EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Ashlea Akers	**v**	Advantage Resourcing UK Limited

Heard at: Cambridge **On:** 14 January 2020

Before: Employment Judge Johnson

Appearances
For the Claimant: Miss R Owusu-Agyei, Counsel
For the Respondent: Mrs C Ashiru, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of unlawful deduction from wages in respect of holiday pay, pursuant to Section 13 of the Employment Rights Act 1996 and / or for payment in respect of accrued but untaken annual leave, pursuant to Regulations 14, 16 and 30(5) of the Working Time Regulations 1998, is not well founded. This means that the Claimant's claim is unsuccessful.

2. The Claimant is found not to be a worker within the meaning of Section 230 of the Employment Rights Act 1996.

3. The Claimant's assertion that she is an employee within the meaning of Section 230 of the Employments Rights Act 1996 is dismissed on withdrawal.

4. The Claimant's application dated 13 January 2020 to amend her claim to include reference to Agency Worker status under Regulation 3 of the Agency Workers Regulations 2010, is dismissed.

RESERVED REASONS

Background

1. This is a claim which has been brought by a Claimant who was engaged by the Respondent employment resourcing business as a PPI Handler for the Nationwide Building Society ('Nationwide') in their Northampton office.

She worked in this role from 4 September 2017 until she resigned on 14 March 2018.

2. On 4 June 2018, the Claimant presented a claim following a period of Acas Early Conciliation from 4 April 2018 until 4 May 2018. The claim relates to holiday pay which she believes the Respondent should have paid her for the time that she worked for Nationwide.

3. The Claimant originally argued that she was an employee with the Respondent in accordance with s.230 of the Employment Rights Act 1996 ("ERA"), or alternatively that she was a worker within the meaning of s.230 of the ERA.

4. She complained that she had suffered a loss of holiday pay contrary to s.13 of the ERA. Alternatively, she said that she had suffered this loss in accordance with Regulations 14 and 16 of the Working Time Regulations 1998 ("WTR"). She said that her loss of holiday pay amounted to £2,308.50.

5. The Respondent argued that the Claimant was in fact an employee of Alexandra Consultancy Limited who supplied her services to the Respondent. They in turn arranged for this company to place the Claimant with Nationwide Building Society as an "end user". Under these circumstances, the Claimant, they argued, could not be an employee or a worker.

6. Immediately before the hearing commenced, the Claimant made an application to withdraw her assertion that she was an employee of the Respondent while maintaining the complaint that she was a worker. She also made an application to amend her claim to include an alternative complaint that she was an Agency Worker in accordance with the Agency Worker Regulations 2010 ("AWR"). This matter was to be resolved at this hearing as it was only made on 13 January 2020.

The Hearing

7. The Claimant attended the hearing with Counsel. The Respondent was represented by Counsel.

8. My first task at the beginning of the hearing was to consider the application to amend the claim and I heard submissions from both Counsel concerning this issue. The parties both accepted that in considering an application to amend, I needed to take into account the decision in the case of Selkent Bus Company Ltd. v Moore [1996] ICR 836 and also the provisions of the overriding objective under Rule 2 of the Employment Tribunals Rules of Procedure 2013.

9. In terms of the nature of the amendment, I heard arguments from Ms Owusu-Agyei that the amendment sought was not in fact a new cause of action, but was simply the relabelling of an existing complaint. However, I

took the view that this was a new cause of action in that it related to an amendment concerning a distinct piece of legislation, namely the Agency Workers Regulations 2010. This was not simply legislation which provided clarification or amendment to earlier legislation relating to wages claims. It was in fact a statutory instrument designed to provide greater protection to Agency Workers and provided a range of protections which would potentially open new areas of enquiry which would have to be considered by the Respondent. In particular, it may have involved further enquiry with the end user Nationwide and the Respondent could not have been properly prepared to deal with this issue at the hearing today.

