



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Nick Kirby

v

Young and Blackmore Limited

Heard at: Watford by CVP

On: 4 September 2020

Before: Employment Judge Alliott

Appearances

For the Claimant: In person

For the Respondent: Mr Ian Blackmore

JUDGMENT

The judgement of the tribunal is that:

1. The claimant was an employee of the respondent at all material times.
2. The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of £4,725.
3. The respondent has made unauthorised deductions from the claimant's wages in respect of holiday pay and the respondent has failed to pay the claimant's holiday entitlement and is ordered to pay him the gross sum of £3,690.

REASONS

1. The notice of this hearing was sent out on 22 February 2020. Employment Judge Vowles directed that a one-day full merits hearing be listed to consider whether the claimant was an employee or worker and whether he is entitled to pursue claims for a redundancy payment and holiday pay and, if so, whether such claims are successful and, if so, what remedy shall be awarded.
2. Directions accompanied that notice of hearing providing for exchange of lists of documents, the preparation of a bundle by the respondent and the exchange of witness statements.

3. On 2 September 2020, this hearing was converted into a remote hearing via CVP. Joining instructions were sent to the parties on 3 September 2020.
4. Initially, Mr Blackmore of the respondent did not attend by CVP. Eventually, arrangements were made for him to attend remotely. It would appear that the respondent received the claim form as it was served on the respondent's registered address. However, the notification of the CVP hearing was sent by email. Mr Blackmore told me that he had not received the emails as the respondent company had ceased trading in October 2019 and that when the company closed down so did all of its email accounts. Further, Mr Blackmore told me that he had not prepared a witness statement in accordance with the case management orders as he did not realise he needed to do so given that the respondent had ceased trading.
5. I caused a company search to be made and it would appear that the respondent's status is:

"Active – active proposal to strike off"
6. I asked Mr Blackmore if he wished to challenge the claimant's assertion that he was an employee and, given the status of the respondent, Mr Blackmore indicated to me that he did not want to do so.

The claimant's status

7. The claimant was engaged by the respondent on 23 May 2013. The claimant has shown me a letter of appointment wherein it is stated that:

"This position is on a self-employed basis, no holiday or sickness is payable by Young and Blackmore, I have attached a document that outlines some structure to our working environment and I would expect this to be adhered to."
8. The claimant has filed a witness statement. The claimant accepts that his engagement was stated to be on the basis that he was employed on a self-employed basis and that he was expected to provide an invoice for the hours worked each month. The claimant accepts that no deductions were made from his pay and that he was responsible for making tax and National Insurance returns.
9. It was agreed that the claimant would work a minimum 45 hours per week, reduced to 40 hours per week on 20 May 2019.
10. The claimant was paid an agreed set hourly rate.
11. The claimant only worked for the respondent. The claimant states that it was made very clear to him by Mr Blackmore that he should not take on any other work.
12. The agreement was for the claimant's personal service. He could not send anyone else to work in his place.

13. There was a high degree of control over the claimant's working environment in that Mr Blackmore dictated his hours, place of work, tasks and work schedule.
14. There was mutuality of obligation in that the claimant was obliged to work and the respondent to provide a set number of hours per week.
15. The claimant's normal place of work was the company workshop unless he worked off site at a client's premises.
16. All machinery and materials were provided by the respondent. The claimant had a small selection of personal hand and power tools along with his own computer.
17. The claimant had to agree his annual leave time with the respondent.
18. On 1 August 2019 the claimant was informed there was no more work following the conclusion of the project he was then working on.
19. The claimant's last working day was 29 August 2019.
20. In determining the employment status of the claimant, I am required to consider a number of factors and make an overall evaluation of the situation in the light of the various factors.
21. I find that the claimant did agree to provide his own work and skill in return for remuneration. I find that the respondent exercised a sufficient degree of control over the relationship such that the claimant was an employee. In particular, the respondent provided the work premises and the overwhelming majority of the tools used. The claimant was integrated within the respondent's operation and there was mutuality of obligation. The agreement on its face provided that the claimant was self-employed as did the tax and National Insurance situation. However, that is not determinative. I find that the claimant took little financial risk on his own account.
22. Assessing the position in the round, I find that the economic reality is that the claimant was an employee.
23. I find that the claimant was dismissed by reason of redundancy and so was entitled to a redundancy payment. The claimant was born on 15 May 1972 and therefore was aged 47 at the date of his dismissal. He has 6 full years of employment. $9 \times \text{£}525 = \text{£}4,725$.
24. As regards holiday pay, there was no express holiday year and as such the claimant's holiday year ran from his start date on 23 June until 22 June.
25. The claimant told me he worked 4 days a week, 10 hours per day at £18 per hour or £180 per day.

26. The claimant's holiday entitlement was therefore 4 days per week x 4 weeks = 16 days plus 8 statutory Bank Holidays. The claimant was therefore entitled to 24 days per year.
27. From 22 June 2019 to 29 August 2019 is 68 days. The claimant was therefore entitled to 4.5 days holiday accrued but not paid on the termination of his employment.
28. $4.5 \times \text{£}180 = \text{£}810$.
29. The claimant told me that he took 2 weeks holiday in the holiday year 2018-19. In addition, he would have been entitled to the 8 Bank Holidays. The claimant was therefore entitled to 16 days holiday pay which was not paid by the respondent. $16 \times \text{£}180 = \text{£}2,880$.
30. I have taken the claimant's claim for holiday pay in the year 2018-2019 to be an unauthorised deduction of payments claim. The claim in relation to the holiday year 2018-2019 accrued at its latest on the date of dismissal, namely 29 August 2019, and accordingly the claimant has presented his claim within three months of that date.
31. As regards previous holiday years, I find that they do not constitute a series of deductions and that well in excess of three months has elapsed since those payments became due. Accordingly, I make no other awards for holiday pay entitlement.

Employment Judge Alliot

Date: ...17th September 2020.....

Sent to the parties on: ..1st October 2020

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For the Tribunal Office