EMPLOYMENT TRIBUNALS

Claimant: **Mr I Kirkwood**

Respondent: **Vencer Ltd**

Heard at: **Cardiff by CVP** **On: 23rd April 2021**

Before: **Employment Judge Duncan**

Representation:
Claimant: Mr Leong (Solicitor)
Respondent: Mr Woodridge (Director)

JUDGMENT having been sent to the parties on 27th April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Iain Kirkwood, commenced work for the Respondent, Vencer Limited, in November 2019. The Respondent is a construction company. There is a dispute as to when the working relationship between the Claimant and Respondent ended but the last date on which the Claimant undertook work was 27th May 2020.

2. The Claimant has been represented throughout the proceedings by Mr Leong of Citizens Advice. The Respondent was represented by company director, Mr Wooldridge.

3. The hearing has taken place by way of one day CVP hearing. Both parties agreed that the full hearing was capable of being heard remotely.

4. By ET1, received on 24th September 2020, the Claimant initially claimed for notice pay and holiday pay. The Claimant is clear in the ET1 that he entered an employment relationship with the Respondent and outlines the reasons for which he states that he was an employee. The sums claimed are £560 for unpaid wages and £2128 for unpaid holiday pay.

5. By way of ET3, the Respondent asserts that the Claimant has been paid all sums owed for work undertaken and that he is not entitled to holiday pay on the basis that he was self-employed. The Respondent, like the Claimant, outlines the reasons that they consider support their position in respect of the employment status.

6. The claims were initially listed for a full hearing on 27th November 2020, however, it became clear on a review of the papers that the issues that were to be determined required longer than the one hour afforded to the case that day. EJ Howden-Evans therefore converted the hearing to a case management preliminary hearing. At the hearing, before EJ Brace, the Claimant appeared to shift his position in respect of two issues. It was that shift in position that led the Claimant's representative to make an application to amend the claim on the basis that:

    a) The Claimant sought to demonstrate that he was a worker rather than an employee; and,

    b) The Claimant was not seeking to claim that he was entitled to notice pay but was in fact claiming for unpaid wages from approximately November 2019.

7. It appeared to EJ Brace that the shift in position was not a simple relabelling and required a different set of considerations from the Respondent and the Tribunal. EJ Brace was not prepared to deal with the application to amend as additional information was required from both parties. Accordingly, directions were made requiring the Claimant to properly outline his case so the Respondent could consider the same.

8. The Claimant filed an amended ET1 in respect of the change to unpaid wages rather than notice pay. He did not amend his stated case regarding employment status.

9. The Respondent responds to the amended ET1 and makes it clear that the claim for unpaid wages is disputed. The Respondent flags the fact that the amended ET1 makes no reference to the suggested amendment, as referred to at the hearing before EJ Brace, to state that the Claimant was a worker.

10. By way of direction, dated 3rd April 2021, Regional Employment Judge S Davies considered that the amended particulars of claim are accepted given the absence of objection.

11. Despite those comments made at the case management hearing, the Claimant did not amend his particulars in respect of the employment status. The amended particulars continue to assert that the Claimant considers that he is an employee but, on his behalf at the outset of the hearing, it was confirmed that all that he must demonstrate is that he was a worker for the purpose of the unpaid holiday.

12. Prior to the commencement of the hearing, I proposed that we firstly deal with the preliminary issue relating to the Claimant's new claim for unpaid wages. I agree entirely with the case summary of EJ Brace, namely, that the unpaid wages claim amounts to a new claim. In any event, even if it did not amount to a new claim, the ET would still need to consider jurisdiction to deal with this limb of the claim given that the unpaid wages relate to November 2019 and this claim was issued on 24th September 2020. The parties agreed that this matter should be dealt with by way of preliminary issue. This claim was struck out at the outset of the hearing as per the reasons given at paragraphs 16 to 26.