10. I also had to consider the question of time limits and noted that under the AWR, the Claimant had to present a complaint within three months from the date that the relevant issue arose. Given that we were now hearing an application which was made more than 18 months following the termination of the Claimant's engagement with Nationwide, it was almost certain that this complaint would be out of time based upon the Claimant's date of termination of 14 March 2018. While I would have discretion to extend time on just and equitable grounds, I noted that this case had been commenced on 4 June 2018 and that the Claimant had had representation throughout. This was the third time the case had been listed for a Final Hearing and it was reasonable to expect that the Claimant would have been advised to make this amendment well before 13 January 2020. To make this amendment immediately before the hearing, in these circumstances, would have a disproportionately prejudicial impact upon the Respondent.

11. Finally, in applying the principles of Selkent, I had to also consider the timing and manner of the application. To some extent I had already addressed these issues above. However, I was clear that while an application could be made to amend a claim at any stage of the proceedings and even during the hearing, I had to take into account the history of this case.

12. I noted that the claim had been presented on 4 June 2018 and the hearing had originally been listed to take place on 7 December 2018. This was amended upon application by the Respondent by Employment Judge Ord on 6 December 2018 due to the number of witnesses being required to give evidence.

13. The case was then relisted for a Full Merits Hearing of one day in length on 30 April 2019. This was postponed on 29 April 2019 due to their being no available Judge.

14. The hearing today was the third time the case had been listed for hearing. Taking into account the Claimant's representation throughout these proceedings, I find it surprising that an application of this nature was not made in advance of the previous two hearings. It is reasonable to assume that the Claimant's representatives would have made some initial preparations for the previous two hearings. Taking into account the postponement of these cases immediately before the hearings took place,

it seems surprising that this particular amendment was not considered as part of case preparation and notified at these earlier dates.

15. It is unfortunate that these proceedings had taken so long to reach a Final Hearing. The earlier postponements should have given the Claimant's representative an opportunity to take stock and review the claims. I did not hear any convincing arguments to support this application being allowed at such a late stage. I could not allow the Respondent to be effectively ambushed the day before a hearing. An adjournment would be required to ensure that the Respondent could properly prepare an amended response and make further enquiries with regard to disclosure and witness evidence that might be required to resist this complaint. Having considered the time already elapsed in these proceedings and the earlier opportunities that the claimant had to make this application, it was not reasonable to allow further delay by adjourning this case.

16. I did consider the overriding objective when reaching my decision to reject the application. I did note that both parties had been represented throughout these proceedings. There was no suggestion that the Claimant had not been available to provide instructions to her Solicitor during these proceedings. I recognised it was important for the Claimant to be able to present her best possible case, but she had been given the opportunity to make her application to amend much earlier, by the extended length of these proceedings following the previous postponements. It would be disproportionate to allow the amendment and to postpone the case for what would likely be a further six months.

17. I did consider the alternative approach of making an Order for costs against the Claimant in respect of the late amendment. However, I did not feel that this would be enough to balance any prejudice placed upon the Respondent, or indeed the Tribunal caused by yet a further postponement in these proceedings.

18. Accordingly, for these reasons the Claimant's application was rejected.

19. Taking into account the Claimant's withdrawal of her claim that she was an employee with the Respondent, the remaining complaint related to the question of whether the Claimant was a worker within the meaning of the ERA and if so, whether she suffered an unlawful deduction of wages either in respect of the provisions of the ERA or the WTR.

Evidence Heard at the Hearing

20. The Claimant gave evidence in person. She did not call any additional witnesses. The Respondent relied upon the witness evidence of Lucy Sheliker who is the Head of Compliance and Contracts Manager with the Respondent and also Elizabeth Renshaw who is a Principal Consultant with the Respondent.

21. A hearing bundle was provided on the day of the hearing which ran to a hundred pages or so. Additionally, the Claimant sought to add some

further documents immediately before the hearing. The Respondent raised no objections to this and these were added.

