant was allowed to use the company vehicle at no cost, made no contribution to the cost of fuel, reimbursed for the hiring of tools and yet was required as part of the arrangement to provide his own general labouring tools such as shovels.

Uniform

102. The Claimant's evidence is that he was required to wear clothes while on site with the company logo including; high visibility jacket, helmet, hoodie, quilted jacket and T- shirts. The Respondent's case is that the Claimant needed to be wear company ID because the projects included sites where there were vulnerable people. The Claimant accepted that there were vulnerable people on certain sites but that "99% of the time we would not be in contract with vulnerable people."

103. The Claimant's evidence was that when he worked on certain sites the Respondent required him to wear the client's logo because the Respondent was not permitted to subcontract the work. Mr Hill's evidence was that the Claimant was provided with a high visibility jacket with the Respondent's logo on it, and he 'may have had a T shirt', he later in cross examination confirmed that the Claimant may have had a 'few T shirts over the time' and that generally the Claimant was required to wear the Respondent's high visibility jacket which was PPE.

104. Mr Hill was taken to the ID cards at pages 70 of the bundle, he accepted that the Claimant was required for 'council jobs' to have ID cards.

105. It was clear that it suited the Respondent at least on certain projects to identify the Claimant as an employee of the Respondent but generally outside of those jobs, he was still required to wear various items of clothing and PPE with the company logo.

Control

106. The Claimant's evidence was that he had no set hours when he worked on assignments but the arrangement in practice was he would be on site from 8am to 4.30 pm depending on the job. He would be paid the same day rate regardless of the hours he worked. He could work he said 7 or 14 hours but paid the same day rate and Mrs Hill would call the Claimant every morning to check if he was on site.

107. The Claimant accepted in cross examination that what was said in the ET1 i.e. that he was told what hours to work was not correct, that Mr Hill did not stipulate set hours but that in practice he was expected to be on site by 8.30am, depending if he had to get materials and that there was a tracker on the company vehicle to check what time he was on site. Mr Hill denied that there was an agreement in practice that the Claimant had to be on site between 8 am and 4.30 pm however Mr Hill was unable to explain how he would calculate half a day's pay in the absence of any expectation about what hours constituted a full day's work.

108. In cross-examination the Claimant accepted that there was a "level of trust "on site but that there was a tracker fixed on the pickup vehicle he used and that he was monitored. The Claimant recalled an occasion when Mr Hill called him to check where he was because the tracker showed the vehicle was not on site. The Claimant accepted that otherwise he was "generally left alone to do the work". The clerk of works on site would check the standard of work rather than the Respondent. If no concerns were raised, Mr Hill would rely on the Claimant to work to the required standard however he accepted that at the outset he would set out what work the Claimant had to do. Mr Hill confirmed that the company vehicle was fitted with a tracker, when it was put to Mr Hill in cross examination that the Claimant believed this was to 'keep an eye on him', Mr Hills evidence was that it was; "there to see if anyone was leaving early and if the vehicle was stolen. To see if anyone on site". Mr Hill's evidence was that it was not only the Claimant driving the vehicle and he did not explain what 'leaving early' meant.

109. Mr Hill clearly did retain a degree of control over the hours the Claimant was working, there may have not been a fixed time when he was due on site but there was an expectation regarding the working day such that Mr Hill would check whether the Claimant had left 'early' and check where he was at certain times if not on site.

Training and Integration into the business of the Respondent

110. The Claimants evidence is that he undertook some courses arranged and paid for by the Respondent albeit he did pay for some courses himself. He accepted for example that it was his responsibility to arrange an asbestos training certificate

111. He was taken to document at page 39, which is a Health and Safety construction skills certification scheme card. The Claimant's evidence was that Mrs Hill arranged the test and the payment was deducted from his "wages"

112. The Claimants evidence is that the Respondent arranged and paid for a lot of training; mobile scaffolding, PASMA, undergrounds services. The Claimant was told when it the training was booked and when to attend. If he had to go on a 2-day course his evidence is that he was paid for that.