13. I explained to both parties that, regardless of the outcome of the preliminary issue, it would be necessary to hear evidence in respect of the claim for holiday pay. I explained the process that would be followed and the importance of a question and answer approach. I explained to the Respondent's representative that it would be necessary to ask questions of the Claimant in respect of matters that they did not accept and, subject to my view that they were relevant matters, needed to be challenged. I invited both parties to carefully consider the questions that they would seek to ask during the short adjournment that I would need to take to consider my reasons in respect of the preliminary issue. I also invited the parties to consider, if the Claimant was found to be a worker or employee with the right to holiday pay, whether there was an agreed figure for the holiday pay that would be due.

14. Following my determination regarding the time limits for the unpaid wages, it was confirmed that the Respondent had prepared a list of questions. It was also confirmed that, in the event that the Claimant was found to be a worker, he would be entitled to payment for 12 days of accrued holiday on the basis of work undertaken from November 2019 to the start of lockdown in March 2020 and the two days in May 2020. The Claimant asserts that the accrued holiday stands at 16 days on the basis of an ending to the working relationship in July 2020.

15. In advance of the hearing today, I was provided with a copy of a 108 page bundle including witness statement from the Claimant and the two Respondent witnesses, Mr Thomas Woolridge and Mr David Howell. There was an issue over whether the Respondent should be permitted to rely on an amended statement dated 15th April 2021. The statement had not fundamentally changed to the previous version drafted in the proceedings. I took the view that the Respondent had sought to comply with the directions of EJ Brace in sending the document to the Court in accordance with the direction that the bundle, including witness statements, be sent to the Tribunal, by 16th April 2021. Accordingly, I concluded the statement was filed in accordance with the direction and the statement should form part of the bundle.

Preliminary Issue

16. As briefly mentioned earlier, given the Claimant's change in position from a claim for notice pay to unpaid wages, it is necessary to consider jurisdiction given the time limits.

17. Briefly, the chronology appears as follows:

5th to 10th November 2019	Claimant undertakes work for Respondent
10th November 2019	Claimant states that payment is due
24th September 2020	Claim is issued
8th December 2020	Claimant filed an amended particulars of claim

18. In my view, the relevant date for the presentation of the claim for unpaid wages is the 8th December 2020. Accordingly, the claim is, on the face of it, approximately ten months out of time.

19. There is a three month time limit for presenting a complaint to the Tribunal. The date runs from the date of deduction or the last deduction in a series of deductions. If the Tribunal is satisfied that it was not reasonably practicable to present a complaint within three months, it may be presented within such further time as the tribunal considers reasonable. Essentially, the questions that must be asked are as follows:

    a) Was the claim made within three months?

    b) If not, was it reasonably practicable to present the claim within the three months?

    c) If it was not, was the complaint nevertheless presented in a reasonable time?

20. I heard submissions from both parties on this issue. The Claimant submitted that the Claimant originally pleaded the case on the mistaken belief that the monies owed were as a result of a failure to pay notice pay. It was stated that it was not reasonably practicable because he reasonably believed that the notice pay claim was the correct claim to make. Effectively, it is stated that there was confusion as the Claimant believed that he was owed money "a week in hand". It is his understanding that he would be paid the sum on termination of his employment. It is stated that the claim being out of time will not prejudice the Respondent and that they are fully prepared to respond. The Claimant states that it is in the interests of justice to allow the application.

21. The Respondent states the time limits should apply and encourages the Tribunal to refuse the Claimant's application. In any event, the Respondent states that the money is not owed as shown by evidence that they ask me to have regard to in the bundle.

22. In consideration of the Claimant's application, I have regard to the document at page 72 of the bundle, namely, the formal application to amend the particulars. The application states that it is accepted that the claim is made some nine months out of time. The Claimant believed and gave instructions on the mistaken belief that it was a claim for notice pay. Accordingly, when his error was noticed, the claim was made as soon as possible thereafter.

23. In my view, the Claimant effectively asks the Tribunal to consider that his ignorance of a fact triggered a new claim. In this scenario, I have regard to the principles in the case of **Machine Tool Industry Research Association v Simpson 1988 ICR 558, CA**. In a case where the Claimant has no knowledge of a fact that is fundamental to the right to bring a complaint, it may render it not practicable to present the complaint in time. The Court of Appeal held that three points must be established:

    a) That the Claimant's ignorance of the fact was reasonable;
    b) That Claimant had reasonably gained knowledge outside the time limit that she reasonably and genuinely believed to be crucial to the case and amounts to a ground to claim; and,
    c) That the acquisition of the knowledge, in fact, was crucial to the decision to bring the claim.

24. I should be cautious in applying a rigid approach to the three factors. I have regard to the further guidance given in **Cambridge and Peterborough NHS Foundation Trust v Crouchman 2009 ICR 1306**. That case distils the principles from various cases.

25. I raised with the Claimant's representative that I struggled to understand how the realisation was made that his claim was not for notice pay but for unpaid wages. In particular, the trigger that caused the change in position. Unfortunately, I still do not understand that position. It is important as the Claimant, in his application, states that the due date for unpaid wages was 10th November 2020. This does not sit well with the submission that the Claimant was paid a week in hand.

26. I find points two and three to be in the Claimant's favour. The Claimant, somehow, has gained knowledge outside the time limit for unpaid wages that led him to the genuine belief that he was owed money relating to November 2019, instead of his notice pay. It has been demonstrated that the knowledge was crucial to making a claim as he applied to vary his particulars following the case management hearing. But what I do not understand is the precise nature of the fact that the Claimant came into knowledge of. I do not understand where this change of stance originated. Without that information, I find it difficult to consider that the ignorance of the fact was reasonable. In my view, the Claimant's own case was that he was owed money on 10th November 2019, he waited until some ten months to bring the claim for unpaid wages. Given the manner in which payments are made, it is difficult to believe how the Claimant can not have understood the payment method of a week in hand at the time of the wages not being paid. If it was his case that the unpaid wages related to the last week of work, the situation may be somewhat different, but it is not. I consider that, in all of the circumstances, the ignorance of the fact that this was unpaid wages was not reasonable. Accordingly, I find that it was reasonably practicable to present the claim in three months and I therefore do not extend the time limit in respect of the claim for unpaid wages. The claim is struck out on the basis that the Tribunal lacks jurisdiction to consider the same.

Findings of Fact

27. In consideration of the issues, I heard oral evidence from the Claimant and Mr Wooldridge. Given the contents of Mr Howell's statement, it was agreed that it was unnecessary to hear from him in oral evidence. Whilst the contents of his statement is not accepted, the vast majority of his evidence goes towards matters that I will not be required to determine. For example, the difficulty encountered in obtaining references. Both parties were content with this approach.

28. The Claimant commenced working for the Respondent on either the 4th or 5th November 2019. There is a dispute between the parties as to the exact date but that does not appear to be relevant to the overarching principles to be determined. It is agreed that the Claimant worked as Site Supervisor

at 20 The Walk. It is agreed that the Claimant would be paid the daily rate of £140 per day.

29. On 11th November 2019, the Claimant provided his UTR number to the Respondent for the purpose of arranging the Construction Industry Scheme (CIS) arrangements for deductions to be made by the employer for subcontractors in the construction trade. The bundle shows that this information was passed to the Respondent's accountant on 12th November 2019. I have had sight of the CIS documentation to demonstrate that the deductions were made by the Respondent in accordance with the scheme. At page 54 of the bundle is a spreadsheet outlining the deductions made.

30. The Respondent asserts that the Claimant was not as experienced as he had led the Respondent to believe. There are also references in the Respondent's documentation to concerns regarding the difficulties encountered in obtaining references and concerns that the Claimant was somehow involved in the disappearance of some scrap metal at the site. These matters, in my view, do not directly go to the issues that must be determined save for that it is potentially relevant that I have not been provided with any documentation to show that the Claimant was subject to any formal disciplinary process.

31. Of some relevance is the allegation that the Claimant often lied about his location and was not onsite undertaking his subcontracted works. It is asserted by Thomas Wooldridge that the Claimant was being paid a daily rate to be on site managing the project. Mr Wooldridge accepted in his evidence that the Claimant would only be paid for work done and that he needed to be on sight 7:30pm to 4pm, five days per week.

32. It is agreed that the Claimant was paid a daily rate of £140. The spreadsheet at page 54 of the bundle demonstrates that the Claimant worked five days per week from the week ending 10th November 2019 to week ending 15th December 2019. He worked three days the following week and then did not work for the two weeks over the Christmas period. He was not paid for holidays or sick days.

33. The spreadsheet demonstrates that he was paid for five days per week from week ending 12th January 2020 to the commencement of the pandemic at week ending 22nd March 2020, save for one week ending 23rd February 2021 where he worked four days and was paid accordingly. The spreadsheet is a demonstration that the Claimant was only paid for time worked.

34. Between the commencement of lockdown in March 2020 to the week ending 24th May 2020, the Claimant did not receive payment and he did

not work. He received payment for two days work in the week ending 31st May 2020. The Respondent states the Claimant returned to work following the lockdown on 26th and 27th May 2020. The Respondent states that he only worked one and a half days but he was paid for two regardless. The Respondent states that he was late for work and did not attend site on the afternoon of 27th. The Respondent states that he was told that he would no longer be required on the project.

35. It is agreed by Mr Wooldridge in the course of cross examination that the Claimant would supervise employees. It was agreed that the Claimant was subject to a probationary period to consider the Claimant's conduct and competence. Mr Wooldridge accepted that if the probation period progressed well, the Claimant would have been offered a full time permanent position. It was agreed that the Claimant was required to undertake the work personally and that he was not entitled to send a substitute. It was accepted that, if the Claimant failed to attend work in accordance with expectations, he would not be paid. Mr Wooldridge accepts that he had overall managerial control of the site. He accepted that he would check on the Claimant for time keeping and attendance at the site. It was agreed that the Claimant did not have to provide invoices for the work undertaken and it was simply known whether he was on site or not and would be paid accordingly. It was agreed that the financial risk was upon the Respondent and not the Claimant – he would be paid regardless of whether the particular project ran a loss. Mr Wooldridge stated that the Claimant was free to work as he wished outside of the allotted hours but during those hours he needed to be managing the site. It was accepted that the Claimant would continue working for the Respondent until the end of his probationary period and that the continuance of the working relationship was not dependent upon the finish date for the project. It was accepted that the Claimant would wear the Respondent's logo and that he was provided with items such as laptop, printer and a diary.

36. I formed the very clear impression that the Wooldridge was a consistent and credible witness. He made concessions in cross-examination where appropriate and was, in my view, doing his best to assist the Tribunal in determining the Claimant's employment status. It was also clear to me that Mr Wooldridge, in hearing his evidence, was clear in his view and intention that at all times that the Claimant was to be self-employed. I do not doubt that Mr Wooldridge genuinely intended that the Claimant be categorised as self-employed and believed that to be the case throughout the course of the time that he undertook work for the Respondent. Mr Wooldridge was keen to point out the documents in the bundle that support his contention that the Claimant was self-employed.

37. On 14th July 2020, the Clamant emailed the Respondent to state that he was advised that there would be no further projects due to pandemic and was released on 28th May 2020 for this reason. He states that "it leaves me no alternative but to give you immediate notice due to the circumstances and hope you understand the need to support myself under these challenging times".

38. Mr Wooldridge responds by email to thank the Claimant for the "Self-employed Subcontracted works you have completed for Vencer Ltd". The email notes that the Claimant has never been employed, no notice was ever required, all payments due have been made and that there are an extensive number of days that you were away from your subcontractor works attending family matters and personal shopping trips – the Respondent states that they would not "contra-charge" for these. The Respondent also raises that numerous items have gone missing and, again, these have not been "contra-charged" but that "further legal action has been taken or local policing authorities have been informed to date".

39. In response, the Claimant states that "I thought out of courtesy and respect under the circumstances I would end my self-employment with Vencer in this way". He goes on to question the personal shopping trips and the allegations of criminal offences. In my view, the allegations of criminal behaviour are not matters that need to be determined.

40. In considering the date of the end of the working relationship, I have regard to the Respondent's oral and written evidence that the Claimant was informed on 27th May 2020 that his services would not be required. This is corroborated by the Claimant's email to state that he was released on the 28th May, albeit the date seems to be slightly incorrect. Those pieces of evidence are a strong indicator that the working relationship terminated on 27th May 2020 and that is the finding I make. The finding is supported by the fact that the Claimant did not undertake any work after that date and whilst purporting to resign in July, this is little more than a reaffirmation of the circumstances in May 2020.

41. The Respondent states that a payment was made towards mobile phone usage in the sum of £22.50 in November 2019. The Claimant invites the Tribunal to consider that regular contributions were made to his telephone bill. I was troubled by the Claimant's evidence on this issue. He had asserted in his statement that he was in regular receipt of telephone contributions. When taken to page 55 of the bundle, and asked to comment on the payments contained in bank statements, he struggled to articulate why it was the case that there only appeared to be one payment that related to telephone bills, as opposed to the regular payments he asserted in his statement. In response to my question, the Claimant was vague and evasive. I found the Claimant to give similarly evasive answers

to any question relating to the documentary evidence that, on the face of it, suggested that the Claimant was self-employed. He obfuscated when asked to explain why he had a UTR, why he part of CIS scheme and why he referred to himself being self-employed. Of particular concern to the Tribunal is his response to being asked about the unpaid wages claim. Whilst it has been struck out for being out of time, I allowed the Respondent to pose a question on the point as part of the Claimant's credibility. The document at page 56 of the bundle demonstrates a payment being made to the Claimant for week ending 11th November 2019, the very week that he claimed he was not paid for. In the face of this evidence, he was again vague and evasive. He sought to change the subject or paint a picture of confusion. I have considered both of the two pieces of documentary evidence as referred to in respect of both the telephone contributions and unpaid wages. I consider that they demonstrate that the Claimant is perfectly content to be flexible with his understanding of the case if that suits his position. I find that the Respondent made one payment to the telephone bill in accordance with the bank statement. I consider that the Claimant, in the face of the documentary evidence, and considering his vague and evasive oral evidence, was also under no illusion that at the start of his working relationship he was self-employed and indeed intended this to be the position– that is the only realistic conclusion to draw from the documentary evidence. I find that it was his intention to be self-employed and that was his understanding of the situation throughout the working relationship. I am supported in this view by the lack of holiday pay and sick pay, however, this is not the end of the matter as the Tribunal must look beyond the labels attached by the parties and look at all the circumstances of the case.

The Law

42. Section 230 of the Employment Rights Act 1996 defines an employee as follows:-

    Section 230(1) states "in this Act "employee" means an individual who has entered into or works under (or where the employment has ceased worked under) a contract of employment.

    Section 230(2) states that In this Act a contract of employment means a contract of service or apprenticeship, whether express or implied, and if it is express whether oral or in writing.

43. In **Ready Mixed Concrete vs Minister for Pensions and National insurance (HC) 1968** three questions were set out to be answered in defining a contract of employment.

(a) Did the worker undertake to provide his own work and skill in return for remuneration;
(b) Was there a sufficient degree of control to enable the worker fairly to be called an employee;
(c) Were there any other factors inconsistent with the existence of a contract of employment.

44. Following Ready Mix Concrete, the courts have established that there is an irreducible minimum without which it will be all but impossible for a contract of service to exist. This is widely recognised to entail control, personal performance and mutuality of obligation and control.

45. Section 230(3) of the Employment Rights Act 1996 ("ERA") defines a "worker" as:

"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."

46. All employees are workers. However, the second limb of the definition is much wider in scope and includes some people who are not nominally self-employed. Therefore, for an individual to lay claim to worker status, he or she must first show there is some form of contract or agreement with the employer. To be a worker an individual must do, perform personally, the work or services required under the contract. Again, to qualify as a worker the other party of the contract must not be a client or customer of any professional business undertaking carried on by an individual.

47. A worker is an intermediate class of protected worker made up of individuals who were not employed, but equally could not be regarded as carrying on business as self-employed.

48. The Tribunal reminds itself we are not bound by the label the parties attach to the relationship put on the agreement. The parties cannot, by agreement, fix the status of their relationship. This is an objective matter to be determined by an assessment of all the relevant facts, it is the totality of all of the evidence. What is the reality of the true picture? And if the

relationship is not actively reflected in those documents that purport to recite the relationship as self-employed then the Tribunal is entitled to interpret the relationship is that of a worker. One should also consider whether there is a disparity in the bargaining powers of the parties.

Conclusions

49. I conclude that the Claimant and Respondent entered a verbal contract for the Claimant to undertake the role of Site Manager. As part of the contract, the Claimant was to be paid for work done at a daily rate of £140 per day. As part of that contract, it was accepted by the Respondent that the Claimant was expected to undertake the task of Site Manager personally – Mr Wooldridge was clear in his evidence on this point. His evidence was candid in that he accepted that if the Claimant had simply delegated the task to an unknown individual the Respondent would not have been able to trust that the person undertaking the task was suitable. I am satisfied that the Respondent was able to exercise considerable control over the Claimant as per the evidence of Mr Wooldridge. He accepted that he would supervise and that, as director, he would be in a position to direct the Claimant to undertake tasks in a certain manner. I also have regard to the evidence that the Claimant was subject to a probationary period with a view to a permanent role. In my view, a probationary period would be highly unusual in a genuine relationship of self-employment. It was, in my view, an indicator of the relationship between the Claimant and Respondent. The Claimant was, realistically, bound to undertake work for the Respondent and the Respondent only and that was what happened throughout the working relationship. The Claimant was, to some extent, integrated within the business by the provision of a laptop, printer and diary. He also wore a uniform. In my view, the aforementioned points are clear indicators that the Claimant was a worker. It is accepted by the Respondent that the Claimant was not a client or customer, nor was he acted in the course of his own business.

50. The factors to the contrary, namely, that the Clamant was self-employed, are limited to the manner in which the parties describe the relationship and their intentions as I have found them to be. As I have found, there are multiple references to the Claimant being described as self-employed and this is reflected in the tax position. The Respondent even describes himself as self-employed in correspondence. But that is the extent of the indicators in support of the Respondent's position that the Claimant was self-employed.

51. I have no doubt that the Respondent has genuinely sought to enter a relationship with the Claimant as a self-employed contractor. The way in which Mr Wooldridge gave his evidence made it clear to me that what the company intended to do was to engage the Respondent as a

subcontractor and treat him fairly and properly as I have no doubt that they would treated any other contractor. But the reality is that the Respondent has been operating under the mistaken belief that the Claimant was self-employed when the evidence runs contrary to this. This is very much a case where the labels ascribed to the relationship do not accurately describe the picture on the ground. Whilst the Claimant has made the assessment difficult by giving vague evidence in respect of his understanding of the situation, this does not detract from the indicators that this was a relationship where the Claimant was a worker and that is the conclusion I make. I wish to emphasise that this is a conclusion I reach on the basis that I consider the Respondent genuinely believed that the Claimant was self-employed, that is an erroneous belief but it is not a belief that demonstrates any malice or ill-intent on their part. It is, in my conclusion, an innocent and genuine mistake by a start-up company finding their feet.

52. In light of the finding I made regarding the termination of employment in May 2020, I prefer the Respondent's calculation of the accrued holiday pay. I therefore conclude that the Respondent shall pay the Claimant for 12 days of accrued holiday pay, in the gross sum of £1680. The Claimant is responsible for income tax or NI that may be due in respect of the unpaid holiday pay.

Employment Judge G Duncan
Dated: 26th May 2021

JUDGMENT SENT TO THE PARTIES ON 27 MAY 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS