EMPLOYMENT TRIBUNALS

Claimant: **Mr Nicholas Cartwright**

Respondent: **Wheel Medic Ltd**

Heard at: **Leeds (By Video Link)** **On:** **16 October 2020**

Before: **Employment Judge R S Drake**

Representation:

Claimant: In Person
Respondent: Mr Y Lunat (Solicitor)

JUDGEMENT

1. The Claimant has not established that he was an "employee" of the Respondent engaged under a "contract of employment" as defined by Section 230 Employment Rights Act 1996 as amended ("ERA") and/or that he was entitled to unpaid wages for the period 21 January 2019 to 21 January 2020. His claim for unlawful deductions from pay in this respect is dismissed.

2. The Claimant has not established that he was a "worker" as defined by Section 230 ("ERA") and /or that he was entitled to holiday and holiday pay as claimed under Regulations 13 and 13A (respectively) of the Working Time Regulations 1998 ("WTR") and/or if he were entitled as a "worker" that there had been any withholding of pay in this respect. Therefore, his claims under this heading and on this basis are also dismissed.

REASONS

2. The Claimant attended in person and with assistance from me (to ensure equality of arms) in framing his questions in cross examination and his final submissions, he explained and presented his case efficiently and well. The Respondent company (effectively by evidence given by Mr Ryan Yates who trades legitimately via the medium of a limited company) also appeared by video link, and was represented by Mr Yunus Lunat, an experienced Solicitor. I was greatly assisted by competent presentation of evidence and

argument on both sides despite the hearing being completely by video link and I was satisfied that the parties felt that they had been able to present their respective cases to best effect by this mode of hearing. I record my thanks to the Tribunal staff for enabling and assisting effective management and hearing of this case in this mode. I confirm that at the conclusion of evidence and submissions I reserved my Decision which is set out in full below with Reasons.

Issues

2. At the start of the hearing and bearing in mind the Claimant was not legally represented, I took time and care to repeat and articulate the issues as identified initially by EJ Eeley on 11 August 2020. Those issues are as follows: -

Status –

2.1 Was the Claimant engaged to work for the Respondent as an "employee" or a "worker" pursuant to Section 230 ERA such that the Tribunal has jurisdiction to hear his complaints?

*Unpaid annual leave – Working Time R*egs *(1998)* ("WTR") -

2.2 What was the Claimants leave year?

2.3 How much of the leave year had elapsed at the effective date of termination?

2.4 In consequence, how much leave had accrued for the year under regulations 13 and 13A WTR?

2.5 How much paid or unpaid leave had the claimant taken in the year or period of employment/engagement if proved?

2.6 How many days remain unpaid?

2.7 What is the relevant net daily rate of pay?

2.8 How much pay is outstanding to be paid to the claimant whether for accrued untaken holiday, or for holiday taken but unpaid?

Unauthorised deductions -

2.9 Did the respondent make unauthorised deductions from the claimant's wages in accordance with section 13 ERA and, if so, how much was deducted?

Findings of Fact

3 The Claimant's evidence before me consisted of his pleadings when commencing the claims (his ET1), his two written statements attested to today, and a body of agreed documents mostly comprising transcripts of Facebook messages. The Respondent's evidence was in the form of the Response pleadings (ET3), a statement from Mr Yates attested to today, and reference to the same agreed bundle of copy Facebook messages. There was no issue about the provenance and content of the documentary evidence, but what was at issue was the appropriate interpretation I was to apply to them. I recognise and recorded that the appropriate standard of proof, the burden laying with the Claimant, was whether any particular point was established on a balance of probabilities. I read all the documentary evidence carefully.

4 I make the following factual findings: -

4.1 The Claimant and Mr Yates were close social friends for a considerable period of time before the commencement of some form of commercial relationship between them which commenced in January 2019.

