THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr A Esundale **v** **One Money Mail Limited**

Heard at: London Central **On**: 15 January & 3 March 2020

Before: Employment Judge H Clark

Representation
Claimant: Mr Z Simret - Representative
Respondent: Mr P Maratos - Consultant

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent, but a worker for the purposes of section 230(3) of the Employment Rights Act 1996.
2. The Respondent unlawfully deducted the sum of £5,625 from the Claimant's wages (by way of accrued annual leave).
3. The Claimant's claims for arrears of pay in respect of overtime and commission are not well-founded.

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Employment Judge Clark

Dated: 2 April 2020

Judgment sent to the parties on:

06/04/2020

…….....
For the Tribunal Office

REASONS

1. By a Claim Form presented on 1 February 2019, the Claimant made a number of claims arising out of his work for the Respondent, including unfair dismissal, detriment arising from paternity leave, unpaid wages and holiday pay. The Respondent denied all the claims and asserted that the Tribunal did not have jurisdiction to hear the claims as the Claimant was a self-employed contractor.

2. A case management hearing was held on 21 May 2019. At a further case management hearing on 19 August 2019 the Claimant's claims for unfair dismissal, discrimination and for paternity pay were struck out and the case was listed for a full merits hearing for one day on 8 November 2019 to consider the following issues:

    2.1 As to the Claimant's status: whether an employee, worker or self-employed contractor.
    2.2 As to the Claimant's entitlement to:
        2.2.1 Arrears of pay of £6,500;
        2.2.2 Holiday pay;
        2.2.3 Overtime pay of £5,000.

Procedural History

3. The Claimant did not attend the hearing on 8 November 2019, explaining that he was looking after a sick relative in Ethiopia. He was content that the hearing should proceed in his absence, since he was represented. His representative, Mr Simret, attended the hearing, however, told to the Tribunal that he had 'flu and was not fit to conduct the hearing. The Respondent's witness, Mr Mes, was present at the hearing as was his representative, Mr Maratos. They consented to the postponement of the hearing in light of Mr Simret's illness.

4. There had been no exchange of witness statement notwithstanding an order for their exchange and there was no agreed bundle of documents, so the Tribunal made directions for their service. The Respondent had already prepared a witness statement for Mr Mes, but it had not been served. There was no witness evidence from the Claimant. The Tribunal pointed out that without any witness statement, the Claimant was likely to struggle to prove his claims in the event that he was not planning to attend the hearing. An unless order was, therefore, made in relation to his service of a witness statement. It

was explained that the Tribunal has the facility to conduct hearings by video conference if arrangements could be made by the Claimant in Addis Ababa.

5. The Claimant attended the hearing 15 January 2020 in person, although the start of the hearing was delayed, since Mr Simret did not arrive at the Tribunal until 10.20am. Mr Mes, the Respondent's witness was not present as he was in Poland on business, albeit the Respondent was represented by Mr Maratos. Prior to the hearing, Mr Maratos realised that, due to an oversight, Mr Mes' witness statement had not been served on the Claimant. He, therefore, served a copy on Mr Simret (for the Claimant) on Friday 10th January 2020, together with a letter asking whether the Claimant was planning to attend the hearing. Mr Maratos received no immediate response to his query and so the Respondent contacted Mr Simret a second time on Monday 13 January expressing concern about the Respondent's incurring further wasted costs in attending a hearing. It was not until the afternoon of Tuesday 14 January that Mr Simret confirmed to the Respondent that the Claimant was on a plane from Ethiopia and was planning to attend the hearing. This was too late for Mr Mes to arrange his own return to the UK from Poland.

6. Mr Mes did not want to incur the cost of returning to the UK for the adjourned hearing if the Claimant was not going to attend to give evidence. Since the Claimant had failed to attend any of the previous hearings in May, August and November (albeit he was represented), it was understandable that he was sceptical as to whether the Claimant would attend on this occasion.

7. Mr Simret invited the Tribunal to determine the Claimant's claim in the absence of the Respondent's only witness. Mr Maratos invited the Tribunal to adjourn the hearing in its entirety to enable Mr Mes to attend. The Tribunal took into account the fact that Mr Mes attended the Tribunal on 8 November 2019 with a witness statement and was prepared to give evidence. He had taken a calculated risk that the Claimant would again fail to attend the hearing (given he was caring for a relative in Ethiopia, had failed to attend all previous hearings and had asked the Tribunal to hear the claim in his absence on 8 November 2019). The, quite proper, attempts by the Respondent's representative to clarify whether the Claimant was planning to attend the hearing on 15 January 2020, were unsuccessful, because Mr Simret took a couple of working days to respond the Respondent's inquiry.