Mr Hill could not recall any asbestos training provided by the Respondent. He confirmed when asked about the Respondent providing portable scaffolding training, that were certain training if needed' 'could have been provided' and that it would have been arranged by Mrs Hill on behalf of the Respondent for the Claimant. Mrs Hill arranged underground services training for the Claimant and Mr Hill accepted that the Respondent paid for the training because at certain times the Claimant had 'money problems' and that they were 'probably naive and helped Pete out.' I find that training was arranged and paid for by the Respondent.

Disciplinary

116. Mr Hill was asked whether he would take disciplinary action against the Claimant if he refused work or to take something to a site, Mr Hill evidence was that he had; 'no disciplinary action over him apart from work he did 'Mr Hill was then taken to the email at document 36 from Mr Hill to Neil Large at Derby Homes which states as follows;

> "Please *can you provide a statement for both Peter Gilbourne and Nick Petter as to the reasons why the named operatives were taken off the job indicated above.* ***Disciplinary action has been taken*** *and we require your input and support in this matter as this action was taken after instruction from yourself"*

117. Mr Hill referred to taking disciplinary action 'only if on a job'. Mr Hill appeared to make a distinction between taking disciplinary action for refusing to accept work (which he stated he would have no right to do) and taking disciplinary action where the Claimant was carrying out a job and there was a problem with it. Mr Hill clearly considered that when working on an assignment for him, Mr Hill had control over the Claimant to the extent he could discipline him for any misconduct/capability issues in the performance of that work.

Sick leave

118. The Claimant's evidence was that he would have to tell the Respondent if he was going to be absent from work, he had the pickup truck and material may needed collecting and therefore he could not simply decide not to work.

119. The Claimant was taken to an entry in his invoice sheets at page 53 and it was put to him that this was evidence that he had simply not attended due to sickness without having told Mr Hill however the Claimant referred to the previous entry dated 13/08 where it stated; "Deliver plasterboard to Hucknall… Gone home sick "and his evidence is that he would have told Mr Hill the day before that he was sick that day, he had claimed only 2 1/1 hours pay that day.

120. I do find that the Claimant would not have in practice have failed to attend site without notifying the Respondent, not least he had pickup vehicle and was tasked with collecting tools and taking subcontractors to site.

Holiday

121. The Claimant evidence is that he did not take any annual leave apart form one occasion when he could not work for personal reasons when he told the Respondent he would not be available.

He accepted that he had never raised with the Respondent any right to paid annual leave because he did not know he had any right to it. He referred to people not wanting to *"rock the boat"*

122. I find that as the Respondent considered the Claimant to be self-employed, the Claimant was not allowed to take paid leave.

Tax

123. The Claimant was paid through the Construction Industry scheme (CIS). Under the scheme contractors deduct money from payments to a subcontractor and pass these to HMRC, the deduction counts as advance payments towards the subcontractor's tax and national insurance. The Claimant had a unique tax code as evidenced by the document at page 72 of the bundle.

124. When it was put to the Claimant that the CIS scheme is for the self-employed, the Claimant's response was that it depends on the definition and that self-employed people would normally quote for their work and he does not "get to quote and, set pay rates "

125. The Claimant evidence was that he had contacted HMRC over 30 years ago to get his unique tax number but that he never registered for the CIS scheme, that the scheme works for the company and the Respondent set it up. Mr Hill's evidence is that the Claimant was paid through the CIS scheme and that he was satisfied that the Claimant was registered having received his CIS certificate.

126. The Claimant was content to be paid via this scheme and that the Respondent would have used the Claimant's unique tax number to set up the payment arrangements.

<u>The Termination of the Arrangement</u>

Matlock Road

127. It is agreed by both parties that the last day the Claimant worked was 4 December 2018.

128. The Respondent's case is that in or around December 2018 allegations came to light regarding the quality of the Claimant's work. The Respondent had been carrying out work at Matlock Road for Derby Homes Limited (a management company for the council) and the Claimant had been working on this site along with another individual Nick Petter. It was accepted that the Claimant was not allowed to return to site.

