



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4110036/2019**

**Heard at Edinburgh on 26 November 2019**

**Employment Judge: J Young**

**Mr Colin Flannigan**

**Claimant  
In Person**

**J S Strachan trading as Strachan Haulage**

**1<sup>st</sup> Respondent  
In Person**

**Corporate Road Solutions 24:7 Ltd**

**2<sup>nd</sup> Respondent  
No appearance and not  
represented**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that:-

- (1) the claimant was an employee of the 1<sup>st</sup> respondent in the period between 2 June 2015 and 1 August 2019;
- (2) the claimant was not an employee of the 2<sup>nd</sup> respondent; and
- (3) the claims so far as directed against the 2<sup>nd</sup> respondent are dismissed.

### **REASONS**

#### **Introduction**

1. In this case the claimant presented a claim to the Employment Tribunal against 1<sup>st</sup> and 2<sup>nd</sup> respondents. He made a claim of unfair dismissal and also claimed a  
ETZ4(WR)

redundancy payment. He stated in his claim form that he had been employed by the 1<sup>st</sup> respondent as an HGV driver but latterly an arrangement was made between the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the effect that he would drive for the 2<sup>nd</sup> respondent but that the claimant would still be employed by the 1<sup>st</sup> respondent. The payment of wages would be arranged between the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He states that on 22<sup>nd</sup> July 2018 he was told by the 2<sup>nd</sup> respondent that he was no longer required for the “shunting work” that he had been engaged in but that they would arrange other work for him. He had concerns about the arrangements which were being made. He declined any change in working arrangements and stopped work. He maintains the 1<sup>st</sup> respondent denied that he was then their employee but was at that time an employee of the 2<sup>nd</sup> respondents. He required to make the claim to the Employment Tribunal against both respondents.

2. The 1<sup>st</sup> respondent in their response advised that the claimant was only their full time employee between 11 June 2018 and 19 April 2019 and that any work performed by the claimant prior to that time was on a self-employed basis. It was also indicated that the claimant did not disclose a prison sentence he received in July 2013 and that was a breach of the contract that he signed.
3. The 2<sup>nd</sup> respondent in their response advised that they had employed the claimant from 29 April 2019 until 3 August 2019. They stated that they had “kept Mr Flannigan on the shunts he had been doing for Mr Strachan and paid him the agreed rate between Mr Keenan and Mr Strachan”.
4. Given the content of the claim form and responses the Tribunal considered that it would be appropriate to have a Preliminary Hearing on the question of whether there was “sufficient continuity of service in respect of each respondent for a claim of unfair dismissal”.

### **The hearing**

5. At the Hearing there was no appearance made for or on behalf of the 2<sup>nd</sup> respondent. Evidence was given by the claimant and the respondent.

Evidence was also given by Alan Reid, a mechanic and Compliance Officer with the respondent.

### Documentation

6. The claimant produced documents (C1-6) as follows:-

- (1) Email from the claimant to the 1st respondent of 14 June 2019 (C1)
- (2) Terms and Conditions of Employment between 1<sup>st</sup> respondent (Strachan Haulage) and the claimant (C2)
- (3) Bank statement of claimant over period 25 November 2015 to 22 May 2019 showing payments from the 1st respondent (C3)
- (4) Duplicate email forming C1 above (C4)
- (5) Exchange of text messages between the claimant and the 1<sup>st</sup> respondent over 19 May-3 June 2019 (C5)
- (6) Email exchange between the claimant and Lisa Bartkus of the 2<sup>nd</sup> respondent dated 1 August 2019 (C6)

7. The 1<sup>st</sup> respondent produced documents (R1-9) as follows:-

- (1) P11 Deductions Working Sheet giving "PAYE details" and "NIC details" in respect of PAYE period 2018/2019 for the claimant (R1)
- (2) Tacho day summary sheet for claimant of 2 November 2017 (R2)
- (3) Tacho day summary sheet for claimant of 3 November 2017 (R3)
- (4) Tacho day summary sheet for claimant of 4 November 2017 (R4)
- (5) Tacho day summary sheet for claimant of 5 November 2017 (R5)
- (6) Tacho day summary sheet for claimant of 6 November 2017 (R6)
- (7) Tacho day summary sheet for claimant of 7 November 2017 (R7)
- (8) Tacho day summary sheet for claimant of 13 November 2017 (R8)
- (9) Tacho day summary sheet for claimant of 14 November 2017 (R9)

8. From the relevant evidence led, admissions made and documents produced I was able to make Findings in Fact on the issue. The crucial facts relate to the period of

commencement and termination of any employment of the claimant with the 1<sup>st</sup> and 2<sup>nd</sup> respondent and in that respect it is necessary to rehearse the evidence before coming to a conclusion on that issue.

