EMPLOYMENT TRIBUNALS

Claimant:
Mr Nigel Perry

Respondent:
Marshall Morrison Ltd

Heard at: **Leeds (By CVP Link)** **On:** **04 December 2020**

Before: **Employment Judge R S Drake**

Representation:

Claimant: In Person
Respondent: Mr A Morrison (Director)

JUDGEMENT

1. The Claimant has established that he was a "worker" as defined in Section 230 of the Employment Rights Act 1996 ("ERA") and thus entitled to unpaid wages unlawfully withheld from his pay contrary to Section 13 ERA for the period 1 April 2020 to the date of termination of his engagement with the Respondents on 9 April 2020 in the sum of £664,61, and also for 18.5 days untaken holiday for the purposes of Regulation 13 of the Working Time Regulations 1998 ("WTR") as at that date in the sum of £1380.92. Thus, the Claimant is entitled to and the Respondents shall pay to him the total sum of £2,045.53 to which extent his claims succeeds.

2. The Claimant has not established that he was engaged as an employee as defined by Section 30 ERA and thus his claim for notice pay as an employee fails and is dismissed.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

REASONS

3. The Claimant attended in person and the Respondent appeared by its director Mr Adrian Morrison. The latter initially sought an adjournment as he wanted to produce documents upon which he wished to rely and had been unable to do so hitherto because he explained that he had been admitted to hospital with Covid19 and was discharged therefrom only lately on 13 November. He was unable to account satisfactorily for not having disclosed his evidence between then and now.

4. However, on examination by me, the Claimant accepted that he did not contest the evidence which was in the form of bank statements showing 8 monthly payments of £1,600 per month to him from July 2019 to April 2020. Therefore, with both parties' full agreement, I concluded it was safe to proceed today without such productions, especially after it became apparent that neither party sought to rely on anything other than oral evidence, which both gave on Affirmation.

Issues

5. At the start of the hearing and bearing in mind the parties were not legally represented, I took time and care to explain the issues and where burdens of proof lay. Accordingly, the following issues were identified: -

5.1 For the purposes of all the claims, but especially in respect of the claim for pay in respect of notice, could the Claimant establish that he was engaged by the Respondent under a contract of service and thus a contract of employment? The Respondent asserted that the Claimant was at all material times engaged not under a contract <u>of service</u> but under a contract <u>for services</u> (my emphasis) and was thus self-employed;

5.2 If not, could the Claimant establish that he was engaged under a contract other than a contract of employment, but one being to provide his services personally? This was relevant specifically to the claims for arrears of pay and for holiday pay for holiday not taken during the entirety of the engagement;

5.3 Could the Claimant establish the value or quantum of each head of his claims?

5.4 It was common ground that the Respondent had paid the Claimant sums covering his entitlement up to 31 March 2020 but not for a further 9 days worked thereafter. Further the Respondent did not contest the Claimant's calculations of his arrears of pay claimed, or holiday entitlement of 17.5 days' pay.

Findings of Fact

6 The Claimant's evidence before me consisted of his oral statement on Affirmation tested by subsequent cross examination by Mr Morrison and also by me. The Respondent's evidence was given and tested in exactly the same way. Both faced examination by me. Apart from what is noted in paragraph 4.4 above as common ground or uncontested, the following were my material findings of fact: -

6.1 Before starting work for or at the Respondent's premises, the Claimant had shown an interest in working with Mr Morrison whose business renovates classic cars, and he had approached Mr Morrison in March 2019. In May 2019, Mr Morrison contacted the Claimant and there were subsequent exchanges of oral conversation, but no follow up written record was kept. The absence of written record is unfortunate for both parties and is materially the main reason for these proceedings being necessary;

6.2 The Claimant says, and I accept his unchallenged evidence on this, that he was unwilling to leave a relatively secure employment unless he could be paid a wage which exceeded his previous pay, and unless he would have some degree of job security. He asked about the status of other people engaged by the Respondent and was told that only one other mechanic was self-employed and rendered invoices for his services; the Claimant was not required by the Respondent to work in a similar way; I find the Claimant assumed that he was therefore to be treated as employed; however, there was no evidence produced to show that the Claimant was assuming financial and/or health and safety responsibility for his services;

6.3 As is apparently common in the motor renovation trade, the Claimant provided his own hand tools to work with, but was provided with all other heavier machinery and equipment by the Respondent, and he thus regarded himself as being part of the Respondent's establishment; I find that the parties agreed but the Claimant was to be paid at a rate of £1,600 per month on a date towards the end of each month, but that at the end of March 2020 he had not been paid for that month and was not paid for the remaining 9 days of his engagement which terminated 9 April 2020; income tax and NI were not deducted and there was no express agreement that it would be; the Claimant merely expected to see payslips, but didn't receive any, but I find he was aware that his rate was as noted above, so he didn't expect any deduction;

6.4 No evidence was produced to me to show that the parties agreed but the claimant could render his services via a substitute. I find that it was clearly contemplated by both parties that the work to be provided by the respondent would be done personally by the claimant and only by him. XXX

The Law and its Application

7 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 …"

8. Regulations 2 and 13 of the WTR provide as follows; -

"2(1) "worker is defined a being … an individual engaged under a contract of employment or under any other contract to perform work personally …" and -

"13 a worker is entitled to annual leave and pay therefor …"

9. The Claimant had first to establish non-payment to him of his monthly salary and the quantum thereof. Throughout these proceedings it has been common ground that the Respondents accept that they did not pay to the Claimant any pay accrued for the month of April 2020, nor any pay in lieu of notice as at the date of termination of his engagement.

10. In the absence of rebuttal evidence from the Respondent today, I am able to accept the Claimant's evidence about this aspect of his claim in full. However, he has not established he was an employee because he has not established that there existed a "mutuality of obligation" (as required pursuant to case law as expressed in the HL decision of **Carmichael v National Power [1998]**) on his part to work, nor an obligation on the part of the Respondent to provide work. He has not established he was a part of the Respondent's establishment nor that he had a contract of "employment" as such.

11. I find that the Claimant has established on the facts found that he was obliged to provide his services personally (again my emphasis) and that he was not free to render such services by a substitute or by any means other than personally. Thus, I find that for the purposes of Section 230 ERA he was engaged to provide personal services and was thus a "worker" as defined by S 230 ERA.

12. I find that the Claimant did not take any holiday during the period of his engagement by the Respondent, but that because he can be treated as a "worker" as defined by Regulation 2 of WTR, he is entitled to holiday and/or

to pay for holiday not taken.

13. Therefore, I find that the Claimant's claim to be a worker, if not an employee, is well founded and that he is entitled to be paid any unpaid wages and for pay for holiday not taken. His claims for and the calculation of the value of his claims in this respect are unchallenged and are therefore well founded.

14. I award the Claimant Judgement for unpaid wages for the period of 1 to 9 April 2020 in the sum of £664.61 to which extent his claim in this respect succeeds.

15. Further, I find that as a “worker” he is entitled to be paid holiday pay for holiday not taken to be well founded and that he is entitled under this head to Judgement in the sum of £1,280.92. Therefore, his claims for the total to which he is entitled is £2,045.53 and is well founded, so I award him Judgement for this total sum. His claims to pay in respect of notice were dependent on him establishing he was an employee which claim fails.

Employment Judge R S Drake

Signed 04 December 2020