EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Genadi Marinov	AND	Mr Leonard Nolan

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 20 December 2019

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: **In person**
For the Respondent: **Mr Towl, Consultant**

JUDGMENT

The judgment of the tribunal is that the claimant was not an employee of the respondent.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine the employment and/or worker status of the claimant. In this case the claimant Mr Genadi Marinov has brought claims alleging unfair dismissal, breach of contract, for unlawful deduction from wages, and for accrued but unpaid holiday pay. The claims are all denied by the respondent. This tribunal's jurisdiction to hear these various claims turns on the claimant's employment status.
2. I have heard from the claimant, and I have heard from the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The respondent Mr Leonard Nolan has largely retired from the building and decorating industry. For the last five years or so he has continued to run a small painting and decorating business, undertaking contracts for some of his previous clients. He does not employ any staff and his liability insurance is limited to no more than seven registered subcontractors. He now undertakes work for corporate institutions or previous major building contractors as a subcontractor, any engages other more junior subcontractors to carry out painting and decorating.
5. The claimant Mr Genadi Marinov has been a general builder and painter and decorator on a self-employed basis since about 2007. He is a sole trader trading as GM General Building. In about 2014 he registered under the Construction Industry Scheme (CIS) and was accepted by HM Revenue and Customs as a self-employed trader and given a Unique Tax Reference (UTR), on the basis that he was a self-employed subcontractor with a CIS certificate.
6. In January 2017 the respondent was approached by an agency on behalf of the claimant to see if he had any work available for the claimant. The respondent engaged the claimant with effect from 30 January 2017. Given that the respondent did not have any current employees and did not have any employer's liability insurance, I accept the respondent's evidence that he engaged the claimant as a self-employed independent contractor having first checked that he was registered as such with HMRC with a CIS certificate.
7. On 28 June 2018 the claimant fell off a ladder and broke his ankle and was certified as unfit to work until 6 January 2019. He did some further work for the respondent from 7 January 2019 but only until 3 February 2019 when their relationship ended.
8. There was no written contract which set out the agreed arrangements between the parties. Depending upon the main contractor, some jobs were agreed at an hourly rate, and the respondent paid the claimant a higher hourly rate than that which would normally be paid to an employee, because as a subcontractor the claimant was responsible for his own tax and National Insurance. Sometimes the parties agreed a set price for a certain job, in which case it was entirely up to the claimant how long it took to complete the job. In addition, on the limited occasions where the claimant's work was deemed to be unsatisfactory, he had to make good in his own time and at his own expense.
9. The claimant was only paid upon his raising an invoice which he did so repeatedly under the name of GM General Building. The claimant also worked for others during this time, and invoiced other parties, including his partner's business, for services rendered on a self-employed basis during this period.
10. The claimant was responsible for the purchase of most, but not all, of his own equipment. He provided a vehicle which was taxed and insured at his own expense. Sometimes he provided his own equipment. On other occasions, because he was not VAT registered and would be unable to reclaim the VAT, the respondent allowed him to purchase paints, rollers and so on through the respondent's trade account, in which case this would be reflected in the agreed price for the job. When working on a local hospital contract, the respondent also agreed to pay the parking charges when the claimant was carrying out work on site.
11. The respondent did not have any direct control over the manner in which the claimant worked. The claimant was not entitled to holiday pay or sick pay. There was no express provision as to whether the claimant was able to send a substitute to carry out work in his place, because the circumstances never arose. The understanding was that if the claimant was unable to attend because of his other work commitments or because he wished to go on holiday, then he need not attend.
12. The claimant was responsible for the payment of his own tax and National Insurance. Indeed, he was engaged on this very basis. The respondent checked that the claimant had a CIS certificate and a UTR, and once satisfied with these formalities, the respondent paid the claimant gross on the understanding he would be responsible to account to HMRC for all of his his own tax and National Insurance.
13. The claimant did exactly that. The claimant has disclosed one of this recent tax returns, namely his tax return to 5 April 2018. In this tax return the claimant has confirmed to HMRC that he is self-employed and works on his own account and confirmed that he has prepared profit and loss accounts for that year. His turnover was expressed to be £21,201 for that

year, and he claimed total allowable expenses of £4,665 thus leaving net profit of £16,536. The claimant has not adduced copies of his profit and loss accounts to show how these sums were calculated, and what business expenses were claimed. Similarly, the claimant has not disclosed his tax return or profit and loss accounts for the years ended 5 April 2017 and for his tax return which he has recently submitted to 5 April 2019. These are the other two financial years which cover his relationship with the respondent. The claimant has confirmed that these two missing tax returns also certified to HMRC that he was a self-employed subcontractor, and again referred to his UTR and his CIS registration.