## Findings

9. The 1<sup>st</sup> respondent operates a general haulage company and has been in business since 1989. The business operates across the UK and has a base depot in Livingston.
10. Mr Strachan deals with customers and the general running of the business. Mr Alan Reid performs the duties of a mechanic as well as being responsible for “general compliance” in health and safety and other matters.
11. The claimant confirmed that he had been sentenced to imprisonment in 2013 on a drugs offence. He had been released on 4 July 2014 with a “tag” which lasted for 6 months and during this period he had occasionally worked for the 1<sup>st</sup> respondent as an HGV driver on a part-time basis. The “tag” had been removed as from January 2015. There was no contract arrangement. At that time he did not work “very many hours per week”. He had no other work at that time. He was paid by transfer into his bank account.

## Working in 2015

12. That changed as from 2 June 2015 when he commenced full-time working with the 1<sup>st</sup> respondent 5 days a week Monday to Friday with overtime on a Saturday/Sunday. He would drive 50 hours per week.

13. Under reference to his Bank statement at C2 he was paid by the 1<sup>st</sup> respondent initially at the rate of £341 per week. Those bank statements at C2 show payment commenced 3 June 2015. He then received a loan from the 1<sup>st</sup> respondent of £1000 on 20 July 2015 and succeeding weekly payments were for a time reduced to repay that loan. The 1<sup>st</sup> respondent agreed that the £1000 loan had been paid back. The payments to the bank account showed consistent weekly payments to the claimant in the period 3 June 2015-22 May 2019.
14. He advised that he had never received any pay slips from the 1<sup>st</sup> respondent who he considered accounted to HMRC for tax and National Insurance in respect of the net sums paid to him.
15. He was not supplied with a uniform but received “safety clothing” being boots, high viz vests and gloves.
16. The 1<sup>st</sup> respondent disputed that the claimant was an employee from 3 June 2015. The 1<sup>st</sup> respondent advised that the claimant had not worked all days Monday to Friday in 2015 but maybe “some days in the week”. If there was no work for a day then he would still pay the claimant. He wanted to be “decent with everybody”.

### **Working in 2018**

17. The 1<sup>st</sup> respondent stated that the claimant “went full-time as from 11 June 2018 with me”. The position of the 1<sup>st</sup> respondent was that he had not paid any tax on the amount paid to the claimant before 11 June 2018. It was at that time that he had entered into the payroll. He agreed to take him on full-time at that point.
18. There had been a further loan of £1500 made to the claimant in December 2018 which was in the course of being paid back before the employment of the claimant ceased.
19. The claimant had wanted pay slips so that he could get a bank loan and he had provided pay slip information. No pay slips were produced. The claimant denied

that he had required a Bank loan in 2018 and so there was no need for any pay slips at that time. He had received a "Whatsapp message" from the 1<sup>st</sup> respondent's "wages clerk" for use in a re-mortgage arrangement.

20. The claimant advised that in 2018 his days of work had altered to Saturday/Wednesday (in place of Monday/Friday) and because of the weekend working his pay improved. At that time the 1<sup>st</sup> respondent had a contract with Tesco and the claimant was engaged in that work. The 1<sup>st</sup> respondent agreed that the claimant had worked Saturday/Wednesday on the Tesco job but the 1<sup>st</sup> respondent had since lost that contract.
21. The Bank statements of the claimant (C3) showed that there was some consistent improvement in pay to the claimant from around May 2018. Payments to the claimant around that period were:-

23 May 2018-	£620
30 May 18 -	£620
6 June 18 -	£510 plus £110 = £620
13 June 18 -	£620
20 June 2018 -	£620
27 June 18 -	£620
4 July 18 -	£510
9 July 2018 -	£620
18 July 2018 -	£620
1 August 2018 -	£620

#### **Arrangement over 2/14 November 2017**

22. The position of the 1<sup>st</sup> respondent was that in November 2017 the claimant worked for another company named Alan Hannah over the period 2<sup>nd</sup> November-14 November 2017. There was differing evidence in respect of this period. The position of the 1<sup>st</sup> respondent was that the claimant told him that he was going to

“try a contract with Alan Hannah” and as he had “no hold on him” he agreed. After the claimant had driven for Alan Hannah he returned to the 1<sup>st</sup> respondent and said “Not for me “and “wanted to come back”.