8. Having regard to the overriding objective in the Employment Tribunal's Rules to do justice to both parties and taking into account the Claimant's previous conduct in the proceedings, which had led to Mr Mes' understandable scepticism that the Claimant would attend the hearing, the Tribunal determined to take a middle ground between the parties' respective positions and enable the Claimant to give evidence, since he had travelled from Ethiopa to do so

and, on a separate occasion, permit Mr Mes to give evidence. Both parties are represented and would be given time to take instructions over the telephone concerning any new matters which arose in cross-examination.

9. The Respondent had incurred the wasted costs of the last previous two hearings for reasons connected to the Claimant's conduct of the hearing, so whilst not condoning Mr Mes' failure to attend, the Tribunal understood his reluctance to incur the additional cost of travelling to UK specially for the hearing if he was in Poland. This was particularly so when there was no immediate response to Mr Maratonis' inquiry about the Claimant's proposed attendance. The Tribunal ordered Mr Mes to provide evidence of his absence from the country, which he subsequently did.

Conduct of the Hearing

10. On 15 January 2020 the Tribunal heard oral evidence from the Claimant, who was cross-examined by Mr Maratos. On 3 March 2020, the Tribunal heard oral evidence from Mr Mes, who was cross-examined by Mr Simret. There was insufficient time for the parties to make oral submissions, so the Tribunal ordered written submissions within 14 days with leave to reply to each other's submissions 7 thereafter, ie. on or before 4pm on 24 March 2020. The Tribunal is grateful to both representatives for their written submissions and to Mr Simret for his response to Mr Maratos' submissions.

The Law

11. The law that the Tribunal has to apply as to the Claimant's status is set out in section 230 of the Employment Rights Act 1996. An employee is defined as:

> "*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 expressed or implied and if it is expressed whether oral or in writing*."
>
> Section 230(3) also defines a "worker":
>
> "*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."

This test is reproduced in regulation 2(1) of the Working Time Regulations 1998 for the purposes of entitlement to annual leave.

12. It is possible for a Claimant to be an employee for some purposes but not for others. A determination by an Employment Tribunal would not necessarily bind the tax authorities or the civil courts in a personal injury or health and safety case.

13. For an employment relationship to exist the case law (including *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497* to which I was referred by Mr Maratos) suggests that a number of minimum features are required : a contract (not necessarily in writing); an obligation to perform work personally (albeit that a limited or occasional power of delegation might not be fatal); mutuality of obligation, that is to say an obligation on the employer to provide work and an obligation on the employee to accept and perform the work offered; an element of control over the work by the employer. If these features are present, the contract maybe a contract of employment but it is not necessarily so. The Tribunal will then look at all the other features of the relationship, such as who provided the equipment, whether the worker hires staff, the degree of financial risk taken by the worker, whether the work done is an integral part of the employer's business, the intention of the parties, the method of remuneration and taxation, whether payment is made for sickness or holiday, whether there are pension arrangements and whether there is a disciplinary or grievance procedure which applies to the worker.

14. Where documentary interpretation is not involved, it is generally a question of fact whether a contract is one of service or services. No single issue is conclusive so one cannot simply say that because the Claimant was not taxed on PAYE, he was, therefore, not an employee or that the parties' intended that they would not be in an employment relationship. The Tribunal must look at the reality of the situation (*Young & Woods v West* [1980] IRLR 201.

15. The Supreme Court considered whether a member of a Limited Liability Partnership was a worker for the purposes of section 230(3)(b) in *Bates von Winkelhof v Clyde & Co LLP* [2014] ICR 730, in the course of which the authorities were reviewed. *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 drew a distinction between "*on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arms-length and independent position to be treated as being able to look after themselves in the relevant respects." (*para 17). In *Bates* at paragraph 39 Lady Hale observed:

> "*There is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that this is no magic test other than the words of the statute themselves. As Elias J recognised in James v Redcats (Brands) Ltd [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making exclusively for the St Michael" brand in the past comes to mind). Equally, Maurice Kay LJ recognised in* Westwood, *one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into operation as to fall within the definition. …. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding universal characteristic of being a worker."*