4.2 The Claimant first asked for some form of engagement for work with the Respondent in August 2018. Later in January 2019 he advised the Respondent that he intended to give his notice at his then present employment. He says he had an oral conversation with Mr Yates at which time he says Mr Yates told him that he would be engaged to work for him and would be paid at a rate amounting to £400 net per week and thus £80 net per day. There was no written record of this arrangement and all of the documentary evidence points clearly to there having been a great degree of informality of the working relationship between the parties from January 2019 until the relationship ended in January 2020.

4.2 The Claimant says he was promised that he would be provided with work and would be paid at a rate of £400 per week. The Respondent says that he would be provided with work when work was available, but that there was no promise or agreement to provide work as of right, and no guarantee given that work would be provided, but that if provided it would be paid for at the rates above mentioned. The documentary evidence shows that from May 2019 onwards the Claimant raised enquiries about why he was not being paid fully, what was happening in relation to tax and National Insurance, and otherwise why he was not being paid on time. The Respondent's explanation was usually that he was awaiting guidance from his accountants but that nothing was otherwise said to show that there was a mutually accepted agreement that work would be provided by the Respondent, and that there was agreement that work would be done by the Claimant except on a daily agreed basis. The absence of any form of evidence including written record to show that it was agreed the Claimant would provide his work, and that the Respondent would provide work to be done satisfies me that the relationship was limited to acceptance that the Respondent would provide occasional work to be done, albeit regularly, but

that the Claimant was free to choose to agree to do that work or to refuse to do so. Given the considerable degree of informality evidenced by the documentary records throughout the entirety of the relationship between the parties, I am satisfied that the evidence shows that the parties did not enter into a relationship whereby the Respondent accepted he was obliged to provide work and the Claimant accepted that he was obliged to do it unless he agreed to do so on each occasion. This is a significant finding of fact.

4.3 It is apparent from the Claimant's presentation of his case and reference to his evidence that he had a particular subjective view as to what he regarded as having been agreed. Mr Yates for the Respondent gives a clearly different interpretation. I conclude on the evidence that it is reasonable to find that the parties had not achieved a common understanding of the nature of the legal relationship they had entered into in January 2019. They have not achieved consensus. This is also a significant finding of fact.

4.4 It is common ground that the Claimant actually worked 109 days and that he had been booked to work for another 35 days which were cancelled and that he says in his own case that there were another 36 days booked but which he did not work. This totals 180 days. It is also common ground that throughout the period of whatever may be described as the "engagement" between the parties, the Respondent paid the Claimant £18,500. I accept that on the evidence, one of the few things which was agreed was that if the Claimant did not do any booked work, he would be paid at a rate of £400 per week and thus £80 per day. Therefore, being paid £18,500 during the whole of the engagement represents being paid for 231.25 days which exceeds the actual number of days worked by the Claimant and/or cancelled by the Respondent. This again characterises the relative informality of the relationship between the parties which is illustrated on many dates in the evidence by messages from the Claimant asking to know whether he was required to refer for a particular day's work and being told sometimes yes and sometimes no.

4.5 There is no evidence to support the contention of the Claimant that he was part of the Respondent's organisation. There is no evidence to show that it was it was expressly and specifically agreed that he would provide his services exclusively to the Respondent. There is no evidence that it was expressly agreed that the Respondent was obliged on all working days to provide him with work to do. There is no evidence that the Respondent restricted the Claimant from working elsewhere or for anyone else. The Claimant says that he did his work using equipment and materials supplied by the Respondent, but that is all. I find that all the evidence points to the greater likelihood that if the respondent had work to offer to the claimant he would do so but that the claimant was not under any specific agreed obligation to do that work , and could choose not to do so.

4.6 What is clear from the evidence is that the parties did not and do not currently believe but they agreed on the same things. This is also a significant finding in contract law. The parties did not have become a common understanding of what they had agreed.