23. The claimant’s position in this was that he had driven with Alan Hannah. He explained that Mr Hannah did work for the BBC and phoned him to ask if he was available to drive to Germany, Italy and Austria. Apparently a replacement driver was needed urgently. He explained that he approached the 1<sup>st</sup> respondent who agreed to this over the claimant’s holiday period. Mr Hannah paid the claimant expenses in respect of this trip but no more as the 1<sup>st</sup> respondent had paid holiday pay which covered the period of working.

24. The bank statements of the claimant (C3) showed in November 2017 the following payments were made:-

1 November 2017 -	£367
8 November 2017 -	£367
15 November 2017 -	£367
22 November 2017 -	£367
29 November 2017 -	£367
6 December 2017 -	£477
13 December 2017 -	£477

25. The 1<sup>st</sup> respondent explained that the claimant had been due holiday pay over the period 2-14 November 2017 and when he returned from his working with Hannah payments simply “picked up again”.

26. The Tachograph information (R2/9) showed the claimant driving in Germany and Austria between 2 November-7 November 2017 and then driving a different vehicle on 13/14 November 2017. As far as Mr Reid was concerned the claimant had gone to work for Alan Hannah but had returned to the 1<sup>st</sup> respondent as the work did not suit him. He recalled that there was a breakdown in that time and that the claimant had phoned him to ask what might fix the problem. As it happened Mr Reid was

not able to assist other than to advise that he should take the truck to a garage for a repair. He had been willing to help the claimant on that occasion.

### **Contract of Employment**

27. There was produced Terms and Conditions of Employment between the 1<sup>st</sup> respondent and the claimant (C2). That document indicated that the date of commencement of employment of the claimant was "2/6/15" with a salary "as agreed". That statement of terms and conditions had been signed by the claimant on 29 January 2019 and by Mr Strachan also on 29 January 2019.
28. Alan Reid had been instructed to obtain signed Terms and Conditions of Employment from employees. He received from the 1<sup>st</sup> respondent "pre signed" Terms and Conditions and the arrangement was that if the drivers agreed with the terms then they would also sign.
29. He had taken the pre signed documents to the claimant. Mr Reid had entered the commencement date of employment "2/6/15" as when they met the claimant had stated that he commenced employment with the 1<sup>st</sup> respondent from that date. The other details being "name of employee" as "Colin Flannigan" as well as the title of the job being "driver" had been entered on the document by the claimant.
30. One copy of the document was left with the claimant and the other taken by Mr Reid to the office where it was filed. He did not know if Mr Strachan had looked at the document after it was signed. The task of Mr Reid was simply to obtain a signed Statement of Terms and Conditions for the drivers.

### **Restriction of 1<sup>st</sup> respondent's licence**

31. The 1<sup>st</sup> respondent's operator licence was curtailed from 8 to 3 vehicles around April/May 2019. At this time the 1<sup>st</sup> respondent no longer had the Tesco contract and the claimant was to work on a "shunt job" between factories for Mitsubishi. He reverted then to Monday to Friday working which meant a drop in pay. There was



an arrangement made between the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent was to subcontract some work to the 2<sup>nd</sup> respondent which included the Mitsubishi contract. The claimant states he was told that he would remain an employee of the 1<sup>st</sup> respondent but that the 2<sup>nd</sup> respondent would pay £400 of his wages and the 1<sup>st</sup> respondent would pay £170. However that lasted only some weeks and the claimant was expected to “stay on with CRS (2<sup>nd</sup> respondent) as a driver”.

32. The Bank statements (C2) show that the claimant received £170 from the 1<sup>st</sup> respondent in the weeks 15 May 2019 and 22 May 2019. Previously he had been paid at the rate of £570 from the 1<sup>st</sup> respondent meaning the change in pay arrangements took place from 15 May 2019.
33. There was also a deduction made by the 2<sup>nd</sup> respondent for a “CPC course” for the claimant but the 1<sup>st</sup> respondent considered that was not a deduction that was appropriate because they had paid for the CPC course for the claimant (texts at C5).
34. In any event by the end of July 2019 the claimant received a telephone call from the 2<sup>nd</sup> respondent telling him that he was not required at Mitsubishi and that he was to report to them on Monday for alternative employment. The claimant indicated at that time that he did not work for the 2<sup>nd</sup> respondent and that he would not be taking up this job. The claimant sent an email to Lisa Bartkus of the 2<sup>nd</sup> respondent on 1 August indicating that he would not take this job offer which had been made. In that email (C6) he indicated that he had been off for the last few days as these were “my holidays anyway last week in July first week in August as agreed by Mr Strachan back in the beginning of May”.
35. In that email the claimant states “I know Mr Strachan has now stopped paying yourselves my wages plus the fact I do not have a contract with yourselves I am going to decline your offer”.