16. In *Stringfellows Restaurant v Quashie [2012] EWCA Civ 1735* at paragraph 52, Elias LJ stated: "*it is trite law that the parties cannot by agreement fixed the status of their relationship: that is an objective matter to be determined by an assessment of all relevant facts. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship and in a case where the position is uncertain, it can be decisive as Lord Denning recognised in Massey v Crown Life Insurance [1978] 2 AL ER 576".*

17. A claim for breach of contract in the Employment Tribunal under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 relies on employment status, whereas a worker is entitled to holiday pay and to claim unpaid wages. Wages are defined in section 27 of the 1996 Act as follows:

> "*any sums payable to the worker in connection with his employment, including –*
> *(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise."*

18. A deduction from wages occurs under section 13(3) of the 1996 Act where:

> "*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 purpose of this Part as a deduction made by the employer from the worker's wages on that occasion."*

Factual Background

19. The Claimant is a Chartered Certified Accountant. He had a long-standing relationship with the Respondent, dating back to 2011 when he was a full-time employee. In subsequent years he worked for the Respondent on an ad hoc basis whilst he was employed elsewhere. The Respondent is an FCA regulated money transfer business, specialising in transfers between the UK and Poland.

20. Following the death of the Respondent's Finance Director at the end of September 2017, the Claimant was engaged by the Managing Director of the Respondent (Mr Mes). The parties entered into a written agreement on 1 October 2017, which describes the Claimant as "the Service Provider" and in the preamble to the agreement it is stated, "*the Service Provider shall not be employed by the Company and shall be self-employed for the duration of this agreement."* It was an agreement for a fixed term from 1 October 2017 to 30 April 2019 in order to deliver a project to transform the Respondent's finance department.

21. Paragraph 12 of the agreement deals with the "Relationship of the Parties" as follows: "*Nothing in this agreement shall be construed to constitute the Service Provider as an employee, partner or agent of the Company and the Service Provider shall not hold themselves out as such."*

22. The services to be performed were set out at paragraph 1 of the agreement, the first of which was to implement the Finance Department Transformation project and act as Head of Finance of the Company and its subsidiaries for the duration of the project. This included responsibility for the control, direction and motivation of staff in the accounting department and to manage their recruitment.

23. The Claimant's obligations under the agreement are set out in section 3 to include at 3.2 to the *"provision of the services at the company's head office not less than four days per week and eight hours during each such day together with such additional time as the Service Provider and the company may agree in writing ("the service period").*

24. Whilst the Claimant's witness statement suggested he was required to work 9.00 to 5.30 Monday to Friday, this was not borne out by the Respondent's door access records. The parties do not agree on the expected working hours of the Claimant. In his oral evidence, the Claimant suggests that he was expected to be in the office within business hours (8 – 6), although there was some flexibility within those hours and he says that the Respondent's records of his presence in the office were inaccurate (the Respondent had a fingerprint recognition access system). It is the Respondent's case that there were 67 days when the Claimant did not work. Mr Mes suggests the Claimant took time off whenever he wanted to. The minimum days per week and hours were inserted in the agreement because it was a big project, which the Company needed to complete within a particular time frame.

25. The parties have provided their own partial versions of attendance records for the Claimant. For the first day of the hearing, the bundle contained printouts

from the Respondent's fingerprint activated access system. These record the times the Claimant entered and left the office from 16 October 2017 to 18 May 2018. It also calculates the days and hours the Claimant worked at the office, which are highly variable. For the March hearing, the Claimant provided copies of his monthly time sheet summaries from October 2017 to August 2018, although these only record days of work, not hours or timings. The invoices he submitted based on these timesheets were all paid, so he invites the Tribunal to infer that they were accurate. The monthly days worked recorded on the time sheets are respectively, 15, 18, 11, 20.5,14, 22, 20, 5, 3, 15, 20 and 15. Whilst the Claimant's monthly time sheet summary shows him working for a day on 7 December 2017, for instance, the door access records suggest he arrived on that date at 16.03 and he left at 17.50, ie he attended the office for I hour and 46 minutes.