129. The Claimant's evidence is that it was not explained to him what the issues with his work were and that he was told that the Respondent needed more details from the client. Document 27 is a text message from Mr Hill to the Claimant;

> "*We are waiting for a meeting with Derby homes as to lack of attendance, we are as much in the dark as you. Will speak to you after Christmas*".

130. In January 2019 the Claimant was told by Mr Hill that they were waiting for CCTV footage. The Claimant alleges that he later received a text from Mr Hill saying that Mr Hill wanted "people around him that he could trust". The text message was not in the bundle but there appears to be no dispute that this text was sent and Mr Hill in his written statement refers to *"reaching a point where his word could not be trusted*" (paragraph 71).

131. There is an email exchange at page 36 of the bundle, between Mr Hill to Neil Lange, Working Supervisor at Derby Homes Limited. It is to be noted that the email was not sent until 6 months after the incident in question namely in June 2019. In essence it is asking Mr Lange to confirm the reasons why the Claimant and Nick Petter had been removed from site. Mr Lange states in his response;

> "*The operatives were taken off the job due to the standard of the work not meeting the specification. This was highlighted when the first concrete pour had to be cancelled "*

132. The Claimant denies any issue with his work, he referred to problems with the weather and of having to put steel reinforcement into the concrete flooring with another operative. He described having to remove large volumes of soil and clay and physically raising the concrete floor higher due to adverse weather conditions but of their inability to physically lift it. At page 69 of the bundle is a document prepared by the Claimant which is record of work done and payments due. This records as against Matlock Road;

> "*steel reinforcing"*
>
> *"Couldn't pour concrete. Securing Bank"*

These entries would support the Claimants account of problems at the site.

133. Mr Hill evidence was that he had had a telephone conversation with the Claimant during which he had told the Claimant that the work was not 'up to standard' and that this call was before the text message from the Claimant on 21 December. However, the Claimant's evidence was that he was given no information and it was never put to him in cross examination that Mr Hill had called him at any point to explain what was happening and indeed the documented text messages do not support this.

134. Mr Hill's evidence was that there were also complaints by the client that *"people on site' we are turning up late and leaving work early and works incorrect'*.

135. Mr Hill accepts he did not meet with the Claimant to elicit his account of events however Mr Hill denied that he had failed to investigate, he alleged he had; '*investigated with Derby 'and that it 'costs thousands of pounds to put it right*'., that he had or sit through meetings and be told 'how inadequate we are '. When it was put to Mr Hill that he had failed to follow a fair disciplinary process, his response was; '*he was a subcontractor – he had done it wrong. I had no choice*'.

Grantham

136. The Claimant was also taken to another email at page 38 of the bundle. This was an email from a Julian Wright at Tomlinson who had been asked by Mr Hill (following a telephone conversation with Mr Hill) for reasons why the Claimant and Mr Patter were damaging the Respondent's reputation with poor workmanship. The Claimant had carried out some work on a Tomlinson site at 23 Munton Fields, Grantham, the response relates to work at this site and complaints that tiling to the kitchen had to be removed and retiled and concrete path was of poor finish stating;

> "*I feel one of the reasons for this sub- standard work was down to the tasks being rushed, when I attended site in the afternoon operatives were rarely onsite past 2 pm*"

137. The Claimant's evidence was that the property they were working in Grantham had subsidence and required underpinning. The Claimant had not been informed about any issues with his work at the time. The Claimant believes that the work was carried out in possibly in September/ October or November 2018.

138. The Claimant denied responsibility for concrete path, he referred to there being two operatives on site better qualified then he was to lay concrete. He also had no knowledge of his tiling being replaced and regarding the quality of his work he said that Mr Hill had asked him to tile his own house.

139. I find on the evidence that the Claimant was not given an opportunity to address the alleged issues with the quality of his work or his timekeeping. There is no evidence on which any finding could be made that if the Claimant were an employee and a fair process carried out, he would have been dismissed in any event. Other than the content of the emails from Mr Lange and Mr Wright, no further evidence was provided regarding the alleged capability/conduct issues. Although Mr Hill referred to the many meetings he had with Derby Homes and the costs incurred, he produced no evidence of to support the allegations against the Claimant.