22. I was grateful to both Counsel for producing clear submissions / skeleton arguments in writing providing copies of case law which they intended to rely upon. I was addressed upon these cases orally in final submissions at the conclusion of the case.

23. This was a case where I allowed the parties breaks as appropriate. However, taking into account the additional time spent dealing with the application to amend, it was difficult to conclude this hearing in a single day. I was conscious that all the parties had travelled some considerable distance to attend the hearing and I was reluctant to send them away with the case part heard. Accordingly, I sat far longer than would usually be permitted in the Employment Tribunal in order that all of the evidence could be heard and for final submissions to be provided orally by both Counsel. Given the limited time available at the end of the day, I did explain to Counsel that if they had any further points that they felt they did not have sufficient time to identify while making oral submissions, I would be willing to consider them if they were provided within two days following the hearing. I did not receive any further correspondence from the parties' Counsel in relation to this matter following the hearing.

The Issues

24. Was the Claimant a worker in accordance with s.230 ERA and / or Regulation 2(1) WTR?

25. If the Claimant was a worker in accordance with s.230 ERA, did she suffer an unlawful deduction of wages in respect of outstanding unpaid holiday pay contrary to s.13 ERA?

26. If the Claimant was a worker in accordance with Regulation 2(1) WTR, is she entitled to claim payments for untaken annual leave pursuant to Regulations 14, 16 and 30(5) WTR?

The Findings of Fact

27. The Claimant has worked for a number of companies during her career in the financial services industry. It was understood that she had set up a company called Alexandra Consultancy Limited which was incorporated with Companies House on 5 November 2014. The documents in the bundle confirm that the nature of the business was a Management Consultancy which provided activities other than financial management. The Claimant was the sole Director and her occupation was described as Complaints Handler.

28. The Claimant was supplied by Alexandra Consultancy to work for Lloyds Bank in 2014. She was then supplied by her company to work for Shop Direct. She explained that a recruitment company called Hunt Wood had

placed her with Lloyds Bank and a recruitment company called Hazel Carr had placed her with Shop Direct. She had professional indemnity insurance obtained for the company which had commenced from 6 November 2016 and which was renewed on an annual basis. The Claimant was told that she had to have this insurance when Alexandra Consulting was engaged to supply her to the end users with whom she worked.

29. On 12 July 2017, the Claimant had a telephone interview with a Mr Sean McCallister from Nationwide and her company was engaged to supply her to Nationwide as a PPI Handler. It is understood that this was a job which Nationwide required in order that they could process claims for alleged mis-selling of Personal Protection Insurance in the past.

30. The Respondents are a resourcing company who provide individuals to work for a range of clients. It is understood that some of these clients, or end-users, engage workers on an Agency basis. However, some clients require those supplied by the Respondent to have their own company which they contract with. This means that the company then makes the necessary arrangements to pay the employee whom they supply and to deal with issues such as tax and other payments.

31. I heard evidence from Ms Renshaw and by an email dated 14 July 2017, she messaged the Claimant to congratulate her upon her offer with Nationwide. She confirmed that the role was to be paid based upon £150 per day on a 12 month contract starting on 4 September 2017. I accept the Claimant's evidence that in this particular business, a contract of 12 months was something that was unusual and that she would be very keen to accept the offer. It would give her certainty in terms of pay and also allow her to obtain a mortgage, or other relevant financial services. It is noted in the email that while the Claimant had to provide a copy of her passport and proof of her address before taking the position with Nationwide, it was also necessary for her to provide details of Alexandra Consultancy's Certificate of Incorporation, professional indemnity insurance and employers liability insurance. A further email was sent by Ms Renshaw to the Claimant on 14 August confirming whom she should report to at Northampton when she started work.

32. It was a matter of dispute between the Claimant and Ms Renshaw as to the extent to which business dress was required when working for Nationwide. While I accept the Claimant's evidence that she has worked in a number of work places where the informal attire was permitted, I prefer the evidence of Ms Renshaw that there was probably a conversation with the Claimant which suggested that it would be appropriate to wear business dress as a 'common courtesy' in order that this would not cause an issue when she commenced work with Nationwide.