26. The agreement excluded any liability for the payment of fees in respect of times when the Claimant was unable to provide the services due to illness or injury. It was agreed that the Claimant would be paid a monthly pro rata fee based on £250 per day on the basis of invoices presented (paragraph 4). At paragraph 4.4 it was stated:

    "*The parties confirm that subject to the agreed performance criteria outlined in schedule 1 (to be agreed within the next three months on the basis of the agreed yearly plans for the Group and linked with documents mentioned in point 1 .9 below agreement) bonus of up to 20% and payable biannually following a quarterly review of services provided."*

27. The Claimant's understanding of his bonus arrangement was that it was an alternative to the £400 a day rate which he had asked for to perform the role, but the Respondent refused to pay. The Claimant considered that a bonus of 20% should be paid to him automatically on a six monthly basis. Whilst the Claimant was in fact paid a bonus payment in or about March 2018, it is common ground that no performance criteria were agreed in accordance with the contract. Mr Mes explained that he had paid the bonus in order to motivate the Claimant

28. Paragraph 5.1 set out "*the Service Provider warrants and represents to the Company that he is an independent contractor of self-employed status, in business on his own account."* Paragraph 6 prevented the Claimant without the written consent of the Company from being directly or indirectly involved in a business or undertaking which is likely is to be in conflict with the interests of the Company. The agreement was terminable on three months' written notice.

29. The Claimant was required to use the Company's secured equipment in line with ISO27001. The Respondent holds data for around 300,000 clients in a heavily regulated area of business, so it would not have been possible for the Claimant to use his own computer equipment, albeit Mr Mes was concerned to see that the Claimant had nonetheless forwarded some Company emails to his personal email account.

30. The Claimant duly invoiced the Respondent on a monthly basis using invoices headed: "The Ash Star Consultancy." The Claimant was asked about this business in cross-examination and he explained that it was started some time in 2013/2014 and operated only for a short period of time. It was set up as he had to be self-employed for periods of time. He told the Tribunal that it wasn't "*operating in any way"* and "*it is not a limited company*." The Claimant was specifically asked whether he provided accountancy services under the umbrella of a limited company and he said "no".

31. Documents provided by the Respondent on 3 March 2020 from Companies House confirm that the Claimant was a Director of a Company called "The Ash Star Ltd" from 15 February 2012 until his resignation on 10 September 2012 and that he was appointed Director of "The Ash Star Consulting (UK) Ltd" on 9 September 2016, which Company is still described as "active." Mr Simret suggests in his closing submissions that the Claimant's evidence was accurate, because, he submitted that the Ash Star Consultancy was a trading name rather than a limited company. It was asserted in the submissions that Ash Star Consultancy (UK) Ltd was used by the Claimant to conduct business importing goods to Ethiopia. Whilst assertions in closing submissions do not amount to evidence in the case, even if the Claimant was conducting other business via a limited company with materially the same name as the entity on his invoices, the absence of any explanation of this in his evidence, when he was expressly asked whether the Ash Star Consultancy was a limited company, was misleading and affects the Claimant's credibility in the Tribunal's view.

32. The Claimant regarded himself as under the control of Mr Mes, whereas Mr Mes suggested that the Claimant had complete autonomy at the start of the project, but that he became increasingly concerned about the Claimant's ability to deliver the project and then instigated regular monthly meetings. The Claimant asserted he was not allowed to work for any other company. Whilst the agreement did contain a restriction against working for competitors of the Respondent in the money transfer business, there was clearly not blanket restriction on the Claimant's taking other work.

33. The Claimant provides an account in his witness statement of a deteriorating working relationship with the Respondent, some of which is not relevant to the claims before the Tribunal. In particular, the Claimant cites Mr Mes' complaints that the Claimant's performance did not justify the money he was earning and also the increased scrutiny of his work by Mr Mes. The Claimant regarded this as bullying and it led to his giving 3 months' notice of termination of his agreement with the Respondent on 4 July 2018. Minutes of a meeting dated 13 July 2018 between the Claimant, Mr Mes record the Respondent's concerns about the Claimant's performance. It is suggested he did not appoint someone to take over his duties during his three weeks' absence following the birth of his son and had not provided key financial results in sufficient detail for the period January to July 2018 and had not implemented the budget plan.

34. The Claimant worked out his notice and two members of staff were recruited to take over his work. They started in late August 2018 and the Claimant was tasked with undertaking a handover process.