14. The claimant now asserts he was an employee or alternatively a worker of the respondent during this period.
15. Having established the above facts, I now apply the law.
16. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. Under section 230(3) of the Act a worker means an individual who has entered into or works under (or, where the employment has ceased, worked under) - (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. (A worker who satisfies this test in sub-paragraph (b) is sometimes referred to as a “limb (b) worker”).
17. Under section 94(1) of the Act the right not to be unfairly dismissed is limited to employees.
18. Under section 13 (1) of the Act the right not to suffer an unlawful deduction from wages applies to workers, and not just employees.
19. This tribunal has jurisdiction to hear breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). This jurisdiction is subject to certain preconditions, including that in paragraph 3 (c) of the Order, namely that the claim arises or is outstanding on the termination of the employee’s employment. Accordingly the right to bring a breach of contract claim before this tribunal is limited to employees.
20. The claimant's claim for accrued but unpaid holiday pay is brought under regulation 14 of the Working Time Regulations 1998 ("the Regulations"). The Regulations apply to workers, rather than just employees. The definition of "worker" for the purposes of the Regulations effectively replicates the definition under section 230(3) of the Act.
21. I have considered the following cases to which I have been referred: Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA and [2011] UKSC 41; Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Pimlico Plumbers Ltd & anor v Smith [2017] EWCA Civ 51; Aslam Farrar & Others v Uber BV and Others 2202550/2015; Addison Lee Ltd v Lange and Others UKEAT/0037/18/BA; Nethermere (St Neots) Limited v Gardiner [1984] ICR 612; Express and Echo Publications Ltd v Tanton [1999] IRLR 367.
22. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz in the Supreme Court: “18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "a contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". 19: Three further propositions are not I think contentious: i) As

Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must … be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."

23. The Supreme Court has upheld the Court of Appeal in the Autoclenz decision, and the approach to be adopted where there is a dispute (as in this case) as to an individual's status. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?
24. I adopt and apply this test in that order. First, as to the terms of the contract, these are set out in the findings of fact above. There was no written contract between the parties, but the claimant was engaged on the clear understanding that he was a self-employed independent contractor registered with a CIS Certificate and with a UTR authorised and accepted by HMRC thus entitling the respondent to pay without any deductions for tax or National Insurance. It was a clear understanding of the parties that the arrangement was on this basis, as is shown by the claimant's tax returns to that effect.
25. The contractual terms or factors which point to self-employed status as an independent contractor are these: the claimant had been in business on his own account for many years before he even met the respondent; the claimant's registration with a CIS certificate and UTR; those are the only circumstances under which he would have been engaged by the respondent who was not insured to engage employees; the agreement that he would pay his own tax and National Insurance; the fact that the claimant did exactly that by way of his tax returns which declared him to be a self-employed contractor; the claimant's trading name; the fact that the claimant was free to work for other businesses, and did so, raising similar invoices to them; he was responsible for the expense of running, taxing and ensuring his own vehicle for his work purposes; the respondent did not have direct control over the manner in which the claimant carried out his work; the fact that some work was on a price rate at his own risk; and no holiday pay or sick pay were paid, or agreed to be paid.
26. As to the second limb of the Autoclenz test, I find that the claimant was not contractually obliged to carry out services personally. There was no "irreducible minimum" of employment status. The claimant was free to accept or decline work, and had time off during his relationship with respondent to work for others. On balance I find that there was no "irreducible minimum": there was no mutuality of obligation; no requirement for personal service; insufficient direct control; and other factors inconsistent with a contract of service.
27. For all of these reasons I find that the claimant was not an employee of the respondent, and had not been an employee of the respondent at any stage. I therefore dismiss his claim for unfair dismissal and for breach of contract.
28. I gave judgment to this effect to the parties, but because the claimant had failed to disclose his full tax and accounting records I was unable to determine the point relating to the third and fourth limbs of the Autoclenz test, and whether the claimant qualified for "worker" status. It seems to me likely that the claimant carried out services personally for the respondent in the capacity of client or customer (and was not therefore a worker of the respondent), but in the absence of the relevant documents and in the interests of justice I was unable to determine that point. Accordingly, I suggested that this aspect should be adjourned pending the receipt of further documents. At that stage the claimant indicated that he intended to withdraw his claims. I offered the claimant opportunity to take time to consider that decision, but the claimant confirmed that he wished to withdraw his claims in

any event. His claims have therefore been dismissed on withdrawal as confirmed in the attached judgment of today's date.

Employment Judge N J Roper

Dated: 20 December 2019

Judgment sent to parties: 8 January 2020

FOR THE TRIBUNAL OFFICE