4.7 The Claimant urges me to find that he chased the Respondent with enquiries and concerns about accounting for his tax and National Insurance as well as alleged arrears of pay. He urges me to accept that it was only as early as May 2019 or as late as August 2019 that the Respondent said that his accountant had advised that the Claimant be treated as self-employed. He says that this shows that hitherto he had been treated by the Respondent as an employee. The Respondent says that when properly analysed, his responses were that his accountants were advising that the Claimant be treated as self-employed and that this was an already ongoing situation and thus confirmation of status rather than a change. On analysing the ordinary objective meaning of the words used by the respondent in various of the documents on this subject, I prefer the Respondent's account that this was confirmation of the existing status of the Claimant and not a change. The subjunctive/conditional as opposed to the active tense of the verbs used is determinative of this point.

4.8 The Claimant, very eloquently, argued by reference to a number of documents showing the Respondent's responses to enquiries about pay and tax, that the proper interpretation of them was to be that the Respondent was accepting that he was legally responsible for deducting tax and National Insurance at source and that this was indicative of a relationship of employment. However, on proper analysis of such evidence, I find that any reasonable reader would conclude that the Respondent's responses did not amount to acceptance that the Claimant was an employee, but that he would take up the enquiries with his accountants. In any event, howsoever the Respondents regarded the relationship, the key determinative factor is the legal interpretation of that relationship and not the subjective interpretation of it by the parties.

The Law and its Application

5 The Claimant's withheld pay complaint is framed under Section 13 of the Employment Rights Act 1996 ("ERA") which provides as follows: -

"(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 a relevant provision of the workers contract, or –

(b) the worker has previously signified in writing her agreement or consent to the making of the deduction …"

6. The Claimant must first establish there existed a binding contract between the parties, This requires evidence of offer and acceptance, consideration flowing from the work provider in the form of willingness to work, intention to be legally bound and consensus as to the same terms. It this case there is abundant evidence that the parties were not in agreement as to the same

terms. There existed in law no binding contract between them and this is a significant finding.

7 The Claimant must then establish that he was an employee, or a worker as defined by S230 ERA.

8 Section 230 ERA provides as follows: -

(1) - In this Act, "employee" means an individual who has entered into or works or where the employment has ceased worked under a contract of employment.
(2) – ……
(3) - In this Act, "worker" means an individual who –

a. has entered into or works under a contract of employment or
b. any other contract whether express or implied and if it is expressed 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 that contract that of a client or customer or of any profession or business undertaking carried on by the individual"

9 From case law I note that there is guidance available to me as to how to interpret whether certain facts show that a relationship is one of employment.

These principles can be broken down as follows: -

9.1. the contract must impose an obligation on the person to provide work personally; - see the Court of Appeal's decision in **Express & Echo Publications v Tanton [1999] IRLR 367** – and -
9.2 there must be a mutuality of obligation between employer and employee; see the House of Lord's decision in **Carmichael v National Power Place [2000] IRLR 43** confirming a decision of the Newcastle ET - and -
9.3 the worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a sufficient degree – see the High Court's decision in **Ready Mixed Concrete v MPNI [1968] 2 QB 497** as later re-affirmed by the Court of Appeal in **Johnson Underwood v Montgomery [2001] EWCA 318**;

On the facts as found, I cannot find that the Claimant has made out any or all of these tests and as all have to be established in, his claim to be an employee must fail. Similarly, on the basis of the definition of worker, as the Claimant has not established on the evidence a clear contract to provide services personally, he has not established he is a worker as defined

10 Even if I were to find that the Claimant was a worker as defined by section 230 ERA, which I cannot find on the evidence available to me, then I have to find on his own evidence that he has been paid more than the total sum to which he is entitled during the course of the relationship between the parties, and thus there has been no withholding of pay from him either in respect of wages as a "worker" or holiday pay as a "worker".

11 Even if I were to find, which I do not, that the Claimant was a "worker" in relationship with the Respondent, his claim fails because he has not established that he has been paid less than his entitlement for work done on the agreed days he has actually worked, including on days that he was booked but was been cancelled, and on other days which he has not worked but which he expected to work. This finding is based on his own evidence.

Conclusion

12 Accordingly, I have no alternative but to dismiss the Claimant's claims.

Employment Judge R S Drake

Signed 16 October 2020