35. In September 2018 the Claimant had a meeting with Mr Mes to discuss a 6 monthly bonus, which he regarded as automatically due in early October 2018. Mr Mes refused to pay the bonus as a matter of course, but told the Claimant he would be entitled to the bonus in the event that the handover was successfully completed. The Claimant's evidence was a little confused as to whether he agrees that his bonus was linked to his handover responsibilities. On the one hand he said that he was not contractually obliged to perform a handover, but on the other that Mr Mes "linked bonus payment to something I was not responsible for and linked to a party outside my control."

36. The detail of the handover was contained in a Excel spreadsheet, which was worked to by the Claimant and his successors. It had 14 listed areas ranging from Understanding the Business, to Management Reporting, Payroll, Statutory Reporting and Project Management. It is the Respondent's case that the Claimant did not satisfactorily complete the handover and that the Claimant's input to the process was cursory.

37. Sadly, the Claimant's father-in-law died in Ethiopia and he (understandably) needed time off during his notice period to fly over there in September 2018, so he took a week off. The Claimant really wanted further time to have a long family holiday in Ethiopia, however, he returned to the UK to complete the handover and to ensure his entitlement to the £6,500 bonus. His last day of work was 4 October 2018.

38. Correspondence post-dating the end of the Claimant's contract demonstrate that the parties remained in disagreement as to whether the Claimant had completed the handover. In an email dated 12 October 2018 Mr Mes sent the Claimant the latest version of this document with his successor's (Piotr/Peter) comments asking the Claimant to assist. Mr Mes ended the email: "*I still believe that you shut [sic] give some time to Peter on Skype to make the handover more beneficial for us and Peter. I shall be happy to bonus once Peter clears the handover."*

39. The Claimant set out in his witness statement, "*I claim the unpaid 6,500 GBP agreed payment in arrears due to be paid on 4th Oct 2019 on final day of service. This was agreed on contract and verbally by the Managing Director. The conditions of the payment was that for me to prepare handover document and sessions to the newly appointed Finance Manager in Poland. The handover document preparation was started on the verbal confirmation of the Managing Director to pay the full 6,500 Pounds."*

40. The balance of his claim is set out in paragraph 47 of his witness statement as follows:

"The Extra work I carried out for the legal case the Company was involved as a Claimant against one of its competitors. My work has resulted in the claim to

be successful and my work amount of 5,000 GBP. I worked on late evenings and outside the scope of my contract to achieve the legal case. I am claiming this as outside of contractual work and hours as I attended and presented the Company's claims at mediation meeting three times at late evenings."

In his oral evidence the Claimant suggested that there was a verbal agreement that he would be paid if he stayed after 6pm to work on the case. This was denied by the Respondent.

41. Mr Mes acknowledges that the Claimant assisted with the Company's legal case, which was concluded in the Spring of 2018. For instance, by responding to court requests for financial information. Mr Mes regarded this as part of his role as the senior financial person in the Company. The Claimant always billed the Company for the work he did and, it is suggested, on some occasions he claimed for hours he did not perform.

42. The Claimant did not use the system staff were required to use to book holiday. In the currency of his relationship with the Respondent, he did not claim an entitlement to paid holiday or sick pay (including when he was absent in February 2018 for 6 days due to sickness) and was not subject to the Respondent's disciplinary procedures.

Conclusions

Status

43. The Tribunal is satisfied that the Claimant was engaged to perform his work personally. Whilst the Respondent suggested that, in practice, he could delegate his work to someone else of his choosing, the agreement between the parties does not expressly permit that. Further, one of the reasons the Claimant was hired was because of his familiarity with the Respondent's systems and, as Mr Simret points out, the contract was with the Claimant personally, rather than any company through which he might have worked. It was very important to the Respondent that the Claimant conduct an orderly handover, which involved training and explanation to his successors, so it seems highly unlikely that the Claimant could have delegated his role to someone wholly unfamiliar with the Respondent's business and processes. There is no dispute that the agreement between the parties creates mutuality of obligation.

44. The Tribunal accepts Mr Mes' evidence to the effect that at the start of the project, the Claimant was given latitude as to how he fulfilled his role. The Claimant was engaged for his financial expertise such that a high degree of control as to how he performed this role would have been unusual in any event. However, Mr Mes grew concerned about the Claimant's performance and then instituted monthly meetings and insisted on targets being set. The Tribunal accepts Mr Mes' evidence to the effect that the Claimant objected to

any attempt to "manage" him on the basis that he was self-employed. In light of the Claimant's professional specialism as a qualified Accountant and his position as Finance Director, it is to be expected that he would have a degree of autonomy in relation to financial compliance issues. Some lack of control as to the manner in which the Claimant performed his specialist work within his expertise is to be expected. However, as discussed below, the Claimant's working hours were not consistent with his attendance at the office being controlled at all by the Respondent.