33. The Claimant continued to work with Nationwide for a number of months. The documents contained in the bundle showed that the Claimant's

company, Alexandra Consultancy Limited was paid on a regular basis by Advantage Resourcing UK Limited in respect of the days she had attended with Nationwide. It is clear that Nationwide would pay the Respondent once the Claimant had successfully submitted time sheets to her line manager without having included relevant commission to the Respondent, although this was not an issue which was particularly addressed during the hearing. What is relevant is that the Claimant's company was clearly being paid £150 for each completed day of work. It was noted that there were occasions when the Claimant would not work a complete week and accordingly the payment that was made would be reduced on a pro rata basis by £150 for each day not worked during the week. There was also evidence within the company's bank statements that regular payments were being made to the Claimant by way of a standing order and I find that these were payments that were being made to the Claimant as an employee of Alexandra Consultancy Limited and that these were in respect of the work that she had carried out for the company with Nationwide.

34. It is understood that the Claimant began to experience difficulties with line management at Nationwide. I heard evidence from both Ms Sheliker for the Respondent and the Claimant which indicated that in relation to PPI claims Nationwide engaged a substantial number of Agency workers. This is not surprising given that the handling of PPI claims was a relatively time sensitive matter, it involved specific unique skills which existing staff at Nationwide would not necessarily have and that the volume of work meant that the handling of PPI claims constituted a 'project' which would engage a large number of workers for a finite period of time.

35. Under these circumstances it is no doubt correct that the Claimant may have been line managed by individuals who were not employees or workers with Nationwide. They may have been supplied as Agency workers or as supplied by companies similar to Alexandra Consultancy Limited. The Claimant was subject to day to day management of her work at the Nationwide office in Northampton and the contract between Alexandra Consultancy Limited and the Respondent included specific terms concerning the relationship that she would have with Nationwide. It is correct that Nationwide was not a party to this agreement. I am satisfied that the Claimant and the Respondent agreed to the basis upon which she would be engaged while working with Nationwide in order that the Respondent could receive payments and that the Claimant's company could in turn be paid.

36. In relation to leave, the Claimant was expected to notify line managers of the days she wished to take. As she was supplied by a company and not an employee with Nationwide or the Respondent, it is argued that she was not entitled to any holiday pay. What is clear is that when the Claimant was not working at the Nationwide Northampton office, the Claimant did not receive any payment.

37. The Claimant, by way of line management, was subject to working rotas and this was evidenced in an email in the bundle. It was sent by her Team Leader and the additional emails that she had provided clearly showed that the Claimant was working within a PPI team at Northampton and was subjected to day to day supervision. It is also accepted that the Claimant had certain expectations placed upon her with regards to performance.

38. During 2018 the Claimant did experience some difficulties with line management. The nature of these issues is not particularly relevant to this case because this is a claim relating to pay rather than unfair dismissal.

39. What happened was that in March 2018, the Claimant was signed off work as being sick. She did not receive any pay from Nationwide as she was not working and was not considered to be an employee or worker by Nationwide.

40. The Claimant had approached Ms Renshaw in February 2018 asking about whether there was a clause in her contract which allowed contractors to use a substitute. She explained that she wanted to plan her holidays and would prefer to use a substitute rather than lose money. She claims that Ms Renshaw did speak to her on the phone shortly afterwards and told her that the substitute clause did not exist in her contract and laughed at her when it was discussed that this was a clause that should actually exist within the contract.

