



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106942/2019 and 4106943/2019

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Held in Glasgow on 1 August 2019

Employment Judge A Jones

10 **Mr Jamie Bruce**

**First Claimant
In Person**

Mr James Bruce

**Second Claimant
In Person**

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Hyspec Scotland

**Respondent
Represented by:
Mr Anderson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimants were workers for the purposes of the Regulation 2 of the Working Time Regulations 1998 and were therefore entitled to be paid in lieu of annual leave to which they were entitled on termination of their employment relationship with the respondent. The respondent is ordered to pay each claimant the sum of £829.64.

REASONS

Introduction

1. The claimants are a father and son who are joiners and worked on and off for the respondent since 2017. The respondent is a sole trader who supplies joinery services on a sub-contracting basis in the building sector. Both Messrs Bruce worked the same number of hours and were paid at the same rate during this arrangement. The cases were conjoined by Order of the Tribunal dated 17 July 2019.

E.T. Z4 (WR)

2. It was agreed at the commencement of the hearing that the factual circumstances of both claimants were identical and therefore it would only be necessary to hear from one of the claimants. It was also agreed at the commencement of the hearing that were the claims successful in their entirety, the sum payable to each claimant would be £829.64, being 7 days' net pay at a daily rate of £118.52.

Findings in fact

3. Having listened to the evidence and submissions and considered the documents to which the Tribunal was referred, the Tribunal makes the following findings in fact.
4. The claimants are joiners who worked for the respondent company on an intermittent basis over a number of years on various contracts in Ayrshire.
5. They took on their roles following an advert on social media by the respondent.
6. There was no written agreement between the respondent and claimants setting out the basis of the arrangement between them
7. The respondent engages around 8 individuals at any one time and is not registered for PAYE.
8. The respondent takes on contracts as a sub-contractor with a main contractor on building sites and then engages sufficient labour to meet the contractual requirements.
9. The claimants commenced work for the respondent on a contract at the David Livingston Centre on 12 November 2018.
10. There was no discussion between the parties at the commencement of the relationship as to its status.
11. The parties agreed an hourly rate of pay for the work they were to carry out.
12. The parties agreed that the claimants would also be paid an extra amount for travel time.

13. At the commencement of their work, they underwent an induction process at the instance of the main contractor.
14. During their work, they wore hi- visibility vests with the respondent's company name.
- 5 15. The claimants provided their own tools to carry out their work.
16. The claimants were required to work the general site hours which were 8.30am to 4.30pm with 30 minutes for lunch and a tea break.
17. The claimants were advised by the respondent in general terms what work to carry out and also received direction from the site manager.
- 10 18. The claimants were registered on the Construction Industry Scheme.
19. The respondent paid the claimants through this scheme which provided an online facility to calculate the pay due.
20. The claimants were paid by the respondent with tax deducted at 20%. No National insurance contributions were deducted and Mr Bruce senior no
15 longer made National insurance contributions due to his age.
21. The claimants had also worked through agencies who had paid them what is commonly termed 'rolled up holiday pay'.
22. The claimants could not substitute another person to carry out their duties on any particular day. All potential workers were required to undergo induction
20 training prior to being allowed to work on the site.
23. When the claimants were off work, no one else carried out their duties.
24. The claimants were not paid during the Christmas period when the site was closed.
- 25 25. On occasion during the contract, as there were insufficient materials, the claimants could not work normal site hours and were not paid for any hours they did not work.

26. The claimants texted the hours they had worked to the respondent at the end of every week.
27. The respondent terminated the arrangement with the claimants on 16 February 2019 on the basis of their timekeeping. The main contractor had complained to the respondent about the claimants' hours.
28. At no time did the claimants receive holiday pay, or were advised that they could take annual leave. Neither claimant requested to take annual leave.
29. Following the termination of the arrangements with the respondent, the claimants became aware that they might be entitled to holiday pay and looked into matters.

Observations on the evidence

30. The Tribunal heard evidence from Mr James Bruce (senior) and Mr Salter who is a sole trader and operates the respondent business.
31. There was little dispute on the facts and both witnesses were generally credible and reliable. The only issue in dispute was whether or not the claimants had any discretion on the hours they worked. Mr Salter suggested at one point that the claimants could determine their own hours. However, that was in direct contradiction to the basis for his decision to dismiss the claimants. Mr Salter indicated that he took this decision as a result of concern being raised by the main contractor that the claimants were leaving early. The Tribunal preferred the evidence of the claimant in this regard.