45. Whilst Mr Simret, in his response to Mr Maratos' submissions, has pointed out inconsistencies between the Respondent's records and those of the Claimant, the latter comprised simply a "1" next to a date when he claimed a day's fee, whereas the former descended into minute by minute detail. Whilst the Respondent paid the Claimant on the basis of his invoices and they were not challenged, the parties had a long-standing working relationship and it is unsurprising that invoices were paid on trust rather than based on the door access records. In the Tribunal's judgment, the Respondent's electronic access records are likely to present a more reliable picture of the Claimant's attendance at its offices than the Claimant's. Beyond the Claimant's assertions in cross-examination when challenged, there was no evidence to suggest that the Respondent's access system was flawed. The Tribunal does, however, accept, the Claimant's unchallenged evidence that the three mediation sessions in relation to the Respondent's legal claim were held off site in early 2018, so would not have been recorded on the access records.

46. There are clearly some weeks where the Claimant attended work for four days in a given week working between 7 and 8 hours a day during office hours, but there were other weeks when he did not. According to the Respondent's entry records (ignoring the variable extra minutes), the Claimant worked for at least 8 hours in a day on 4 occasions between 16 October 2017 and 15 November 2017, but for 4 hours on two occasions and 3 hours on another. Otherwise his working hours were 6 or 7. From 16 November 2017 to 31 December 2017 the Claimant worked 8 hours plus on only one day, on 3 days he worked for 2 hours, 1 day he worked for 1 hour and 3 days for 4 hours, 6 days for 7 hours, 6 days for 6 hours and 2 days for 5 hours. The Claimant then had a period of working longer hours in the period 16 February 2018 to 2 April 2018 with 7 days of working 9 hours in the day and mostly 5-day weeks (presumably in the run up to the year end). These longer hours continued to the start of May when the Claimant's hours reduced and then he took 3 weeks off due to the birth of his son. On any view, the above is not a pattern of work which suggests that the Respondent was exercising control of the Claimant's hours, as it would do for an employee.

47. Whilst it can assist a Tribunal to determine employment status by looking at who provided the equipment for the job, the nature of the Respondent's business (money transfers involving sensitive data) is such that it is unsurprising that the Claimant was required to work on the Respondent's secure computer equipment. In these circumstances, the provision of equipment is not a significant indicator of his status. The inclusion of a non-competition clause at paragraph 6 of the parties' agreement is consistent with a relationship of employment rather than self-employment, however, the restriction is very narrowly drawn (to involvement in businesses which provide a similar service to the Respondent's of "money transfer service to Poland"). This tempers its significance, therefore.

48. The Claimant can be regarded as a sophisticated litigant for the purposes of the determination of his status. As a qualified accountant, he was well aware of the sorts of issues to which HMRC (and the Tribunal) would have regard in deciding whether he was employed, self-employed or a worker. The Tribunal does not accept the Claimant's evidence that he was "forced" by the Respondent to be a self-employed contractor and does not accept that there was any significant inequality in bargaining power between the parties. The Claimant had set up a company and a trading name to enable him to do contract work before his arrangement with the Respondent, which is inconsistent with the impression of reluctance to be self-employed which he gave to the Tribunal. He had worked for the Respondent before both as an employee and an independent contractor, the Tribunal is satisfied that it was a deliberate decision by both parties that he should be engaged on a self-employed basis and he was taxed as such. The parties' intentions and the tax treatment are not conclusive, however.

49. The Claimant was not treated as the Respondent's employee in certain other respects, for instance, as to grievance and disciplinary procedures, payment of sick pay and the absence of a requirement to use Respondent's annual leave booking system.

50. In the case of status, there is no single factor which is determinative, but an accumulation of detail which tends to suggest employment or self-employment. In this case the parties deliberately set up a relationship of self-employment in circumstances where they had a previous course of dealings as employer and employee. The Claimant objected to attempts by Mr Mes to manage him later in his employment, when Mr Mes was concerned about his performance. As an accountant, the Claimant was well aware of the indicators of employed and self-employed status and their implications. He entered into a fixed term business arrangement with the Respondent to deliver a specific project and there was nothing incongruous about his doing so on a self-employed basis. This is not a case where the written agreement between the parties did not

reflect the reality of the situation. It did. In these circumstances and looking at their relationship as a whole, the Tribunal is not satisfied that the Claimant was employed under a contract of employment by the Respondent.