Wrongful Dismissal - Notice Pay

140. With regards to the allegations of conduct and or capability, the evidence of the Claimant is that with respect to his work on the Matlock site, he denies the allegations that his work was substandard. The Claimant explained that he and his colleague experienced difficulties on this project, the specification for the work was changed "*about three times*" before the first concrete pour and by the time they came to pour the concrete the weather was "*bad*" and there was a land-slip. The Claimant and his colleague had to insert steel reinforcing into the concrete footing and he described how physical challenges of removing tonnes of soil and clay to cut the trench.

141. Mr Hill denied that the specification for the job had changed or that the weather was bad but produced no evidence to support this.

142. Mr Hill referred to having meetings with the client regarding the substandard work and the cost of rectification but did not expand on what was discussed in relation to the Claimant specifically or indeed generally about the cause of the problems on site and he produced no evidence of the content of the discussions or of any costs incurred.

143. The only document which supported Mr Hill account was the email of the 24 June 2019, from Mr Lange of Derby Homes which referred not to the Claimant specifically but to the " operatives " who had been " taken off the job due to the standard of work not meeting the specification. "Further, this was an email sent 6 months later and in response to a request by Mr Hill for Mr Lange to provide a statement regarding the Claimant and Mr Petter as to the reasons why they were taken off the job, disciplinary action having been taken and the Respondent "requiring support in this matter as this action was taken after instruction from yourself." Mr Lange did not provide a statement and did not attend the hearing to be cross examined. Mr Hill, it is to be noted does not refer to this own finding as to the Claimant's standard of work but to acting in response to an "instruction" from Mr Lange.

Submissions

144. Miss Johns gave oral submissions only, she had not prepared a skeleton argument and did not produce copies of any case authorities. In essence Miss Johns set out what she described as the primary points in favour of a finding that the Claimant was self-employed namely; payment via the CSI scheme, agreement by the Claimant that 'hypothetically 'he could send a substitute to do his work, insufficient control including over the work carried out and the hours, lack of obligation to provide work (with reference to text messages where Claimant was enquiring of Mr Hill if there was work) and other factors including that he provided some of his own tools, no mention was made by the Claimant of paid holidays and variable pay. In support of an argument that the Claimant was also not a worker Miss Johns submits that there was not the requirement for personal service in that the Claimant accepted he could have sent someone else and invited me to consider that looking at the relationship as a whole, the claim to employee or worker status must fail albeit she submitted that it is "not a clear cut case". In respect of any issue of fairness regarding the dismissal, Miss Johns referred to the administrative resources of the Respondent which is a fairly small business and that taking into account the damage to the respondent's reputation it was reasonable to terminate but Miss Johns conceded insufficient investigation was undertaken and thus elected to make no submissions in defence of an uplift in any compensation awarded; section 207 (A) TULRC(A).

145. Mr McCracken gave oral submissions and produced a written skeleton argument with a copy of the transcripts of two cases; Cotswold Developments Construction Ltd v Mrs J Williams UKEAT/0457/05/DM and Plastering Contractors Stanmore Ltd v Mr P Holden UKEAT/0074/14/LA. In oral submissions he submitted in summary that there was an obligation on both sides in terms of the way work was offered and carried out. In reality work was offered to the Claimant when available, regardless of the hypothetical satiation the relationship was constant over the 5 years other than for a short period of about 7 days when Mr Hill was working on his own home and there was no other work. That there is evidence to infer mutuality of obligation because in practice the Claimant never worked for other people. The Claimant felt obligated to accept work and apart from a few examples he was paid a day rate regardless of what the work involved was or indeed what Mr Hill was being paid for the work. There was an expectation of working hours and the use of the tracker shows there was control. Mr Hill could tell the Claimant what to do and where to go.

The CIS scheme does not determine his employment status. The Respondent provided the van, most of the tools and reimbursed the Claimant for fuel, he wore the company logo, had an ID card and provided with training. Looking at the contract as a whole it is submitted that he was an employee or in the alternative a worker.