36. The position of the 1<sup>st</sup> respondent in this respect was that after restriction of the operator licence he asked the 2<sup>nd</sup> respondent if they would take on the claimant and he would sub-contract work to them. That involved the shunting job at Mitsubishi but the claimant went absent for periods and there were complaints so the 2<sup>nd</sup> respondent required to take the claimant off that work but they were to offer him alternative work which the claimant refused. The position of the 1<sup>st</sup> respondent was that the claimant had moved over to be an employee of the 2<sup>nd</sup> respondent around May 2019 who had then paid him directly.

#### **P45 by 1<sup>st</sup> respondent**

37. It was stated by the 1<sup>st</sup> respondent that the claimant had received a P45 after he had finished with the 1<sup>st</sup> respondent in May 2019. The claimant denied getting any P45. Mr Reid initially indicated that he had no knowledge of a P45 but then indicated that he had been given one by Mr Strachan to deliver to the 2<sup>nd</sup> respondent. He had then done that and received a “pack from CRS” to be completed by the claimant and had passed that to him. He did not know what was in that pack. The claimant denied receiving any contractual documents from the 2<sup>nd</sup> respondent.

38. He also indicated that he had got calls from Mr Strachan to say that a driver at Mitsubishi had “disappeared” and he needed to go and take over. He did not know which driver it was who had gone. He did not ask. He simply responded to the need for a driver to go to Mitsubishi.

#### **Conclusions**

39. From this disputed situation I concluded that the claimant commenced employment with the 1<sup>st</sup> respondent as from 2 June 2015. My reasons for that conclusion are:-

- (1) It was stated by the 1<sup>st</sup> respondent that until 11 June 2018 the claimant was self-employed and only then did he become an employee with responsibility on the 1<sup>st</sup> respondent for deduction of tax and National Insurance from wages. However according to the Bank statements from the claimant (C2) he was paid continually and weekly from 3 June 2015 and there is no variation in the amounts paid to him in June 2018 to account for deduction of Tax and NI to suggest that before 11 June 2018 he had been paid as a self-employed person and only then became an employee. If the claimant had been truly self-employed prior to 11 June 2018 then he would be responsible for accounting to HMRC for tax and National Insurance and would be paid a gross sum. Thereafter if his status changed the 1<sup>st</sup> respondent would require to make those deductions through PAYE and pay would not be on a gross basis but on a net basis. Looking to the Bank statements the claimant received £620 pay for the weeks 23 and 30 May and 6 June 2018 and the same amount in the weeks for 13 June 2018, 20 June 2018 and 27 June 2018. The pay fell to £510 on 4 July 2018 and then reverted again to £620 for the following 5 weeks. There was no indication that the basis of pay to the claimant had changed to reflect the fact that he was no longer being paid a gross amount but under deduction of tax and National Insurance. That did not favour there was any change in the nature of the arrangement between the claimant and the 1<sup>st</sup> respondent.
- (2) The Contract of Employment indicated that the claimant's employment commenced 2 June 2015. It was stated that this had only been completed by Mr Reid accepting the claimant's start date and inserting that in the Contract. At the same time it is a document of the 1<sup>st</sup> respondent. It would not appear they have made any attempt to alter that start date or effect any change when the document was prepared and signed in January 2019. That exercise seems well before there was any dispute over when it was that the claimant had commenced his employment.

- (3) The 1<sup>st</sup> respondent seemed to suggest that the “tag” worn by the claimant had some impact on the relationship. I did not see that as having any bearing on the matter. The evidence was that the “tag” had been removed from the claimant in January 2015 and he had been taken on as a full-time employee in June 2015. From that date there are regular weekly payments to the claimant and regular working. He was supplied with safety equipment namely high viz vest, boots and gloves which would not indicate he was self-employed. He worked under the instruction of the 1<sup>st</sup> respondent who rostered him for particular contracts. He was under the control and direction of the 1<sup>st</sup> respondent. It appeared his working hours were altered in May 2018 from Monday/Friday to Wednesday/Saturday. There was no evidence he had the right to substitute another driver. There was no evidence that he worked for any other party in the period June 2015 to June 2018. There was no indication that the engagement by the claimant was one of self-employment. The evidence pointed to the claimant working under a contract of employment.
- (4) There was some issue over the claimant being able to work for Andrew Hannah for a week in November 2017. I accepted the claimant’s evidence that this was by arrangement with the 1<sup>st</sup> respondent. I did not accept that this was because the claimant wanted to work for Andrew Hannah and that the claimant had no control over him as he was self-employed. It was agreed by the 1<sup>st</sup> respondent that he continued to pay the claimant through those 2 weeks in November 2017. His reason for doing so was because the claimant was due holiday pay. The claimant would not be due holiday pay were he truly self-employed. That would only arise if there was a relationship of employee or worker. That was an indication that there was no true self-employment by the claimant or that the respondent regarded him as being self-employed. I did not consider that there was any break in the continuity of the employment relationship in this period. It was