51. Although not an employee, the Claimant's work for the Respondent was clearly his main economic activity. As a professional accountant, there are clearly a number of ways that accountancy services can be delivered from being someone who works for an Accountancy firm with multiple clients as an employee or partner of that firm, as a sole practitioner with multiple clients or customer (as is contemplated in section 230(3)(b)) or as someone who is unambiguously engaged as an employee to work in the finance department of an organisation. The Claimant's arrangement with the Respondent was closer to the latter than the former, albeit he was free to offer accountancy services to other clients (and potentially had a day free every week in which to do so). He had a variety of entities through which to do so (either personally, via The Ash Star Consultancy or through The Ash Star Consulting (UK) Limited). However, the Claimant was integrated into the Respondent's organisation to an extent and attended senior staff meetings. The Respondent had a degree of control over the Claimant's work (specifying for instance, a number of days per week and hours a day he should dedicate to their business), albeit not the level of control which would be consistent with an employment relationship. As such, the Tribunal is satisfied that he qualifies as a "worker" for the purposes of section 230(3). As set out above, the Claimant was contracted personally to provide services to the Respondent. For the sake of completeness, however, even had the Claimant contracted with the Respondent through his Limited Company, the reality of the situation would have been one of personal service, as the Claimant "was" The Ash Star Consulting (UK) Ltd. The latter was simply a vehicle through which he provided his services – whether as an accountant or exporting goods to Ethiopia.

52. As a worker, the Claimant is entitled to the protection of Part II of the Employment Rights Act 1996, namely in relation to unlawful deduction from wages, including accrued annual leave under the Working Time Regulations 1998. To this end, the Tribunal's task is to decide what is "properly payable" under his contract for the purposes of section 13(3) of the 1996 Act.

<u>Bonus</u>

53. The Claimant was potentially entitled to a performance related bonus under paragraph 4.4 of his contract. Whilst the parties did not agree performance criteria within three months of the date of the contract, that was not a barrier to the Claimant's being paid a bonus for his first six months' work. Mr Mes stated that it had been paid to motivate the Claimant. Entitlement was clearly not automatic (that would be wholly inconsistent with the terms of the written

contract) and neither was the percentage guaranteed. The bonus was clearly performance related. The clause referred to a bonus of "*up to 20% and payable bi-annually following a quarterly review of services provided*." There would have been no need to have a quarterly review of services provided if payment was automatic and the percentage was not fixed. For these reasons, Mr Simret's submission that the Respondent had no discretion concerning the bonus is not accepted.

54. It was obvious from both the Claimant's and Mr Mes' evidence that the parties had divergent views of the Claimant's performance in the spring and summer of 2018. The Claimant's stated reason for resigning related to Mr Mes' criticisms of his performance. In those circumstances, Mr Mes' refusal to pay the Claimant a performance related bonus at the end of September 2018 was unsurprising. However, it is clear that Mr Mes verbally agreed to pay the Claimant a bonus in the event of a successful handover by the Claimant to his replacement, Piotr. Given the Claimant had been working on changes to the Respondent's financial reporting systems, it was in the Respondent's interests that the Claimant co-operated in the handover, which could properly be construed as "*such other tasks as may be required by the Company from time to time*" under clause 1.8 of the parties' contract.

55. The Respondent has provided extracts of the Excel spreadsheet which governed the handover process. There was some confusion in Mr Mes' evidence as to who made the various entries on the spreadsheet, not helped by the fact that the spreadsheet appeared over separate A4 pages of the bundle. What is clear from this document, however, read together with the correspondence, is that there were elements of the handover which neither Mr Mes or the Claimant's successor, Piotr, considered to have been completed. Mr Mes explained in his evidence that the Claimant would not provide specific handover information in response to requests for it from the Respondent's employees. By way of example, he said that the Claimant's response would be to provide a link to an electronic folder, without pinpointing in which of the 15 sub-folders the information was contained. Mr Mes drew an analogy in his evidence to the Claimant's simply stating that a document was in a physical cupboard, which might have 150 items in it, whereas the Respondent needed to know the shelf, binder and page number. The Tribunal found this evidence credible and also consistent with the fact that the Claimant had been disenchanted with his work for the Respondent for some months. Given the Claimant's expressed level of grievance with the Respondent, it was perhaps understandable that he was not working to his full capacity during his notice period.