41. On 23 February 2018 an email was sent by Ms Renshaw to the Claimant providing an extract of the contract between the Respondent and the Claimant's company identifying the operation of a substitution clause. Section 9 of the contract could be identified in the complete version which was included in the bundle. It said as follows,

> *"9. <u>Substitution</u>*
>
> *9.1 If a Consultant currently working on the Assignment is unable for any reason to continue, the Supplier should inform the Company by no later than a normal start time on the first date of absence to enable alternative arrangements to be made.*
>
> *9.2 The Supplier may substitute any Consultant with another Consultant at any time during an Assignment provided that the substitute has similar qualifications and subject always to the agreement of the Client, which shall not be unreasonably withheld. The Supplier shall remain responsible for any substitute provided and shall bear all associated costs.*
>
> *9.3 If at any time during an Assignment the Client is dissatisfied with any Consultant, the Company will notify the Supplier in writing and the Supplier will, if requested to do so by the Company, substitute that Consultant with another having similar qualifications."*

42. The Claimant responded to Ms Renshaw asking why she had previously told her that a substitution clause did not exist. She then asked for details as to how she could apply to use a substitute. Ms Renshaw said that she had initially received some training concerning handling PPI Case Handler contracts and she had been made aware of the possibility of the operation of substitution clauses. However, she did not know a great deal about this issue. Following her receipt of the email from the Claimant on 23 February 2018, she sought advice from Ms Sheliker as Head of Compliance and obtained guidance concerning this clause. Later that day she emailed the Claimant back asking the Claimant to confirm the date she wanted a holiday and its duration in order that she could contact Nationwide.

43. It is clear that a substitute clause existed within the contract between the Claimant and the Respondent. It explained that if the consultant supplied by the company could not work on an assignment, the supplier which was Alexandra Consultancy Ltd. should inform the company in order that alternative arrangements can be made. This suggests that there is a general obligation placed upon consultants to notify the company whom they are working for of dates when they will not be available. Sub-section 9.2 goes on to mention that the supplier company may substitute a consultant with another providing that they have similar qualifications and subject to the agreement of the client end user. It goes on to say that this agreement should not be unreasonably withheld. This does suggest that while a client company may wish to ensure that it has a properly qualified individual being supplied to work in place of the original consultant, they must accept the principle that the consultant may be changed from time to time. Sub-section 9.3 goes on to say that if at any time during an Assignment the client is dissatisfied with any consultant the company will notify the supplier in writing and the supplier if requested to do so by the company substitute the consultant with another having similar qualifications. This also allows for the client company to monitor the person supplied by the company and to ask it to provide an alternative person if it feels that their performance is not sufficient. This would suggest that not only was the Claimant being given the opportunity to provide an alternative to herself when appropriate, she also had to provide good quality service herself and her company could be asked to provide an alternative.

44. While this substitution clause was proposed to be used for a period of leave, it does not appear from this contract that its primary intention was to allow for cover during holidays. It appears, instead, to relate to situations where a company provided by the Respondent is unable to continue providing the nominated consultant for the duration of the contract or due to issues relating to performance and that a mechanism has been inserted to allow the company to continue with the contract but providing alternative consultants who might step into the shoes of the consultant who was originally supplied. While in practical terms it would have been difficult for the Claimant to provide an alternative given that she was the sole

employee of her company, in principal there was no reason why she could not have relied upon this clause. It is noted that once Ms Renshaw asked the Claimant to proceed with offering data for substitution, she decided not to take matters further, or at least the absence of any further emails within the bundle would suggest that this was the case and I did not hear any evidence to the contrary from the witnesses.

45. I was taken to a document contained within the bundle which was the Advantage Resourcing Candidate Information Pack. This was an information pack that was provided to all "Partners" who were supplying workers to the Respondent and who could be supplied to their company clients. It was noted that the contents of the pack contain separate sections relating to PAYE (or Pay As You Earn) workers and limited company suppliers.

46. PAYE workers were those who were supplied directly by Advantage Resourcing and for whom the Respondent would make statutory deductions such as National Insurance and Income Tax on their behalf. These deductions would be outlined and marked clearly on their pay slips. It also explained that as PAYE workers, they would be entitled to key rights and benefits under UK Employment Law.