Submissions

32. The claimants' position was that they were entitled to receive holiday pay on the basis of the criteria they had read on the ACAS website. They were of the view that they were told the hours they should work; they wore the respondent's vests with the logo on it; they couldn't put a substitute in to work for them; they were told what work to do and couldn't take time off without being spoken to about it; tax was deducted from their pay; they were not

required to provide invoices and that on one occasion the respondent had posted a thank you message on social media referring to 'workers'.

5 33. The respondent's position was that the claimants were self-employed. It was suggested that as the respondent was not PAYE registered it could not employ staff. The respondent also relied on the fact that the claimants were paid through CIS scheme. It was also said to be relevant that the claimants had not sought to claim holiday pay when they were engaged on previous contracts and that they were not entitled to paid sick pay or maternity pay or be paid for a notice period. The respondent's submission was that the claimants were within their rights to walk off site if they received a better offer for other work and the fact that they had to provide their own equipment all pointed to them being self-employed.

10 34. When taking into account these factors, it was submitted that it was clear that the claimants were self-employed.

15 35. The respondent adopted an alternative position that if the claimants were entitled to be paid holiday pay, then they were only entitled to pay which would have accrued from 1 January to the end of their employment. It was suggested that if the respondent did allow his staff to take holidays, he would have adopted a holiday year which was consistent with the calendar year and would not have permitted staff to carry forward any holidays and therefore the claimants should only receive pay for holidays which would have accrued during January and February.

Discussion and decision

25 36. The Tribunal had little hesitation in concluding that the claimants were workers for the purposes of Regulation 2 Working Time Regulations 1998 ('the Regulations') and therefore entitled to be paid in lieu of the holidays they had accrued and not taken when their contracts were terminated.

30 37. Regulation 2 defines a worker as "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”.

- 5 38. Regulation 16 requires that a worker be paid in respect of annual leave which he has accrued in terms of Regulation 13 of the Regulations.
39. The Tribunal also considered the recent authorities which considered the question of employment status, in particular *Pimlico Plumbers v Smith* [1998] UKSC [29] and *Uber BV v Aslam* [2018] EWCA Civ 2748.
- 10 40. The Tribunal concluded that the claimants were workers on the basis of the following facts which it found proved:
41. The claimants were paid hourly rates of pay and submitted timesheets at the end of the week.
42. The claimants were paid a travel time allowance.
- 15 43. The claimants could not provide a substitute for their duties. While there was no specific discussion in relation to this factor between the parties, it was clear from the facts that the respondent engaged the number of workers he required to perform a contract, and it was those workers who provided the services. Any worker would have to go through the induction process required by the
- 20 main contractor to carry out any work on the site and it was the individual who was approved, not the individual and any substitute. The Tribunal was therefore of the view that this was not discussed as it was understood.
44. The claimants were required to wear the respondent’s hi-visibility vests when on site with the respondent company name on them.
- 25 45. The Tribunal bore in mind that the claimants were required to provide their own tools and that they were registered with the Construction Industry Scheme. However, no documentation was provided to the Tribunal in relation to this scheme which might provide a basis for an argument that this factor pointed to self-employment. The only document provided was a print out of a

5 submission by the respondent of hours worked by the claimants and the Tribunal heard evidence that there were different classes of registration. While the Tribunal accepted that tax was deducted at a flat rate of 20% from the claimants' earnings in terms of this scheme, and no national insurance, which might be indicative of a self-employed status, when considering all the facts of the case, the Tribunal concluded that the facts pointed to the claimants being workers and not self-employed contractors.

10 46. The Tribunal also considered the respondent's argument that the claimants should only be entitled to pay in respect of leave accrued since 1 January to the end of their contracts. The Tribunal could not accept this submission. In the first instance, the submission speculated that if the respondent did actually employ anyone (which was denied), it would have had a holiday year which was concurrent with the calendar year. It would also have prohibited its staff from carrying forward leave. The Tribunal found this submission fanciful. In 15 any event, Regulation 13 provides how to calculate a leave year and provides that the leave year commences on the date of employment.

20 47. In these circumstances, the Tribunal concluded that the claimants were workers, that they were entitled to annual leave when engaged by the respondent and that they should be paid in lieu of the entitlement which had accrued at the termination of their contracts. It was agreed between the parties that if the claims were successful then the amount to be paid would be £829.64 (net) each and accordingly the respondent is ordered to make these payments to the claimants.

25 **Employment Judge: A Jones**
Date of Judgment: 09 August 2019
Date sent to parties: 13 August 2019