56. Although the Claimant was offering to assist with the handover after the termination of his contract (on 12 October 2018, for instance) he was doing so

in the broadest of terms in order to obtain his bonus or alternatively, further consultancy work from Addis Ababa. In circumstances where the Claimant was expecting the sum of £6,600 on top of his normal pay for no additional hours, the Respondent was, quite reasonably, expecting specific and detailed responses to their queries. The spreadsheet which was used to manage the handover process demonstrates the level of detail which was needed. Mr Mes summed up his criticism of the Claimant's performance in the handover by stating that he would spend one hour answering questions which had taken the Respondent's staff three days to formulate or would simply copy and paste stock answers, such as "I did the necessary handover".

57. The Tribunal found Mr Mes' evidence in relation to the Claimant's performance during the handover process generally to be compelling. His frustration with the cursory manner with which the Claimant responded to questions raised in the course of the handover was quite clear and he was able to provide examples of the Claimant's cut and pasted responses in the Excel spreadsheet. If this is taken together with the Claimant's misleading denial of involvement in any limited company at the time of his engagement by the Respondent, the Tribunal prefers the evidence of Mr Mes in relation to the Claimant's completion of the handover tasks and considers the Respondent took the decision not to award the bonus on proper grounds and in good faith. In the circumstances, a bonus of £6,600 was not "properly payable" to the Claimant and it was not, therefore, unlawfully deducted from his final pay.

<u>"Overtime" Payments</u>

56. The Claimant's own description in his Claim Form and paragraph 47 of his witness statement of his claim for the "extra work" he carried out for the legal case was that it was "*outside the scope of my contract*" and as "*outside of contractual work and hours as I attended and presented the Company's claims at mediation meeting three times at late evenings*." In his schedule of loss he stated: "*I should have been paid for additional duties undertaken outside of the scope of my contractual work and time of normal working hours….The normal understanding between me and the managing directors was that I will be compensated if the Company win the claim for my technical expertise on the schedule preparation and presentation before the respondent's management and mediator which I successfully accomplished leading the company to win the case. Based on a fair market rate this work (£125) I calculate that I should have been paid for 40 hours, amounting to £5,000."*

57. According to the Claimant's own description, if anything, this is a claim for breach of contract not a claim for unpaid wages and, therefore, the Tribunal does not have jurisdiction to hear it as the Claimant is not an employee.

However, even if the Tribunal does have jurisdiction to consider whether the Claimant is due additional payment for work on the Respondent's litigation, the Tribunal considers it is an evidentially problematic claim. The Respondent asserts that any work the Claimant did in relation to the litigation was within the scope of his contract and was invoiced for. Paragraph 1 of the agreement defined the Claimant's services and paragraph 1.8 provided that one of those services was: "*To assist the Managing Director in running the Company's Board of Directors, and to undertake such other tasks as may be required by the Company from time to time."* Providing financial information about the Respondent in the course of litigation thus, appears to be within the scope of the agreement.

58. If, as the Claimant suggests there was an agreement to pay the Claimant "outside the contract" in the event the claim was successful, it is wholly unclear why the Claimant did not invoice the Respondent in relation to this work at or around the time it was done. The litigation itself was successfully concluded in the spring of 2018 and yet there is no evidence before the Tribunal that the Claimant made any claim for payment prior to his Claim Form within these proceedings. Mr Mes was quite clear in his evidence that any work the Claimant did on the case was invoiced for in the usual way (as was entirely logical and consistent with the parties' written agreement). Given the lack of any corroborating evidence that the Claimant was expecting to be paid separately for this particular category of work for the Respondent, the Tribunal is not satisfied that any such agreement was reached and prefers the evidence of the Respondent in this respect. As such, the Claimant is not entitled to "overtime payments" estimated by him at £5,000.

Holiday Pay

59. The Claimant's Schedule of Loss calculates his entitlement to holiday pay based on a 5-day working week. In fact, the Claimant was not engaged by the Respondent for 5 days per week, but for 4 (paragraph 3.2). His statutory entitlement was, therefore, to 4/5th of 28 days, namely 22.5 days. This amounts to £5,625.