47. The limited company suppliers (umbrella suppliers) section related to individuals who had set up a limited company supplier applied to those individuals who were working through their own limited company. The basis of payment for these individuals was that the Respondent would raise invoices with the company end user and instead it would be sent what was described as a limited company remittance advice to the limited (umbrella company supplier) and that these payments would be inclusive of tax and NI contributions. It explained that it was the limited (umbrella company suppliers) responsibility to ensure that these deductions were paid to HMRC by them.

48. Upon cross examination the Claimant confirmed that she had become involved with the Respondent through a limited company supplier / umbrella supplier's agreement and that she was not a PAYE worker.

49. During March 2018, the Claimant explained to Liz Renshaw by email that she had been signed off work due to work related stress. Copies of the sick notes were provided and these had been included in the hearing bundle. The Claimant was absent from work from 26 February 2018 until 30 March 2018. The Claimant explained in her email of 14 March 2018 that she was unhappy with the working relationship with her line manager and had actually experienced panic attacks. As a consequence, she asked to be released from her contract on 23 March 2018 and asked that this be permitted without the standard 4 weeks' notice being required. On 19 March 2018, Ms Renshaw confirmed that she would ensure that a termination letter would be sent to her. A Miss Clare Reavley on 20 March 2018 emailed Lottie Tyler at Nationwide asking if an end date of 23 March 2018 would be in order and she agreed by return that Nationwide would be

comfortable with this termination date. Advantage Resourcing sent a termination letter to the Claimant's company Alexandra Consultancy Limited on 20 March 2018 and confirmed that the last day of her service with Nationwide would be 23 March 2018. She was asked to ensure that all outstanding time and expenses were submitted to the Respondent.

50. The Claimant subsequently raised a complaint with Nationwide concerning her treatment and described herself as a contingent worker at Nationwide. This was sent on 14 March 2018. On 26 March 2018, Melissa Harrington of Nationwide emailed the Claimant to advise that as a contingent worker at Nationwide, the Nationwide grievance policy did not apply to her. She did however confirm that she would take an investigation into her concerns enabling Nationwide to take the appropriate action. A series of emails followed between Miss Harrington and the Claimant. The position of Nationwide was that the Claimant as a contingent worker was not subject to any of the procedures that applied to employees with Nationwide and on 12 April 2018 Miss Harrington informed the Claimant that appropriate action had been taken following an internal investigation. The details of that action were not identified to her because of Nationwide's concerns regarding Data Protection issues.

The Law

Section 230(3)(b) ERA Worker

51. S.230 ERA 1996 states that:

> (3) In this Act "worker" (except in the phrases "shop worker" and "betting 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;
>
> and any reference to a worker's contract shall be construed accordingly.

52. When considering whether the Claimant was a worker of the Respondent, the Tribunal must determine the true position between the parties – even if not reflected by a written, signed contract – as per the Court of Appeal in Uber BV and ors v Aslam and ors [2019 IRLR257,

> "…in the context of alleged employment (whether as employee or worker), (taking into account the relative bargaining power of the parties) the written documentation may not reflect the reality of the relationship. The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996, the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldly-wise", "sensible and robust" approach to the determination of what the true position is"

53. Limited rights to substitute are not a bar to establishing worker status under s.230(3)(b) [Pimlico Plumbers Ltd. and anor v Smith [2018] IRLR872]

Applicable to both statuses

54. Pursuant to s.13 ERA 1996, workers have a right not to suffer unauthorised deductions from wages:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless-
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract; or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) in this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised-
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question; or
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker

on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

55. The following Regulations from the WTR are material:

14. Compensation related to entitlement leave:

(1) This regulation applies where-

(a) a worker's employment is terminated during the course of his leave year; and
(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A]2 differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be-

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement; or
(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula-

(A x B) – C

Where-

A is the period of leave to which the worker is entitled under [regulation 13]1[and regulation 13A]2;

B is the proportion of the worker's leave year which expired before the termination date; and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

16. Payment in respect of periods of leave:

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply-

(a) as if references to the employee were references to the worker;
(b) as if references to the employee's contract of employment were references to the worker's contract;
(c) as if the calculation date were the first day of the period of leave in question; and
(d) as if the references to sections 227 and 228 did not apply.