covered by the contract of employment between the claimant and 1<sup>st</sup> respondent which had been established in June 2015. That was evidenced by continuing payments.

40. In those circumstances I considered that there was employment under a contract of employment between claimant and respondent not from 11 June 2018 as was stated by the 1<sup>st</sup> respondent but from 2 June 2015 as expressed in the Statement of Terms and Conditions of employment.
41. It then requires to be considered when that employment came to an end.
42. Again I preferred the position of the claimant that his employment had not transferred to the 2<sup>nd</sup> respondent prior to 1 August 2019 and he remained an employee of the 1<sup>st</sup> respondent.
43. The arrangement was very confusing between 1<sup>st</sup> and 2<sup>nd</sup> respondent as to the payment of the wages of the claimant. The arrangements seemed to arise out of the curtailment of the 1<sup>st</sup> respondent's operator licence. He explained that he sub-contracted work to the 2<sup>nd</sup> respondent. At that time the claimant went to perform that contract. I do not consider that there was truly a transfer of the employment from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent. Certainly the claimant never agreed to that transfer. His position was that he had been assured by the 1<sup>st</sup> respondent that he would continue to be an employee of the 1<sup>st</sup> respondent albeit he would be working on the Mitsubishi contract which was being performed by the 2<sup>nd</sup> respondent on a sub-contracted basis. It appeared to me that the arrangement was that the claimant was seconded to the 2<sup>nd</sup> respondent for a period in respect of the Mitsubishi contract.
44. There was no evidence of any Contract of Employment being entered into between the claimant and the 2<sup>nd</sup> respondent. Certainly there was no signed Contract produced. With the ET3 response from the 2<sup>nd</sup> respondent was an unsigned Contracts indicating that the start date of employment of the claimant was as at 29 April 2019. However that was never accepted.

45. Neither was there produced any P45 which would show that the employment of the claimant had ceased with the 1<sup>st</sup> respondent at any time. It was stated that a P45 had been given to Mr Alan Reid to give to the claimant. Mr Reid did not recall that matter. Mr Reid was then asked whether he had been given a P45 to hand to the 2<sup>nd</sup> respondent and Mr Reid agreed that he had done that. However the claimant had never been given a P45 to show that his employment had terminated. The P45 which was stated to be given to the 2<sup>nd</sup> respondent (or a copy) was never produced.
46. In all the circumstances I could not conclude that the employment of the claimant with the 1<sup>st</sup> respondent had ceased until he turned down any further working with the 2<sup>nd</sup> respondent. I would say then that his employment with the 1<sup>st</sup> respondent ceased from 1 August 2019 being the date he indicated he would no longer work under these arrangements (C6).
47. That would mean that the period of employment of the claimant with the 1<sup>st</sup> respondent covered the period 3 June 2015 to 1 August 2019. That would mean he has a sufficient period of employment to entitle him to bring his claims.
48. I do not consider that there was any employment of the claimant by the 2<sup>nd</sup> respondent and they are dismissed from the claim.
49. The essence of this decision is that the claimant has sufficient qualifying service with the 1<sup>st</sup> respondent for the Tribunal to have jurisdiction on his claims of unfair dismissal/redundancy. Inevitably in the circumstances of the claimant's departure from employment his claim for unfair dismissal is one of unfair (constructive) dismissal which would require him to show that he was entitled to terminate his contract of employment without notice by reason of the conduct of the 1<sup>st</sup> respondent, Given this Judgment it would be appropriate for there to be a case management discussion by way of fixing a preliminary hearing of one hour to explore the issues in those claims and fix a date for a Final Hearing.

**Date of Judgement: 23<sup>rd</sup> December 2019**

**Employment Judgement: J Young**

**Date Entered in Register: 27<sup>th</sup> December 2019**

**And Copied to Parties**