Conclusions

Employee Status

146. I begin by considering in respect of the facts of this matter each of the factors in **Ready Mixed Concrete** and I set out above in detail my findings in relation to these.

147. I firstly need to consider whether there is a contract between the Claimant and the Respondent. There plainly is a contract between the parties albeit not a written contract. The terms of the contract as to remuneration were that the Claimant was paid a fix daily rate, on some projects he was paid according to the amount of work undertaken by which I mean the square meterage. There was an expectation regarding the hours of work which would be worked and that the work provided would meet the client's specification for each job.

148. I turn then to consider whether there was a requirement for personal service. I find that on a balance of probabilities, on the evidence there was no right of substitution. Although Mr Hill said that the Claimant could have arranged a substitute, Mr Hill had also said that if the Claimant did not want the work he could offer it to other what he terms 'subcontractors'. The Claimant in practice never arranged a substitute and indeed was not sure how this would work with the insurance situation. When the Claimant arranged for someone to assist him to complete a job in time, he paid them out of his own wages, they were not substituting for him but an additional pair of hands. There is nothing to suggest an ability to send a substitute or anything inconsistent with a requirement to give personal service.

149. I find that there was not an unfettered right to substitute in practice. Mr Hill explained that he had other subcontractors and I find that it is more likely that Mr Hill would have arranged himself for someone else to do the work rather than the Claimant find a substitute.

150. Not least given the concern on certain contracts that the Claimant was seen as an employee, I find on a balance of probabilities that Mr Hill would have retained absolute discretion over who he allowed to carry out the work on site but in practice the Claimant never engaged a substitute.

151. I find that there are strong factors indicating that the Claimant was integrated into the business and that the Respondent had control over his work; he did not have a uniform as such however he was provided I find with T-shirts with the company logo, hard hat with their logo and required to wear a high visibility vest with the company logo. He was also provided on certain jobs with an ID card which identified him as an employee of the Respondent. Further, the Respondent provided the Claimant with a job specification and he was required to work to that specification on each project. It was not for the Claimant to challenge how the work should be carried out.

The Claimant was not involved in agreeing the job specification or pricing for the work. The Claimant drove a vehicle fitted with a tracker, at least one of the reasons for this was to check when he (and others) were on site. Mr Hill in his evidence referred to being able to take disciplinary action for work not completed properly on a job, to the required standard.

152. I have also whether the other provisions of the contract are consistent with it being a contract of service. I deal firstly here with the key ingredient of mutuality of obligation. The Respondent contends that mutuality of obligation was inherently absent in this relationship because there was firstly no obligation on the employer to provide work and no obligation on the Claimant to accept it if it was offered.

153. I am satisfied ultimately that this was not the case. In reality, where there was work available this was offered consistently to the Claimant even more so when the Claimant was provided with use of and insured on the company vehicle and tasked with using it to transport contractors and materials to site for the Respondent. When the Claimant was working on a site, if work was finished, then the Claimant would be moved to another site, all this work was covered by his fixed daily rate regardless of the work being undertaken.

154. There were periods when the Respondent did not have work but that is not fatal given that I accept that when it was available it was always offered to the Claimant and in practice that created an obligation between the parties. The Respondent clearly considered itself under an obligation to offer work when it was available, this is evidenced by Mr Hill offering the Claimant work on his own home when it was being built during a period when there was no other work available, with a truly self-employed business Mr Hill would not have felt under any compulsion to find him work. The Claimant clearly considered that there was expectation that work would be offered to him if viable; he referred to taking other work during this period when no work was available as assisting the Respondent, with the Respondent knowing that he was not 'going away '. The Respondent also made advances of payments to the Claimant when he was struggling financially, this is not consistent with a situation where the individual is in business on their own account.

155. In terms of the Claimant's acceptance of work, although he accepted that he could refuse work, he did so in the context that any person regardless of their employment situation could not be compelled to work, which is of course correct. However, it was also clear that the Claimant felt an obligation toward the Respondent to accept he work, was concerned he would not be offered other work if he turned it down and once he was driving the company vehicle felt even more of an obligation. Once the Claimant had accepted work on a project there is no evidence that the Claimant changed his mind to accept other work or indeed any evidence that the Claimant accepted work subject to working around other work commitments he had. He worked exclusively for the Respondent and did not market his services elsewhere.