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") (and paragraph (1) does not confer a right under that contract).

56. The Respondent referred me to the case of Halawi v WDFG UK Ltd. (t/a World Duty Free) and another UKEAT/0166/13GE, which discussed the existence of a contract between the Claimant and the Respondent for worker status to be established.

57. The Respondent also referred to the case of Town and Country Glasgow Ltd. v Munro UKEATS 0035/18/SS.

Discussion and Analysis

58. This is a case which considers the question of whether or not the claimant was a worker with the respondent. Although cases such as this appear before the Tribunals on a regular basis, to a large degree, each one is determined on its own factual background.

59. It is clear from the findings of fact above that the claimant supplied her services via her services company Alexandra Consulting, who contracted

with recruitment companies such as the respondent. The respondent placed the claimant with its end user client; Nationwide.

60. The claimant had been operating under the service company model for a number of years before she started working with Nationwide. This was not a case where she had been asked to create a service company for that particular client by the respondent. Previously, she had been able to secure a relatively regular pattern of work with end user companies over a number of years.

61. Alexandra Consulting was required to have professional indemnity insurance and employer's liability insurance which indemnified the claimant while working at Nationwide and this suggests that she was treated by Nationwide as an independent contractor. While the claimant was subject to line management while working with Nationwide, it is not surprising that in a case based working environment, direction and monitoring of work would take place.

62. The claimant was paid by submitting time sheets to the respondent which had been approved by her line manager. These were then paid to Alexandra Consulting and were drawn by the claimant as required. The sums paid were consistent with the claimant's working patterns. The claimant was responsible for the payment of her own national insurance and tax. The respondent's documentation showed that there were and limited company suppliers and PAYE workers. There was no dispute that the claimant's service company Alexandra Consulting fell into the latter category and it was not described as a worker for the respondent, but as a supplier.

63. There was a substitution clause in the respondent's contract with the claimant. While in the case of a service company employing only one person, it was unlikely to be used by the claimant, she did appear to consider using it when she had health issues while working at Nationwide. The respondent was willing to explore the activation of this clause, but the claimant did not take it any further. However, there was no suggestion that it would be refused and that only she could be supplied by Alexandra Consulting. Indeed, the clause was specific that while Nationwide was required to agree to a substitute, this could not be unreasonably withheld. On this basis, there was some flexibility of engagement even if the claimant was the nominated individual supplied by Alexandra Consulting at first instance.

64. For these reasons, I am not satisfied from the evidence that I heard that this is a case where the claimant is an individual who had undertaken to do work personally for another party to the contract in question. The relevant contract was between the claimant's service company and the respondent. The work was done for Nationwide by an employee of the service company who were effectively a client to the respondent. This was not a sham arrangement and the claimant worked for Alexandra Consulting for a number of years, drawing payments from them after they

had been paid by the respondent who did not deduct any tax or national insurance before doing so. As a consequence, I am unable to see how she could be described as a worker with the respondent or indeed Nationwide.

Conclusion

65. I recognise that the model of placing individuals via a service company is often required by businesses such as Nationwide and that the claimant may feel that she was effectively compelled to use the service company model. However, this was a model that she had operated for a number of different end user businesses for several years. The ethical issues concerning the use of the service company model is beyond my jurisdiction and my role is simply to consider whether the claimant can be considered a worker within the meaning of the Employment Rights Act 1996. For the reasons I have given above, I find that she is not a worker and accordingly her complaints of unlawful deduction of wages and/or payments in respect of accrued but untaken annual leave cannot succeed. when considering the application of employment law in cases such as these.

_____
Employment Judge Johnson

Date: 14 February 2020

Sent to the parties on: .....

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For the Tribunal Office