THE EMPLOYMENT TRIBUNALS

Claimant: **Mr D Jardine**

Respondent: **D.M & E.A McClurg**

Heard at: **Teesside Justice Hearing Centre** **On: 29 March 2021**

Before: **Employment Judge Newburn**

Members:

Representation:

Claimant: **In person**
Respondent: **Ms Riddell (HR Consultant)**

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent but was a worker for the purposes of section 230 ERA 1996.

2. The Claimant's claim for unfair dismissal, wrongful dismissal, and a redundancy payment are therefore struck out on the basis that the Tribunal does not have jurisdiction to hear them.

3. The Claimant's claim under regulation 30 Working Time Regulations/section 23 Employment Rights Act 1996 in respect of the Claimant's holiday pay is well founded and the Respondent is ordered to pay to the claimant the sum of **£113.36.** This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.

4. The Claimant's claim of unlawful deduction of wages in respect of the Respondent's failure to pay National Minimum Wage is well founded and succeeds. The Respondent is ordered to pay the Claimant the gross sum of **£56.80**. This is a gross award and the Claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.

5. The Claimant is awarded **£279.04** this being 2 weeks gross pay pursuant to Section 38 of the Employment Act 2002.

REASONS

1. The Claimant brings claims for holiday pay, unlawful deduction from wages, wrongful dismissal, unfair dismissal, and a redundancy payment.

2. The Respondent submitted that it considers the Claimant was not an employee but rather a self-employed contractor and dispute all the claims made save as for the unlawful deductions relating to the period 1 April 2020 to the termination of employment.

3. The immediate issue in this matter was that of the Claimant's employment status. The Claimant asserts that he was an employee, and the Respondent states that he was self-employed. I informed the parties that there is a third possibility of worker and explained that the true status of an employment relationship is fact specific to the case.

4. If the Claimant were not found to be an employee his claims for unfair dismissal, wrongful dismissal, and a redundancy payment would not succeed. If he were however found to be a worker he would still have claims in respect of holiday pay and unlawful deduction from wages.

The Issues

5. <u>Employment status</u>

   5.1. Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

   5.2. Was the Claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010?

   5.3. Was the Claimant a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

6. If the Claimant was found to be an employee, I would consider:

7. <u>Wrongful dismissal / Notice pay</u>

   7.1. What was the Claimant's notice period?

   7.2. Was the Claimant paid for that notice period?

8. <u>Unfair dismissal</u>

   8.1. Was the Claimant dismissed?

   8.2. What was the reason or principal reason for dismissal? Was it a potentially fair reason?

8.2.1. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

9. If the Claimant was found to be worker or an employee, I would consider:

10. Holiday Pay

10.1. When the Claimant's work at the Respondent came to an end, was he paid all the compensation he was entitled to in relation to holiday pay?

11. Unlawful Deduction from wages

11.1. Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted?

Evidence

12. The matter had originally been set to heard by video hearing however a hearing in this case had been listed to be heard by Cloud Video Platform. The Claimant was struggling with the video hearing process and expressed a preference to for an in-person hearing. The Claimant has a speech impairment. The matter was re-listed for an in-person hearing and came before me. The Claimant represented himself at this hearing and handled both giving his own evidence and cross examining the Respondent well.

13. Ms Riddell, the Respondent's HR Consultant appeared on behalf of the Respondent and called evidence from Mrs A McClurg, the Respondent and one of the owners of the Respondent farm busines, and Mr A McClurg the Respondent's son who works at the Respondent's farm.

14. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and I had read the same prior to hearing oral evidence. I was also provided with a joint bundle of documents consisting of 64 pages plus 3 appendices plus a bundle of documents totalling 14 pages relating to remedy. All references to page numbers within the body of this judgment are references to pages in the bundles provided unless otherwise stated.

Findings of Fact

15. On nearly every incident relevant to the issues in this matter the parties' evidence was in direct conflict and there was little by the way of documentary evidence to support either claim. Where this was the case, I had regard to all the evidence, both oral and documentary, and in considering the submissions of the parties, I made the following findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard but is based on the salient parts of the evidence upon which I based my decision.