156. The Claimant was clearly seen as integral to the business. He had regularly use of the company vehicle such that he dispensed of his own and the Respondent arranged and paid for training courses and paid him to attend. The Respondent was responsible for provision of the main tools and PPE.

157. The nature and length of the relationship is also an issue to be considered here. This was a lengthy relationship of over 5 years with the Claimant being provided with a regular work. This was not an ad hoc arrangement.

158. Regardless of the labels attached to the working relationship, I find on the evidence that at all material times the Claimant was an employee within the meaning of Section 230(1) ERA 1996.

Unfair Dismissal

159. The Respondent defends the claim of unfair dismissal on the grounds that of the Claimant's conduct or capability and the concerns raised by two separate clients namely the concerns raised in respect of the work carried out at the Matlock and Grantham sites. Miss John's referred to the concerns that the Respondent had regarding its reputation and that this should be considered. The Respondent's defence as set out in its grounds of resistance at paragraph 38 pleaded conduct as the potentially fair reason for dismissal; "*conduct was the sole reason that his engagement came to an end*". There was no application to amend the response to include some other substantial reason under section 98 (1) (b) in the alternative.

160. I find on the evidence that the Respondent did not provide the Claimant with an opportunity to respond to the allegations of substandard work on the Matlock Road site or having turned up to site late and leaving working early. The text message exchanges between the Mr Hill and the Claimant support the Claimant's account that he asked for an explanation and that he was not told any details of what had been alleged and did not have the opportunity to put his account of events. The email at page 36 from Mr Lange postdates the incidents however I do find on the evidence, namely the oral evidence of Mr Hill, his text messages with the Claimant regarding the complaints raised and the text message from Mr Lange, that the client was dissatisfied. The undisputed evidence of Mr Hill is that he met with the client to address the concerns. However, Mr Hill provided no details of what was discussed or what the outcome of those discussions were with respect to the work carried out by the Respondent. With regards to leaving site early and attending late, despite the tracker on the vehicle the Respondent did not adduce any evidence nor indeed allege, that the tracker supported the client's complaints in this regard.

161. Mr Hill did not deny that he had failed to follow a fair disciplinary process, he considered the Claimant a subcontractor and did not consider it necessary.

162. Mr Hill had also produced an email (page 38) from another client concerning work the Claimant had carried out at Grantham. The Claimant's undisputed evidence was that this work was carried out before the Matlock work, sometime in the period September to November 2018. It was not alleged that these issues were ever brought to the attention of the Claimant and the Respondent does not allege that it took any action over these allegations at the time nor did Mr Hill in his evidence assert they were the reason for the decision to remove the Claimant from the Matlock Site. If the allegations relating to the Grantham site formed part of the reason behind the decision to terminate the Claimant's employment, Mr Hill does not assert that these issues were ever raised with the Claimant or indeed investigated. I accept the evidence of the Claimant which is undisputed that he was never made aware of these allegations until after his dismissal.

163. I therefore find that the Respondent did not carry out as much investigation into the matter as was reasonable regarding the Claimant's conduct and/or competence.

164. The Respondent did not have reasonable grounds to sustain a belief that the Claimant had carried out substandard work. The Respondent did not adopt a reasonable investigation applying the band of reasonable responses to the circumstances of this case. The Respondent did not put the allegations to the Claimant regarding the alleged issues with his work and attendance on site.

165. The Claimant was not working alone on the projects in question, he described difficult working conditions and in respect of the laying of concrete at the Grantham site he denies being responsible for laying it, that others were better qualified for this task.

166. I find that the Respondent's primary concern was to appease the client rather than ascertaining the extent to which the Claimant was responsible. The Respondent did not adduce any evidence regarding his findings regarding the Claimant's individual responsibility or the detail of what was discussed with the client.

167. I find that the Respondent did not have reasonable grounds for believing that the Claimant had committed an act of gross misconduct or gross incompetence justifying summary dismissal. The Respondent immediately removed the Claimant and the other operative from site and concerned itself with managing the relationship with the client rather than investigating the Claimant's individual conduct or competence. The Respondent did not explain to the Claimant what the allegations were or provide him with an opportunity to respond to those allegations before deciding to terminate his employment.

168. I find on the evidence that the dismissal was unfair having regard to the reason shown by the Respondent and that the Claimant was therefore unfairly dismissed.

169. The Respondent concedes that it failed to follow a fair process and Miss Johns elected to make no submissions on the Acas uplift sought by the Claimant.

170. I find the dismissal substantively and procedurally unfair and that there had been a complete absence of any process. The Respondent did not consider the Claimant to be an employee and I consider the failure was unreasonable. I consider that it would be just and equitable taking into account the reasons why the Respondent failed to comply and the size of the business, to increase the award by 15%.

171. Contributory fault was not pleaded nor was there any application to amend the defence.

Holiday Pay

172. In the absence of a contract of employment which confirms what the holiday year is, it is the anniversary of the Claimant's start date which is the 1 November 2013. This is provided for by regulation 13 (3) (ii) WTR. The Respondent accepts in its response form that this is the date.

173. The Claimant did not take leave during the period 2013 to 2018. The Respondent accepts that he was not offered paid leave because the Claimant was not recognised as being an employee or worker. The Respondent does not attempt to argue that it encouraged the Claimant to take leave whether paid or unpaid.

174. The finding of the tribunal is that the Claimant was an employee and therefore he is entitled to accrued annual leave. The leave to which he is entitled will be an issue to be determined at the Remedy Hearing. Further submissions will be required and the parties will need to address the tribunal on the relevant authorities including that of the EAT in **Sood Enterprises Ltd v Healy [2013] IRLR 865**, the recent ECJ Judgement in **Terveys – ja sosiaalialan neuvottelujaresto (TSN) v Hyvinvointialan litto C-609/17, HM Revenue Customs v Stringer [2009] UKHL 31 IRLR 677** and **King v The Sash Window Workshop C-214/16** and **Max – Planck- Gesellschaft zur *Förderung der Wissenschaften e v Shimizu C-684/16 [2019] CMLR 1233***.

Wrongful Dismissal - Notice Pay

175. The Claimant denied that he had carried out work which was of an unacceptable standard, he accepted that there were difficulties with the site but that this was not something for which he accepts he was responsible. The Respondent did not accept the Claimant's explanation however produced any evidence to support the allegation that the Claimant's work was not of an acceptable standard other than the email from Derby Homes written 6 months later and in direct response from Mr Hill in his appeal for "support." Given Mr Lange did not attend the hearing and the email does not set out in any detail why he considered the work did not meet the specification, I attach very little weight to the content of this email.

176. With respect to his work on the Matlock site, the Claimant denies the allegations that his work was substandard and provides an explanation for the difficulties with the pouring of the concrete which Mr Hill rejects but failed to explain his reasons for doing so. Mr Hill referred to having meetings with the client but did not explain what was discussed regarding the problems or failing on the site nor did he produce any documents addressing the issues or explaining the extent of the Client's dissatisfaction.

177. I do not find on the evidence that the Respondent has proven on a balance of probabilities that the misconduct/ incapability is proven with respect to the standard of work or indeed the issues over timekeeping/attendance on site. The Respondent has not established that the Claimant is guilty of the offences for which he was dismissed.

178. The Claimant was wrongfully dismissed and is entitled to payment of 5 weeks statutory notice.

Written Particulars

179. It is accepted that there was a failure by the Respondent to comply with section 1 Employment Rights Act 1996. An adjustment under section 38 of the Employment Act 2002 will be appropriate and the tribunal will hear representations at the Remedy hearing as to whether there should be an award of the higher or lower amount.

Remedy

180. The matter will be set down for a one-day remedy hearing to determine remedy.

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Employment Judge Rachel Broughton

Date: 16 December 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE