EMPLOYMENT TRIBUNALS

Claimant: (1) Mrs M Dixon
(2) Mr J L Dixon

Respondent: Autotransportation Ltd

Heard at: Newcastle (CVP) **On: 23 July 2021**

Before: Employment Tribunal Judge A.M.S. Green

Representation
Claimants: In person
Respondent: Mr S Bleasdale – managing director of the respondent

REASONS

Introduction

1. The respondent has requested written reasons in respect of the judgment dated 23 July 2021.

2. For ease of reading, I refer to the second claimant as Mr Dixon, the first claimant as Mrs Dixon and the respondent as Autotransportation.

3. Mr and Mrs Dixon and Mr S Bleasdale gave oral evidence. We worked from a digital bundle.

4. In reaching my decision, I have considered the oral and documentary evidence. The fact that I have not referred to every document produced should not be taken to mean that I have not considered it.

Mr Dixon's claims

5. Mr Dixon presented his claim form to the Tribunal on 14 May 2021 after a period of early conciliation which commenced on 1 April 2021 and ended 4 May 2021. He says that he was dismissed on 19 February 2021. He is claiming a statutory redundancy payment, holiday pay unlawful deduction from wages in respect of furlough payments. He is claiming 6 days holiday for the leave year ended 31 December 2020 and accrued but untaken holiday for the leave year

commencing on 1 January 2021.

Mrs Dixon's claims

6. Mrs Dixon presented her claim form to the Tribunal on 14 May 2021 after a period of early conciliation which commenced on 1 April 2021 and ended on 5 May 2021. She is claiming holiday pay. She is claiming payment for 21 days accrued but untaken holiday for the leave year ended 31 December 2020.

Autotransportation's response

7. Regarding Mr Dixon's claim, Autotransportation says that he is not entitled to a statutory redundancy payment because his employment commenced on 14 January 2019, and he did not have the requisite two years continuous service to qualify for a redundancy payment. Autotransportation denies that it is liable to pay Mr Dixon accrued but untaken holiday pay for the year ended 31 December 2020 because he took his full allocation.

8. Regarding Mrs Dixon's claim, Autotransportation says that she took her full allocation of holiday in the leave year ended 31 December 2020. Consequently, no payment is due to her.

The issues

9. The issues I must determine is whether Mr Dixon is entitled to a statutory redundancy payment, accrued but untaken holiday pay. Regarding compensation to make up the difference between in respect of furlough payments and what he should have been paid, this has been resolved by the parties. His claim for holiday pay is in respect of two holiday years (i.e. the year ended 31 December 2020 and the year commencing 1 January 2021. In respect of his holiday pay claim for the year ended 31 December 2020 is he entitled to carry over unused holiday and be paid for that on termination of his employment? This proceeds from the principle of "use it or loose it".

10. The issue that I must determine in respect of the Mrs Dixon's claim is whether she is entitled to holiday pay.

Findings of fact in Mr Dixon's claim

11. Having considered the evidence, I make the following findings of fact in respect of the Mr Dixon's claim.

12. Mr Dixon was approached by Autotransportation to do driving work. This involved collecting and delivering vehicles. He started working for them on 8 November 2018. He had a contract of employment which stated that his employment started on 14 January 2019. He was given this and signed it on 11 February 2020. His contract provided for him to work up to 30 hours per week. Initially he worked part-time but then moved to full-time work. In reality he worked a 50-hour week.

13. There was disputed evidence about Mr Dixon's employment status between 8 November 2018 and 14 January 2018. Mr Bleasdale, the managing

director of Autotransportation, said in his evidence that Mr Dixon was initially retained on a self-employed basis and subsequently became an employee. He said that filled out a time sheet and was paid in respect of the hours claimed. He also said that income tax and national insurance was not deducted from his pay. He said that under the arrangement, Mr Dixon would be contacted and asked if he could work on an ad hoc basis. Mr Dixon never said that he could not do the work. He did not wear a uniform. Mr Bleasdale told me Mr Dixon could not send someone else to do the work. Mr Dixon told me that he always understood that he had been an employee from the outset. I prefer Mr Dixon's evidence for the following reasons.

a. Mr Dixon did not have the option of doing the work or not doing it. He would be called and told what was required the following day and he did the work allocated to him. There was no suggestion that he had the option to nominate someone else to do the work and, in reality, he never sent someone else in his place. He said this was a consistent practice throughout his time at Autotransport until he was put on furlough when the Covid lockdown was introduced in March 2020. I have no reason to disbelieve him.

b. From the outset, Mr Dixon's wages were paid into his bank account after deduction of tax and national insurance. His earnings varied as per the bank statements that he produced to the Tribunal. He was separately paid for expenses. His gross weekly pay, as of 8 January 2021 was £500. His net weekly pay was £440.

c. The fact that his contract of employment had a commencement date of 14 January 2019 does not necessarily mean that Mr Dixon was not an employee prior to that date. I believe that the contract was issued to regularise a pre-existing arrangement.

14. Mr Dixon was put on furlough on 23 March 2020. This continued with limited exceptions until his employment was terminated with effect on 8 January 2021.

15. Over the Christmas of 2020, Mr Bleasdale held a board meeting. It was decided that eight employees should be made redundant. He told the Tribunal that Mr Dixon's position would be redundant with effect on 8 January 2021. At that point Mr Dixon had acquired more than two years' continuous service.

16. On 5 January 2021, Mr Bleasdale wrote to Mr Dixon confirming a telephone conversation that took place on 3 January 2021 and confirmed that Mr Dixon had been selected for redundancy. The letter stated that his last day would be on 8 January 2021. In his oral evidence, Mr Dixon told the Tribunal that Mr Bleasdale's son Stephen had called him on 3 January 2021 to say that because of the furlough, Autotransportation would have to let him and Mrs Dixon go. He also referred to Stephen Bleasdale building his own house and offering Mr Dixon a few weeks work on the construction site. He said that he would be kept on furlough whilst working for Stephen Bleasdale and would be paid by Autotransportation.

17. During the calendar year 2020, Mr Dixon took and was paid for holidays. At no point during that year did Autotransportation say that he could not take holiday. He took 16 days holiday in 2020.

18. After 8 January 2021, Mr Dixon was kept on the Autotransportation payroll in error. This only came to light at the end of February 2021. Since that time, Autotransportation have been trying to reclaim that money from Mr Dixon and have resorted to litigation in the County Court. The sum claimed is £3045. Mr Dixon is defending the claim.

Findings of fact in Mrs Dixon's claim

19. Mrs Dixon also worked as a driver for Autotransportation. Her employment started on 3 February 2020 and terminated on 8 January 2021. She worked four days per week.

20. In the calendar year ending 2020, she was paid for her holidays. Taking holidays was not an issue during the year. If she asked for it, she was given the time off. She took 13 days holiday (including bank holidays).

Applicable law

21. The courts and tribunals have developed a number of tests over the years aimed at helping them to identify a contract of service and to distinguish between employees and the self-employed. This has been a particularly challenging task, given that the types of working arrangements in existence are seemingly limitless.

22. While control, organisational integration and economic reality are all still relevant to the question of whether someone is an employee, the courts now question the usefulness of any single test, instead regarding them as helpful approaches when weighing all the relevant factors and deciding whether, on balance, the contract is one of employment. This flexible approach has become known as the 'multiple (or mixed) test' and can be considered to represent the settled approach to determining employee status.

23. The most common judicial starting point for the multiple test is a passage from the judgment of Mr Justice MacKenna in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD.** He stated:

> *A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and 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 in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*

24. The continuing relevance of this passage was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**, where Lord Clarke called it the 'the classic description of a contract of employment'. In essence, the **Ready Mixed** formulation of the multiple test can be boiled down to three questions:

a. did the worker agree to provide his or her own work and skill in return for remuneration?

b. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

c. were the other provisions of the contract consistent with its being a contract of service?

25. Following the **Ready Mixed Concrete** decision, 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. It is now widely recognised that this entails three elements:

a. control

b. personal performance, and

c. mutuality of obligation and control.

26. A contract of employment need not be in writing. The various statutory definitions make clear that it can be an entirely oral agreement, and this is also the position at common law.

27. For a contract to exist at all, the parties must be under some obligation towards each other. However, the courts have endorsed the idea that, for a contract of employment to exist, there must be an 'irreducible minimum' of obligation on each side (**Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA,** and **Carmichael and anor v National Power plc 1999 ICR 1226, HL**). This will usually be expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered.

28. The requirement of personal performance focuses on substitution clauses. The Supreme Court's decision in **Autoclenz** permits a court or tribunal to disregard written clauses that do not form part of the true terms of the agreement. The contracts at issue in the **Autoclenz** case included a substitution clause, but an employment judge found that this did not reflect what was actually agreed between the parties, which was that the claimants would show up each day to do work and A Ltd would offer work, provided it was there for them to do. The fact that a manager who gave evidence did not know of a single example of true substitution among all the valets employed by A Ltd, not only at the depot where he worked but elsewhere, permitted the inference that no one ever intended that it should be done. Having determined that the employment judge had been entitled to adopt this approach to the substitution clause, the Supreme Court upheld the conclusion that the claimants were employees.

29. Where a substitution clause does form part of the true terms of the agreement, the extent of the right of substitution will determine whether the clause is consistent with an obligation of personal performance. Does it provide absolute freedom to do the job either by one's own hands or another's or, is it more limited?

30. Another relevant financial indicator of employment is the incidence of income tax and national insurance — deductions at source point to employment; gross payments suggest self-employment. However, this factor is not generally regarded as strong evidence and the opinion of HM Revenue and Customs on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes.

31. The statutory redundancy pay scheme, which is set out in Part XI of the Employment Rights Act 1996 ("ERA"), applies only to employees — i.e. those working under a contract of employment or apprenticeship — sections 135 and 230.

32. An employee needs to have two years' continuous employment in order to qualify for a redundancy payment — ERA section155.

33. The amount of statutory redundancy pay an employee is entitled to depends on his or her age, length of service and pay. The employee is entitled to:

a. one and a half weeks' pay for each complete year of service after reaching the age of 41

b. one week's pay for each complete year of service between the ages of 22 and 40 inclusive, and

c. half a week's pay for each complete year of service below the age of 22.

34. A week's pay is the gross contractual remuneration for working the normal working hours in a week, capped at the applicable statutory maximum rate.

35. The definition of a week's pay is modified with effect from 31 July 2020 in respect of employees furloughed under the Coronavirus Job Retention Scheme (CJRS). The Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 SI 2020/814 (the 'Week's Pay Regulations'), which came into force on 31 July 2020, modify the calculation of a 'week's pay' for the purposes of statutory redundancy pay and certain other statutory payments, including the assessment of whether an employee has been on 'short-time' for a week in accordance with S.147(2) ERA (which applies when the employee's remuneration for the week is less than half a week's pay). The purpose of the modification is to ensure that employees furloughed under the CJRS receive statutory payments based on their normal wages, rather than the reduced furlough rate.

36. The Regulations set out how a week's pay is calculated where an employee who is, or has been, furloughed is entitled to a statutory redundancy payment and notice to terminate the employment was given on or after the date on which the employee became furloughed (or, if the employee was dismissed without notice, the date of termination was on or after the date on which the employee became furloughed) — Reg 3(1)(f). It is not entirely clear whether the notice of dismissal must have been given on or after 31 July 2020, the date on

which the Regulations came into force. The better view appears to be that the Regulations potentially apply to any statutory redundancy payment that becomes due after 31 July 2020, regardless of the timing of the notice of dismissal. The Regulations also apply where an employee is eligible for a statutory redundancy payment by reason of being laid off or kept on short-time on or after the date on which he or she was furloughed — Reg 3(1)(g).

37. Turning to holiday pay, the general rule is that statutory annual leave cannot be replaced by a payment in lieu — Regs 13(9)(b) and 13A (6) of the Working Time Regulations 1998 ("WTR"). Furthermore, unused statutory holiday entitlement cannot be carried forward into subsequent leave years (the principle of "use it or lose it").

38. The main exception to this rule, arises where the worker is owed outstanding holiday on the termination of his or her contract. Under Reg 14(1) and (2) a worker is entitled to a payment in lieu where:

a. his or her employment is terminated during the course of the leave year, and

b. on the termination date, the proportion of statutory annual leave he or she has taken under Regs 13 and 13A is less than the proportion of the leave year that has expired.

39. Where a worker is entitled to a payment in lieu of holiday entitlement, Reg 14(3) provides that the sum due shall be determined either by the terms of a relevant agreement or by reference to a statutory formula set out in Reg 14(3)(b).

40. Two German references to the ECJ, **Kreuziger v Land Berlin Case C-619/16, ECJ**, and **Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ**, have clarified the application of the 'use it or lose it' principle to a worker who seeks a payment in lieu of unused leave on termination of employment. In both cases, the worker failed to take his full leave entitlement before the employment relationship ended and then sought to recover a payment in lieu, which was refused by the employer in reliance on German law. The cases were separate, but the referring courts asked broadly the same question: does EU law preclude national legislation that provides for the loss of an allowance in lieu of untaken leave where the worker did not apply to take that leave before the employment relationship ended?

41. The European Court held that a worker in this position does not automatically lose the right to a payment in lieu. In the ECJ's view, it would not comply with Article 7 of the Directive for national law to prescribe an automatic loss of rights in such circumstances without prior verification that the worker had an effective opportunity to take the leave owing to him or her. It is for the employer to show that it encouraged the worker to take the outstanding leave, while informing him or her, accurately and in good time, of the risk of losing that leave at the end of the applicable reference period or authorised carry-over period, or on termination of the employment relationship. If the employer shows that it met its obligations in this regard, such that the court is satisfied that the worker deliberately declined to take holiday and was aware of the consequences, Article 7 does not exclude the possibility of the worker losing the right to paid annual leave or the corresponding payment in lieu on termination.

42. In response to the outbreak of Novel Coronavirus (COVID-19) in the UK, the Government has introduced a temporary relaxation of the general rule set out in Reg 13(9) of the Working Time Regulations 1998 ("WTR") that basic annual leave cannot be carried over and taken in a subsequent leave year. The Working Time (Coronavirus) (Amendment) Regulations 2020 (the '2020 Regulations'), which came into effect on 26 March 2020, make WTR Reg 13(9)(a) subject to the exception set out in two newly inserted paragraphs, Reg 13(10) and (11). Under new Reg 13(10), where it was 'not reasonably practicable' for the worker to take some or all of his or her Reg 13 leave in the relevant leave year as a result of the effects of COVID-19, he or she is entitled to carry forward such untaken leave. The 'effects of COVID-19' include the effects on the worker, the employer or the wider economy or society. Reg 13(11) provides that the carried-forward leave may be taken in the two leave years immediately following the leave year in respect of which it was due. Additionally, Reg 14, which provides for the calculation of a payment in lieu of leave where the worker's employment has terminated, has been amended to ensure that the worker can receive a payment in lieu of this carried over leave if the employment terminates before the leave has been taken. The new rules apply to the four weeks' annual leave provided for by Reg 13 but not the additional 1.6 weeks' annual leave provided for by Reg 13A, which is already subject to different rules on carry-over.

43. The 2020 Regulations also introduce a restriction on an employer's right to refuse leave on particular days. Under Reg 15(2) of the Working Time Regulations 1998, an employer may normally require a worker not to take leave on particular days by giving the worker notice that complies with the formalities set out in Reg 15(3). Under new Reg 13(12), inserted by the 2020 Regulations, an employer can require a worker not to take leave that has been carried over under Reg 13(10) on particular days only where it has good reason to do so. The Regulations do not define what amounts to a 'good reason'.

44. On 13 May 2020 the Government published guidance on 'Holiday entitlement and pay during coronavirus'. This suggests that the following factors may be relevant when considering whether it was 'not reasonably practicable' for the worker to take leave for the purposes of Reg 13(10):

a. whether the employer has faced a significant increase in demand due to coronavirus that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures

b. the extent to which the employer's workforce is disrupted by the coronavirus and the practical options available to provide temporary cover of essential activities

c. the health of the worker and how soon he or she needs to take a period of rest and relaxation

d. the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year

e. the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the coronavirus situation; and

f. the ability of the remainder of the available workforce to provide cover for the worker going on leave.

Discussion and conclusion

45. Mr Dixon was employed continuously by Autotransportation from 8 November 2018 until 8 January 2021. He was dismissed because his position was redundant. The employment relationship existed by virtue of mutuality of obligation, the requirement to provide personal service and the level of control that Autotransportation exercised over Mr Dixon. He could not and did not offer a substitute. He had to perform the work when it was offered to him and he was paid for that work.

46. As at the date of his dismissal, Mr Dixon had the requisite two years continuous service which entitled him to receive a statutory redundancy payment. He is entitled to a statutory redundancy payment of £1500 (based on 2 years complete service at gross weekly pay of £500 for his age (51) at the effective date of termination of his employment (8 January 2021).

47. I am unable to make a finding as to what happened after 8 January 2021. At its highest, Mr Dixon had a private arrangement to work on Mr Bleasdale's son's house for which he was paid, albeit out of Autotransportation's bank account. The source of that payment does not, in itself, indicate employment by that company. In any event, there is separate litigation in the County Court relating to that payment which adds credence to the fact that his employment at Autotransportation ended on 8 January 2021.

48. Regarding holiday pay for the year ended 2020, Mr Dixon has lost that entitlement and cannot benefit from the 2021 Regulations allowing carry forward for up to two years. He was not prevented from taking holiday by Autotransportation in the leave year 2020. There was no evidence to show that it was not reasonably practicable for Mr Dixon to take his holiday. He was on furlough. The dispute is about how much holiday he took. He is claiming for holiday pay in 2 holiday years. The leave year started again from 1 January 2021. He worked 8 days in 2021. He had a 28-day entitlement to holiday pay. He worked a 50-hour week. He had accrued 6.2 hours holiday entitlement in the current leave for which he is entitled to payment. He is entitled to £53.68. The calculation is based on his net pay of £440 and is calculated as follows: £440 / 50 x 6.1 = £53.68.

49. Turning to Mrs Dixon's claim. She is claiming for the holiday year ended 2020. She has lost that entitlement and cannot benefit from the 2021 Regulations allowing carry forward for up to two years. She was not prevented from taking holiday by Autotransportation in the leave year in 2020. There was no evidence to show that it was not reasonably practicable for Mrs Dixon to take her holiday. Indeed the dispute is about how much holiday she had taken.

Employment Judge Green

Date 30 August 2021