Start of the working relationship

16. The Respondent operated a family run farm for over 46 years. Mr M McClurg and Mrs A McClurg are in their seventies and their son Mr A McClurg has taken on a more managerial role in the farm over the last 6 years.

17. The Claimant previously worked for around 4 or 5 years with the Respondent's son, Mr J McClurg in his scaffolding business and there was one wage slip from McClurg Scaffolding dated February 2008 in the bundle demonstrating the Claimant worked 15 hours that week.

18. In September 2011, the Claimant left McClurg Scaffolding, at page 58 of the bundle appears a letter from Mr J McClurg stating the Claimant left the company because the Child Support Agency (CSA) contacted Mr McClurg's accountant with an attachment of earnings order, and the Claimant wished to avoid having to make Child Support payments at the time.

19. The Claimant gave oral evidence regarding his dispute with the CSA. He stated this was an issue that had lasted 14 years as he had refused to pay child support on the basis that he believed one of the children for which his ex-partner was claiming payments was not his child.

20. The Claimant denied that he left Mr J McClurg's scaffolding company further to its accountant receiving an attachment of earnings order from the CSA. However, he gave conflicting evidence as to the reason he says he stopped. In his witness evidence he wrote that the contract "*ended due to insufficient work available*". In his oral evidence he confirmed that Mr McClurg's scaffolding business was going well and so he "*was not needed any way*".

21. In oral evidence the Claimant stated the reason he left the scaffolding company was because he wanted to work on the farm as he had completed a college course in animal husbandry, and this was his passion. He stated that he previously worked on the Respondent's farm and only left for the 4 or 5 years to work with Mr J McClurg on scaffolding because Mr J McClurg had asked him and needed help.

22. The Claimant's evidence was that he informed Mr J McClurg he wanted to return to the farm then spoke with Mr and Mrs McClurg regarding work on the farm and they told him they would offer him 16 hours per week on National Minimum Wage (NMW) with potential overtime if available throughout the season.

23. The Claimant gave oral evidence that he would have taken a full-time job if the Respondent had offered that as he would have wanted to earn more money. However, his oral evidence was contradictory in and of itself and it did not accord with this witness statement. The Claimant confirmed that throughout his 9 years with the Respondent, he never looked for alternative employment offering greater hours or increased pay and he did not provide any evidence suggesting that he had requested additional hours or sought to renegotiate his weekly hours or pay with the Respondent despite his suggestion that he did want to earn more money. In cross examination he stated that he had not wanted any additional hours as he was in receipt of benefits.

24. The Respondent's evidence was that the Claimant approached Mr & Mrs McClurg requesting that he worked on a self-employed basis at 16 hours per week on NMW, as this would enable him to limit or avoid Child Support payments.

25. The Claimant would sometimes work overtime. The Respondent stated that, and he requested that all his overtime was paid via cheque or cash and not into his NatWest account by direct debit like his usual wages. The Respondent highlighted that it would have been easier to make payment by direct debit, and that businesses are charged for writing cheques.

26. Upon receipt of the cash or cheque for overtime, the Claimant confirmed he placed the money into a separate Halifax account. The Respondent submitted the Claimant was using this Halifax account to hide any additional hours worked or sums earned, so that his benefits would not be disturbed and/or to limit/avoid CSA payments.

27. In oral evidence the Claimant stated that the CSA had caught up with him in 2020 and he had started to make repayments of his arrears prior to the March 2020. He confirmed that the CSA based his repayments on his NatWest bank statements and he also stated that he was in receipt of benefits and did not want to work additional hours as they topped up his pay, although he suggested the benefits reduced over time.

28. The Claimant suggested in oral evidence that he paid his overtime into his Halifax account because this was a savings account however the Halifax bank statements in the bundle demonstrated that the Halifax account was not a savings account and was being used as a current account.

29. On the balance of probabilities, I preferred the Respondent's evidence regarding the beginning of the parties' working relationship. The Claimant contradicted himself in his own evidence as to the reason for leaving the scaffolding business and in his own oral evidence regarding his dispute with the CSA, he confirmed that he had been avoiding Child Support for at least one child that his ex-partner claimed to be his. The CSA dispute had clearly been an issue that had caused the Claimant much concern for many years, he highlighted that ultimately it transpired he had been correct about one of the children. The Claimant was therefore motivated to avoid the CSA and confirmed in oral evidence he had in fact been avoiding making CSA payments.

30. I therefore found that the Claimant did approach the Respondent requesting that he carry out work at 16 hours per week on NMW on the basis that he was not placed onto a PAYE system as he wished to avoid or limit his CSA.

<u>Control of working hours</u>

31. The Claimant stated that he worked 8 hours on Mondays and Tuesdays. However, in his Schedule of Loss he stated that he worked 3 days a week. In his oral evidence he stated that he split 16 hours across Monday, Tuesday and Wednesday. He then stated that he was required to work on Thursdays and could not miss a Thursday as this was market day and had never missed a Thursday in his 9 years with the Respondent. He stated that he would arrive at work on Monday and be told what hours he would be working that week and therefore suggested the Respondent had control over his working times and days.

32. However, the Claimant's oral evidence however suggested that he did have a degree of a control over the hours he worked; he confirmed he would be able to change one day for another, for example he stated he could do this if he had been unable to attend work on a

specific day, and he also stated that he was able to adapt his schedule around holidays which he claimed meant he had never taken a holiday.

33. The Respondent confirmed that all people who carried out work on the farm did so on a self-employed basis and Mr A McClurg, the son of the Respondents gave evidence that this was even the case for himself. He confirmed the other people working on the farm were all paid in excess of NMW, a fact which the Claimant echoed in his evidence.

34. The Respondent stated that the Claimant chose the hours he worked and made it clear that he would not work at times other than those he proposed.

35. It was the common evidence of both parties that the Claimant did not usually work weekends. The Respondent confirmed work was still required on a farm over the weekends.

36. The Respondent stated that it was required to engage other people to carry out work when the Claimant refused to do so, either because he would not want to carry out the specified hours or the specific work involved. Given that the other people all charged a higher rate than NMW, it would have been beneficial for the Respondent if the Claimant had agreed to work additional hours at NMW.

37. The parties agreed that the Claimant used his own agricultural diary (agri-diary), to note his hours of work which he submitted to the Respondent. The Respondent then made payment to the Claimant in accordance with the hours he had noted. When the Claimant was unable to submit his agri-diary in person, due to the lockdown restrictions, he informed them orally that he had worked 100 hours overtime in the period before 29 March 2020 for which they paid him on 29 April 2020. The Claimant did not suggest or provide evidence that the Respondent had ever questioned the entries in his agri-dairies.

38. The Claimant suggested the Respondent did not rely on his diary but kept its own note of his hours thus indicating that the Respondent was informed and in control of his working times. However, I rejected this inference and found on balance, the Respondent's evidence was a more accurate reflection of the reality that the Claimant had control of his own hours and he informed the Respondent what hours he had carried out. The evidence does not support the idea that the Respondent was monitoring the Claimant's hours and logically this would render the exercise of reviewing the Claimant's agri-diary a waste of time.

39. I preferred the Respondent's evidence regarding the Claimant's control and choice of working hours. The Claimant's evidence was not consistent as to the times he worked and control he had over his working times. His own evidence suggests he had a degree of control over when he worked. It would have been cheaper for the Respondent to have the Claimant work additional hours rather than make payment to engage other workers at a higher cost, and it was common evidence from both parties that the Claimant usually did not work weekends, despite the fact that work was still required on a farm over the weekends.

Contract

40. There was no contract between the parties setting out any terms agreed between them regarding the working relationship provided in the bundle.

41. The Claimant asserted that a contract did exist as Mrs McClurg had approached him at some point whilst he was working in the corn field and asked that he sign something which she told him was his basic employment contract for 16 hours as they had discussed. The Claimant could not provide any further details as to when this happened, he did not have a copy of the document, and suggested he had never requested a copy of the same. The Respondent's evidence was that this simply did not happen, and that it would be incredibly unlikely that Mrs McClurg would ever ask someone to sign a document while they were in the field working.

42. I prefer the Respondent's evidence on this point. I found that the Respondent believed that the Claimant did not wish to be an employee and would not have asked him to sign an employment contract. The Claimant could not give any clear information regarding the date or times that this event occurred or who else was with him when this occurred and as such his evidence was less clear; Mrs McClurg however was confident that she would not have approached the Claimant in the middle of his work in the field which on the balance of probabilities I find more likely.

Holidays and sickness

43. The Respondent paid the Claimant for 16 hours directly into his NatWest account by standing order every week. The Respondent stated this happened even when the Claimant had taken holidays and when he had been sick. As an example, the Respondent confirmed that each year the farm operated a 2-week shutdown over Christmas during which time, as there was minimal work to be done, the immediate family would carry out anything necessary, and silos would be put out to feed the livestock. Appendix 2 in the bundle showed weekly payments that were made by the Respondent to the Claimant every week of the year in an amount that appeared to correspond to 16 hours at the relevant NMW for the period from 23 September 2011 to 5 May 2020 including each Christmas period. The Respondent also stated that the farm usually operated a 3-week shutdown in the first three weeks of May during which time there was very little work to be done, and similar to the Christmas period, silos were filled to feed livestock, and the family would take stagger their holidays so that one member would be available to carry out any necessary works. Again, the Respondent relied on the document at Appendix to 2 show the Claimant received payment for every week in May.

44. The Respondent stated that the Claimant had been sick during his time with them and had not attended the farm as a result of this and that he had also taken holiday and relied on Appendix 2 as a demonstration that the Claimant received a weekly standing order for `6 hours work. The Respondent also directed me to a Facebook page from 19 November 2019 in the bundle which showed the Claimant was on holiday in Amsterdam, and the corresponding week in Appendix 2 which showed the Claimant received a weekly wage for this week. The Respondent confirmed that the reason holidays and sick days were paid to the Claimant was because they were kind, relying on the parties' close relationship to support this.

45. The Claimant asserted there had never been a 2-week Christmas shutdown or 3-week May shutdown period, that he had never been sick or taken holiday in his 9 years with the Respondent, and that he would be able to schedule his working times to suit holidays or work around sickness.

46. I preferred the Respondent's evidence as it was supported by the documentary evidence in the bundle. It was less likely that that the Claimant did not have any sick days in 9 years, and it was clear that he had in fact taken at least one holiday during time where he would be working.

47. The Claimant was paid a standing order of 16 hours at NMW each week by the Respondent, and that this was paid during times he was on holiday or sick. I accept this would have covered a 2-week Christmas shutdown period during which minimal duties on the farm were automated where possible or carried out by immediate family where necessary.

Control of work

48. The Claimant stated that he would arrive at work and was told what needed to be carried out. He did not suggest that the Respondent oversaw his work however I do not think this was indicative of a lack of control by the Respondent but because the tasks did not require monitoring by the Respondent.

49. The Respondent gave evidence that there were tasks the Claimant did not enjoy doing such as fencing and ploughing and refused to do; as a result, the Respondent did not force the Claimant to carry them out. Consequently, the Respondent stated other people charging more than NMW would be engaged to carry out that work which was obviously less economical. The Claimant asked the Respondent why they did not force him to carry out those tasks. Mr A McClurg confirmed that the Respondent could not force the Claimant to carry them out, previously the Respondent had requested that the Claimant undertake the tasks and he refused.

50. When asked if the Claimant had ever made a mistake, Mr A McClurg was slow to find an example however he stated that the Claimant had once injected the wrong animal, and he had fed a dead sheep. I asked how he had dealt with this and he said he indicated he had told the Claimant it had happened.

51. The Claimant denied these instances occurred.

52. Overall, it was clear that Claimant had never received any sort of disciplinary by the Respondent, although it seemed likely that this was because the Claimant had not done anything to warrant such action.

53. It was clear that neither of the parties had addressed the question as to whether it would have been possible for the Claimant to send a substitute to carry out his work on his behalf. I asked the Claimant if he felt hypothetically this would have been permitted, however he was not able to answer the question. In reality, I suspect due to the close family relationship this would not have been readily accepted without the family having a degree of control over such substitute. Furthermore, practically I imagine if another person was willing to carry out work at NMW, the Respondent would likely have engaged their services directly.

54. There was a suggestion from the Claimant's evidence that he felt he would face criticism if for example he did not turn up to work due to illness as he believed he would be reprimanded. He intimated that it was necessary for him to work on a Thursday as this was market day and as a result, he never missed a Thursday at work, as this would result in him being shouted at.

55. The Respondent denied this and stated the Claimant had taken sick days and was paid for them. Mr A McClurg stated he was confused as to why the Claimant would suggest he had to work Thursdays as this was untrue, and the Claimant was not needed to attend the market in any event.

56. I make no finding of fact on this conflict save that I accepted that there was an element of feeling from the Claimant that he did not want to let the Respondent down and felt this would result in him being shouted at. However, it was not clear whether this was because he had a close relationship with the Respondent family or whether this was borne in any way out of a fear that this would affect his working relationship.

Working for others

57. The Respondent submitted that the Claimant was a self-employed contractor and throughout his time working with them he was free to, and did, provide services to other people. Amongst those included Mrs Hedley, as well as work for another dairy farm in the region. The Claimant was never prevented from doing this and the Respondent was aware of this other work.

58. The Respondent submitted that the Claimant was paid for the work he carried out for others by those people and that work did not relate to his work on their farm. At page 42 of the bundle was a letter from Mrs Hedley supporting the Respondent's position which stated that the Claimant worked for on a causal basis for approximately 10 years and "*was usually required from April to September for approximately 2 days per month (about 16 hrs)*" for which he charged her NMW. Mr A McClurg stated in his oral evidence that he believed this was the agreement between the Claimant and Mrs Hedley and that the Respondent did not make payment to the Claimant for works he carried out at her property as this was not the Respondent's business. Mrs Hedley did not provide a witness statement and did not give evidence at the hearing. As her evidence could not be cross-examined, I attached limited weight to her letter.

59. The Claimant stated any work he carried out for others was further to a direct instruction from the Respondent which formed part of his 16 hours work for the Respondent.

60. The Claimant stated that the Mrs Hedley would often contact him directly to ask that he carried out work for her. He asserted that he would always refer her to the Respondent to seek their agreement as to whether they were happy for him to substitute some of his 16 hours with them to go to and work with her.

61. The Claimant stated that he had not worked for Mrs Hedley for 10 years as he only knew her through the Respondent because she was a relative of the McClurg family. However, the Claimant had stated that he had known he Respondent family for over 20 years and had worked for them before he started working with Mr J McClurg, which was in or around 2006/2007.

62. The Claimant's evidence was that he was always paid by the Respondent for any work he carried out for others. In his oral evidence he said he had never been paid by Mrs Hedley other than maybe £5-£10 for fuel. However, the Claimant reported of at least one occasion where he was paid by a Mr Ripley in cash for the work he carried out at Mr Ripley's farm.

63. I prefer the evidence of the Respondent and I find that the Claimant was providing services to others for which he received pay directly from them and not the Respondent, and that this did not reduce the time he spent working for the Respondent. I preferred the Respondent's evidence on this point because they were consistent in questioning, whereas the Claimant admitted in evidence that he carried out work at another farm and was paid in cash by the farm owner on at least one occasion. Furthermore, he accepted that he had a relationship with Mrs Hedley whereby she would personally contact him regarding work which accorded more with the evidence that he arranged his work with her directly and independently of the Respondent.

64. Throughout the course of the oral evidence the Respondent accepted that it had not increased the Claimant's rate of pay in April 2020 in line with the change in National Minimum Wage and confirmed they agreed to pay him for any shortfall.

Relevant Law

65. Employment status:.

66. Section 203 of the Employment Rights Act 1996 provides: -

> *"(1) In this Act "employee" means an individual who has entered into or works under a contract of employment.*
>
> *(2) In this Act a "contract of employment" means a contract of service or apprenticeship, whether express or implied and, (if it is expressed) whether oral or in writing."*

67. The classic description of a contract of employment is set out in the judgment of McKenna J in Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 10 ER 433, QBD in which he stated:-

> *67.1.* "*A contract of service exists if three conditions are fulfilled.*
>
> *i. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own working skill in the performance of some service for his master.*
> *ii. He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control to a sufficient degree to make that other master.*
>
> iii. *The other provisions of the contract are consistent with its being a contract of service… Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be*."

68. The Supreme Court underlined the continuing relevance of this passage in Autoclenz Ltd v Belcher and Others [2011] ICR 1157, SC, where Lord Clark referred to it as the "*classic description of a contract of employment*".

69. Following Ready Mixed Concrete the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of employment to exist and it is now widely recognised that this entails three elements:

    • Control

    • Personal Performance

    • Mutuality of obligation and control

70. The requirement for control will not be met merely because the putative employer can terminate the contract, something more is required. It is necessary to demonstrate that the employer can, under the contract of employment, direct the employee in what he did (Wright v Aegis Defence Services (BVI) Ltd and ors EAT 0173/17). That is distinct from showing that the employer controls the way that the employee does the work. Even a complete absence of day-to-day control is irrelevant if ultimately the employer retains the contractual power to direct what work should be done (White and Anor v Troutbeck SA 2013 IRLR 949, CA.)

71. In Carmichael v National Power plc 2000 IRLR 43 the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

72. Worker

73. 'Worker' status on the other hand reflects the fact that some individuals, while not enjoying the range of protections afforded to full-blown employees are nevertheless entitled to certain protections.

74. A worker is defined under section 230(3) of the Employment Rights Act 1996 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''

75. Following Windle v Secretary of State for Justice [2016] EWCA Civ 459), it is now established that the necessary elements required to establish 'worker status' in terms of section 230(3) are that:

    i. There must be a contract between the worker and the putative employer;

    ii. The contract must require personal service;

iii. The other party to the contract must not be the customer or client of any business undertaking or profession carried on by the individual;

iv. There must be mutuality of obligation between the parties.

76. The putative worker needs to show that that contract requires them to provide 'personally any work or services'. In common with employment status worker status will not be defeated by some limited right to delegate see Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51. The fact that there was no delegation in practice does not determine the question of whether there is a contractual obligation to perform services personally Redrow Homes (Yorkshire) Ltd v Wright 2004 ICR 1126, CA

77. Where the express terms of an agreement for services are silent as to who might perform the services whether a term that the services will be performed personally can be implied will depend on the context and all of the surrounding circumstances. It may simply be a matter of common sense that that is what the parties would have agreed had it been expressly mentioned - Byrne Brothers (Formwork) Ltd v Baird and others 2002 [ICR] 667

78. Redundancy payment

79. Section 135 of the Employment Rights Act 1996 states that an employer shall pay a redundancy payment to an employee if the employee is dismissed by reason of redundancy.

80. Unlawful deductions:

81. Section 1 of the National Minimum Wage Act 1998, confirms that a worker is entitled to be paid at a rate not less than the NMW.

82. Section 2 of that Act states that a person qualifies for the minimum wage where they are a worker.

83. A claim for failure to pay the NMW is a claim for unlawful deductions of a wage under section 13 of the Employment Rights Act 1996.

84. Section 17(4) of the National Minimum Wage Act 1998 Act states that where the employer has failed to pay the worker the relevant rate for each hour worked, the Tribunal is required to base the calculation upon the national minimum/living wage rate that applies at the date of calculation, even if the minimum wage rate was lower when the deduction took place.

85. Holiday pay

86. The Working Time Regulations 1998 confirm:

86.1. Reg 13 provides that a worker is entitled to 4 weeks' leave ("basic leave").

86.2. Reg 13A provides that a worker is entitled to an additional 1.6 weeks' leave ("additional leave").

86.3. Reg 13(3)(b)(ii) provides that, where there is no express provision within an agreement as to the start date of the leave year, the leave year is deemed to start

on the date on which the Claimant's employment started, and on each anniversary thereafter.

86.4. Reg 14 provides that a worker is entitled to be paid for holiday leave accrued but untaken at the time of termination of his employment.

86.5. Reg 16 entitles a worker to payment in respect of periods of leave. A worker is entitled to be paid in respect of any period of annual leave to which they are entitled under reg 13 and reg 13A (basic and additional leave), at the rate of a week's pay in respect of each week of leave.

87. European case law recognises that when a worker is unable to take leave during the leave year in question, it may be carried forward, for a limited period, so as to preserve the health and safety benefits, see Stringer & Others v Revenue and Customs Commissioners [2009] ICR 932 and Pereda v Madrid Movilidad SA [2009] ICR959.

88. In King v The Sash Windows Workshop Limited & Another [2018] ICR 693 ECJ, the employer wrongly thought that Mr King was self employed and so not entitled to paid holiday. Mr King therefore took limited unpaid holiday. He was subsequently found as a matter of law, to have been employed and he therefore claimed his accrued due but untaken holiday pay. The European Court found that because he had been unable to take his leave, (he was prevented from taking it because he thought he would not be paid for it) he was permitted to carry it over, for an unlimited period.

89. Failure to provide written particulars of employment:

90. Section 38 of the Employment Act 2002 provides that where the Tribunal finds in favour of an employee in any claim listed in Schedule 5 of that Act, and the employer has not complied with section 1 of the Employment Rights Act 1996 and provided the employee with written particulars of employment, the Tribunal shall make an award to the employee of a minimum of two weeks' pay and if just and equitable, four weeks' pay

Conclusions

91. As a starting note, I am satisfied that the Claimant did not want to be considered an employee for the purposes of avoiding or limiting CSA and it was on this basis he approached the Respondent offering to work for 16 hours each week at NMW.

92. I find that the Respondent accepted this and, as the other people who carried out work on the farm were all self-employed, considered that was the only alternative to not being an employee. The Respondent therefore considered that this constituted the legal arrangement between the parties. I do not believe that either party had in mind the legal classification of the Claimant's status by reference to the actual terms under which he worked.

93. In the absence of any written agreement, I needed to consider the reality of the arrangements between the parties based on the evidence that I had heard.

Control

94. The first question is the issue of whether the Respondent had sufficient control that this could be a relationship of master and servant.

95. The relationship between the parties had been close and there was almost a family loyalty between them which had developed over the years. They appeared to have developed a pattern of working together which made it difficult to determine where there was any overt element of control by the Respondent or where the parties were compromising and cooperating due to their friendship in ways that clouded that level of control.

96. It was clear however that the Respondent was not able to exert a level of control over the Claimant that would be expected in an employee/employer relationship.

97. The Respondent had wanted the Claimant to work additional hours and during the weekends, but the Claimant refused to do this.

98. The Claimant had flexibility over the days he chose to work and was able to substitute days/shifts for other days/shifts if he wished to suit his own schedule. He was able to refuse to work weekends or any hours in addition to the 16 he worked weekly.

99. The Claimant was in control of his overtime and kept a note of those hours in his agri-diary which he submitted to the Respondent to receive payment.

100. The Respondent did inform the Claimant of the tasks that needed to be carried out when he arrived at work. However, there were tasks that the Claimant did not enjoy, and consequently did not do. The Respondent was not able to force the Claimant to carry them out.

101. As a result, there was not sufficient control to make the relationship one of employer and employee.

Personal service

102. I considered whether the Claimant agreed to provide his services personally.

103. The reality of the situation was that this was probably not practically possible in the parties' circumstances. Hypothetically I suspect it would not have been acceptable for the Claimant to simply send another person to carry out his work. The parties had a close relationship, and the Respondent ran a family farm and would not have been likely to agree to have a substitute work in the Claimant's place without them having a good degree of control over who that person would be.

104. I find that the Claimant was required to carry out his works personally.

Mutuality of obligation

105. I considered whether there was an "irreducible minimum" of mutual obligation necessary to create a contract of employment.

106. The Respondent was required to offer the Claimant 16 hours a week work at NMW, and I find that the Claimant was obliged to work 16 hours in a week at NMW.

107. As such there clearly was a mutuality of obligation between the parties.

Employee/worker/self-employed?

108. Having regard to the above, the Respondent did not have a sufficient level of control over the Claimant and as such, I conclude that the Claimant as not an employee.

109. However, the relationship did not suggest there was a contract for services and the Claimant was not a self-employed contractor.

110. The Claimant's involvement with the Respondent were closer than that - there was elements of mutuality of obligation and personal service.

111. I therefore conclude that he satisfies the definition of worker.

112. That being the case he does not qualify to bring a claim of unfair dismissal, wrongful dismissal, or a redundancy payment and those claims are struck out.

113. As a worker however the Claimant is still able to bring a claim for holiday pay and unlawful deduction from wages.

Unlawful deduction from wages

114. The Respondent accepted that it had not increased the Claimant's rate of pay in April 2020 in line with the change in National Minimum Wage.

115. In accordance with section 17(4) of the National Minimum Wage Act 1998 Act the current national minimum wage must be used to calculate the sum due.

116. One 16 hour week at the current NMW rate of £8.91 would amount to £142.46. The Claimant was paid £131.20 from 1 April 2020 for the remaining 5 weeks of his contract, this being £11.36 less each week.

117. As such, the Respondent underpaid the Claimant by **£56.80.**

Holiday pay

118. As a worker, the Claimant had a right to annual leave under the WTR 1998.

119. The Claimant asserted he had been informed he was not entitled to pay for periods of annual leave and seeks to claim for his holiday for the entire period he worked with the Respondent. Essentially the Claimant seeks to rely on the ECJ case of King v The Sash Windows Workshop Limited & Another [2018] ICR 693 ECJ,

120. However, I did not accept that the Respondent had prevented the Claimant taking annual leave. The Claimant did take annual leave and enforced shutdown periods and the Respondent made payment to the Claimant for those periods.

121. The claimant is however entitled to annual leave accrued but untaken on termination under Regulation 14.

122. There was no set holiday year assigned for the Claimant as such in accordance with Reg 13(3)(b)(ii) of the Working Time Regulation 1998 the holiday year runs from the anniversary of the Claimant's start date. As this was in September 2011, the Claimant's holiday year ran from 1 September 2019 to 31 August 2020.

123. The Claimant works 16 hours per week and is entitled to 5.6 weeks holiday in a full holiday year which equates to 89.6 hours.

124. The Claimant's employment ended on 5 May 2020, which was 35.4 weeks into the holiday year.

125. Accordingly, the Claimant would be entitled to 35.4/52 x 89.6 = 61 hours.

126. However, in this period the Claimant had taken 1 week off in November 2019 to go to Amsterdam, a further 2 weeks off over the Christmas period during the Christmas shutdown.

127. Accordingly, the Claimant had taken 48 hours annual leave and is therefore entitled to 13 hours at a rate of £8.72. This being £8.72 x 13 = **£113.36**.

Breach of S.38 of the Employment Act 2002

128. As the Respondent had failed to provide the Claimant with a written statement setting out the main particulars of his employment. I am required to make an award of 2 weeks' pay. This can be increased to 4 weeks' pay if it is considered just an equitable to do so however, I do not believe that it is in the circumstances of this case.

129. I find the Respondent had believed that as the Claimant had stated he did not wish to be an employee on PAYE, they considered him to be a self-employed and accordingly did not believe a written statement in accordance with S.1 of the Employment Rights Act 1996 would have been required.

130. The claimant is therefore awarded 2 weeks pay which amounts £8.72 x 16 x 2 = **£179.04**

Summary

1. The Claimant's claims for unfair dismissal, wrongful dismissal, and redundancy payment are struck out.

2. The Respondent shall pay to the Claimant:

    2.1. Holiday pay in the gross sum of **£113.36**;

    2.2. Pay in respect of unauthorised deduction of wages in the sum of **£56.80**; and,

    2.3. Pay in respect of Section 38 of the Employment Act 2002 in the sum of **£279.04**.

The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply to these awards.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 May 2021