Case Number: 3306069/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P. Patterson	AND	Total Auto Glazing Services Ltd

HEARD AT: **Watford Tribunal Centre** **ON:** 28 July 2021

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: Mr Donnelly, Solicitor

For Respondent: In person

RESERVED JUDGMENT

1. **The Claimant was an employee, with a minimum of 2 years' service**
2. **The Claimant was unfairly dismissed**
3. **The Claimant is entitled to pay for accrued and unused holiday entitlement**
4. **The Respondent unlawfully deducted wages from the Claimant**

REASONS

Claims and issues

1. The Claimant has brought the following claims:

   1.1 Unfair dismissal

   1.2 Unpaid holiday pay

   1.3 Deduction from wages

2. There was no list of issues agreed before the hearing. I determined them to be as follows:

3. Employment status

   3.1 What was the claimant's status (i.e. was he a worker or employee) from 2 April 2018 to 1 April 2019?

4. Unfair dismissal

   4.1 What was the reason or principal reason for dismissal, and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

   4.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

5. Automatic Unfair Dismissal - s.100(1)(c) and/or (e) Employment Rights Act 1996 (ERA)

   7.1 Can the Claimant show that the reason (or, if more than one, the principal reason) for his dismissal was that:

   a) Being an employee at a place where there was no safety representative or committee, he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety; or

b) In circumstances of danger which he reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger?

6. Unlawful deductions

5.1 Were the wages paid to the claimant less than the wages he should have been paid in respect of April to May 2020

5.2 Was any deduction required or authorised by statute?

5.3 Was any deduction required or authorised by a written term of the contract?

5.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

5.5 Did the claimant agree in writing to the deduction before it was made?

5.6 How much is the claimant owed?

7. Holiday pay (Working Time Regulations 1998)

7.1 What was the claimant's leave year?

7.2 How much of the leave year had passed when the claimant's employment ended?

7.3 How much leave had accrued for the year by that date?

7.4 How much paid leave had the claimant taken in the year?

7.5 Were any days carried over from previous holiday years?

7.6 How many days remain unpaid?

7.7 What is the relevant daily rate of pay?

Procedure and evidence

8. The Respondent was previously represented, at the time that a response to the claims was submitted, but were unrepresented at the merits hearing. The Claimant has been represented throughout.
9. There was a digital bundle before the Tribunal, amounting to 227 pages – references to page numbers within the judgment are to this bundle.
10. The Claimant provided a witness statement and gave evidence on his own behalf.
11. On behalf of the Respondent, I had a witness statement from Mr Beresford Senior and a document from Mr Beresford Junior which was described as a witness statement, but was effectively a chronology presented in a table. Both Mr Beresfords gave oral evidence to the Tribunal.
12. The Claimant submitted additional evidence before the start of the hearing – these were GP records confirming that the Claimant has a splenectomy operation in 1982, and that he was issued a 'shielding' letter in April 2020. As these were simply documents corroborating points in the witness statement, I determined that there was no detriment to the Respondent by them being provided at a late stage.

Facts

13. In light of the documents to which I have been referred and the evidence that has been before me I make the following findings of fact on the balance of probabilities. I have limited tgese as closely as I can to the issues that are to be determined by me in respect of the identified issues.
14. The Respondent company, providing glazing services for vehicles, is owned by Mr Berseford Junior, with Mr Beresford Senior being responsible for the day-to-day management.
15. It is agreed that the claimant began working for the respondent on 2 April 2018, working 5 days per week and receiving £400 per week. However. the respondent describes this as part time, appearing to only consider someone as working full time if they were 'on the cards'.
16. The respondent agrees that the claimant was paid £400 from April 2018, and the claimant's bank statements show he was paid £400 each week by standing order from the respondent every week from 6 April 2018.
17. At various times in his evidence, Mr Beresford Snr described the claimant as working part-time, and interchangeably as self-employed. However, he confirmed that at no point did

he receive an invoice from the claimant for his services, nor did he ever ask for one. Later, in closing submissions, the Respondent also described the Claimant as “casual labour”.

18. Mr Beresford Snr confirmed that:

    17.1 The claimant was not able to send someone else to work in his place, because the respondent wouldn’t know who they were.

    17.2 The claimant wasn’t responsible for the success or failure of the business.

    17.3 The respondent had complete control over the work the claimant did and how he did it.

19. Mr Beresford Snr disputed that the claimant wasn’t able to pick and choose when he came to work, but it is clear from the events surrounding the claims before the Tribunal that the claimant had to notify the respondent if he was too unwell to work, and that he had to make a request to use his annual leave entitlement.
20. In April 2019 the respondent started to provide the claimant with pay slips. Nothing else changed in relation to his pay – he continued to receive £400 per week directly into his bank account. The respondent agreed that there was no change to the job at this point either.
21. The background to the run-up to the claimant’s dismissal is the outbreak of the Covid-19 pandemic. This presented a unique, challenging and fastmoving situation for both employers and employees to deal with.
22. Taking judicial notice, on 23 March 2020 the Prime Minister announced a national lockdown, stating that all those not required to do otherwise, should ‘stay at home’. On 26 March, following Royal Assent of the bill, the Coronavirus Act 2020 came into force, making lockdown legally enforceable.
23. The UK Government introduced the Coronavirus Job Retention Scheme (“CJRS”) in March 2020, which provided for a process whereby employees could be furloughed – not required to work, but still paid. The scheme would reimburse employers up to 80% of the wages paid to an employee, but the employer could choose to continue paying 100% to the employee. It is not legislation: it is a direction with guidance. It does not amend any existing law. Employees and workers had the same rights as before furlough.
24. During this time, the government also wrote to people deemed to be clinically extremely vulnerable from Covid-19 with advice to strictly self-isolate or ‘shield’ for at least 12 weeks, or until further notice.

25. The events following this are crucial to this claim and although there is some written correspondence, the bulk of the evidence is oral and therefore, as the accounts differ, I will need to come to a view as to which account, I prefer.
26. There are so many inconsistencies within the Respondent's witness evidence – the formal Response submitted when legally represented, witness statements, and oral evidence - when it comes to dates, I find it impossible to rely on any of them. I will refer to points where the Respondent's version differs, and specific reasons for rejecting this, but on the whole I say from the outset that I prefer the Claimant's evidence as to when events occurred and accept these as correct when dealing with the chronology of events below.
27. On 27 March 2020 the claimant felt unwell with symptoms he believed may have been covid. In written and oral evidence Mr Beresford Snr said that this happened on 24 March, and Mr Beresford Jnr's statement records this too, however the letter of 5 May 2020 refers to 27 March.
28. There is an overlap of dates between the Claimant self-isolating because of covid symptoms; being furloughed; and being told to shield for 12 weeks.
29. The Claimant took holiday for the week of 30 March 2020 - he received £400 salary on 3 April into his bank account as usual [218]. He cannot have worked on 30 March and some of 31 March, as claimed by the Respondent, and then have taken holiday for days already worked.
30. On 31 March it was agreed that the Claimant would be furloughed from 6 April 2020 for 2 weeks. As the scheme required a minimum period of furlough of 3 weeks, I find as a matter of fact that the Claimant was furloughed from 30 March, but took annual leave for the first week of this.
31. The letter from the Respondent confirming furlough [49] advised that the situation would be reviewed again. Although dated 31 March, this was provided to the Claimant by hand on 2 April when he signed it [50].
32. Both Respondent witnesses refer to the Claimant being at work on 30 and 31 March and that it was on 31 March that he left a job. The dismissal letter of 5 May 2020 says "you came back to work on the Monday 31st March worked until Thursday 2nd April" [71], and Mr Beresford Snr then said during cross-examination that the Claimant had walked off of a job on 3 April. Leaving aside the days and dates not matching, this is impossible given that it had already been agreed that the claimant would take a week of holiday for week commencing 30 March – he couldn't also have been at work.

33. On 11 April, in a phone call with Mr Beresford Jnr, the Respondent asked the claimant to return to work for 20 April. The claimant advised that he had received a letter from the NHS advising him to shield [52] - medical records show this was issued on 9 April 2020. The Respondent disputes that they were aware of the Claimant's medical condition, that he had a splenectomy in 1982, at any point before this.
34. Whether they did or didn't know at an earlier point, as detailed below the claimant certainly informed the Respondent that he had an underlying health condition when it became relevant.
35. The Respondent denies that they were informed of the shielding instruction on 11 April, and concluded that the claimant was choosing to stay at home. Michael Beresford Jnr said in his chronology: "Advised not acceptable and actions seen as misconduct for failing to attend work" on 11 April. However, at that point the Claimant was still on furlough - he was not permitted to work.
36. The Respondent says that they then sent a letter to the Claimant on 11 April, advising of termination of his employment. The Claimant says this was not received by him, and this letter was not before the Tribunal. In his witness statement Mr Beresford Snr says this was sent "in writing to the only address he had provided to me", which in oral evidence he says was a mistake, and then in cross examination he says this was sent by email. No copy of the email was before the Tribunal either – Mr Beresford Snr says it was sent from his phone and he doesn't have access to it after his phone was stolen and replaced. I have to find that this letter wasn't sent, otherwise the next events would not have occurred.
37. On 13 April the Claimant asked for his P45, effectively offering his resignation, but quickly retracted it.
38. On 14 April Mr Beresford Snr, by text, asked the claimant to confirm if he did want to leave or not [53]. The claimant responded, clarifying that he had told Mr Beresford Jnr that he had a shielding letter, saying "I will attach the letter at the end of this message from the NHS [54]." He provided a photograph of the letter via MMS [55]. Mr Beresford disputes that this was the claimant providing a proper copy of the letter and says that he wasn't able to see the content.
39. Prior to seeing the medical records, the respondent disputed the authenticity of the shielding letter, suggesting that perhaps it was issued to the claimant's father. They have continued to allege that the claimant was simply using the shielding as an excuse not to work, and expressed that they weren't happy to pay someone to lay in bed.

40. On 14 April, by way of an email from his nephew's account, the claimant confirmed that he didn't want to leave the respondent company [60].
41. The Claimant received 2 payments from the Respondent on 14 and 17 April 2020, each for £363.51 [218 & 219], representing furlough payment.
42. The Respondent has been unclear on the date of dismissal throughout these proceedings, suggesting: 11 April 2020 by letter/email; other dates in April verbally; and the letter of 5 May retrospectively referring to 20 April.
43. On 28 April the Claimant asked if his employment was continuing as he had not been paid – the Respondent did not reply.
44. On 5 May, the Respondent wrote a letter to the Claimant terminating employment. The Respondent asserts that this was simply confirmation of an earlier termination. That letter was hand delivered to the Claimant's sister's address on 8 May.
45. The 5 May letter, with reference to the claimant's underlying heath conditions, states "unfortunately you are not fit for purpose for employment in this industry" [71], suggesting issues of capability. It goes on to say that the respondent "is not willing to take any risk concerning your health." The Respondent elaborated on this in oral evidence, with Mr Beresford Snr suggesting that he was advised that their insurance wouldn't have covered the Claimant if they were aware of the medical condition, and that it should have been recorded on his driving licence.

Holiday pay

46. The Claimant was entitled to the statutory 28 days holiday each year.
47. It is unclear when the Respondent's holiday year began – the Particulars of Response refer to 1 January 2020 [31], whilst the letter of 5 May [71] refers to dates taken from 4th January, and Mr Beresford Snr referred to this in oral evidence.
48. In relation to days taken, the Claimant's witness statement says he had taken 8 days, whilst the schedule of loss refers to only the 5 days from w/c 30 March. As the Claimant worked 6 days per week, a full week off would require him to use 6 days.
49. There are also inconsistencies within the dates put forward by the Respondent. The letter of 5 May says: 27 January; 3rd February; 18th February; 20th March; and 27/28th March. The Particulars detail: 1st January (bank holiday); 2-4th January; 27th January; 3rd February; 8th February; 27th and 28th March; and 30th March to 6th April.

Law

Employment status

50. Section 230 of the ERA provides as follows so far as is relevant:

> *(1) 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.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act 'worker' … means 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 …*

51. In A**utoclenz Limited v Belcher [2011]** IRLR 820, Lord Clarke said at [29]:

> "The question in every case is…what was the true agreement between the parties."

He went on at paragraph 35 to say: "So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be

described as a purposive approach to the problem. If so, I am content with that description."

52. In **Uber BV v Aslam (CA) [2019]** ICR 845 the majority described the approach as follows:

> "As discussed above, Autoclenz shows that, in the context of alleged employment (whether as employee or worker), (taking into account the relative bargaining power of the parties) the written documentation may not reflect the reality of the relationship. The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996 , the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldlywise", "sensible and robust" approach to the determination of what the true position is."

53. The principles of Autoclenz apply not only to identifying the terms of a contract but also to the identification of the parties to the contract: **Dynastems for Trade & General Consulting & Others v Mosley**, unreported EAT, UKEAT/0091/17/BA, Langstaff J.
54. The classic test for the existence of a contract of service is that of MacKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968]** 2 QB 497:

> 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. I need say little about (i) and (ii).
>
> As to (i). There must be a wage or other remuneration. Otherwise, there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. 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: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

55. Nolan LJ in **Hall (HM Inspector of Taxes) v Lorimer [1994]** IRLR 171 observed: In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. (para.11)
56. In **White & Anor v Troutbeck SA [2013]** IRLR 949 the Court of Appeal agreed with the EAT that the mere fact that the individual has day to day control over how to do his/her work does not preclude an employment relationship. In that case there was a contractual right of control and that, together, with the other features of the relationship pointed to employment.
57. The Supreme Court in **Pimlico Plumbers Ltd v Smith [2018]** UKSC 29, [2018] IRLR 872 approved the analysis of the Court of Appeal in that case [2017] IRLR 323. Etherton MR at paragraph 84 said:

> "…. I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in

> particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

58. The test for worker is similar to the test for employee and the same factors will be relevant but with a 'lower pass-mark' as Mr Recorder Underhill QC (as he was) put it in **Byrne Brothers (Formwork) Ltd v Bair [2002]** IRLR 96:

> [17]…(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

59. In **Pimlico Plumbers v Smith [2018]** IRLR 872, the observation of Maurice Kay LJ in **Hospital Medical Group v Westwood [2012]** IRLR 834 was cited with approval by Lord Wilson: "there is no single key with which to unlock the words of the statue in every case" [44].
60. In **Cotswolds v Williams [2006]** IRLR 181, Langstaff J gave some guidance to assist in distinguishing between those who are workers and those who are not in cases in which there is a requirement of personal service. He said this at [53]:

> Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.

61. In **Hospital Medical Group v Westwood [2012]** IRLR 834 a doctor was held to be a worker essentially because of the twin features of his case: the level of integration into the other parties' business and the requirement that he provide such services to them exclusively [10 – 18]. In an otherwise similar case the lack of exclusivity and the freedom to work elsewhere meant that the doctor in question was not a worker: **Suhail v Barking Havering & Redbridge University Appeal No. UKEAT/0536/13/RN** [26 - 27].
62. In J**ames v Redcats [2007]** IRLR 296 the EAT said this:

> 67 An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not if, for example, the dominant feature of the contract is a particular outcome or objective and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.

63. In the cases of **Jivraj v Hashwani [2011]** IRLR 827 and **Halawi v WDFG UK Ltd [2015]** IRLR 50 the requirements of personal service and subordination were emphasised (I acknowledge that they were Equality Act 2010 cases). 11
64. In **Bacica v Muir [2006]** IRLR 35 factors such as the preparation of one's own accounts, being free to work for others and not being paid when not working were all considered relevant factors.
65. There is no rule of law that a person who provides services via a company cannot be an employee: **Catamaran Cruisers Ltd v Williams [1994]** IRLR 386. If the true relationship is that of employer and employee, it cannot be changed by putting a different label on it. Whether or not the contract in question is one of service, or one for services, is a question of fact. The formation of a company may be strong evidence of a change in status, but that fact has to be evaluated in the context of all the other facts found.
66. The labels the parties themselves use is not determinative but it is a relevant part of overall factual picture.

Unfair Dismissal – Employment Rights Act 1996

67. *Section 94. The right.*

(1) An employee has the right not to be unfairly dismissed by his employer.

68. *Section 98. General.*

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it- ...

(c) is that the employee was redundant …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Automatic unfair dismissal

69. s.100 ERA — Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly

dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

Deductions from wages

70. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

> *"An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

71. Section 13(3) ERA provides:

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

Holiday pay – Working Time Regulations

72. Regulation 13 — Entitlement to annual leave

> *(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.*
>
> *...*
>
> *(3) A worker's leave year, for the purposes of this regulation, begins–*
>
> *(a) on such date during the calendar year as may be provided for in a relevant agreement; or*

(b) where there are no provisions of a relevant agreement which apply–

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

73. Regulation 13A — Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

Conclusions

Employment status

74. It is clear that there have been a number of mistakes and misunderstandings on the part of the Respondent, which led to the situation before the Tribunal. Much of this is based on the Respondent incorrectly believing that someone was only a fulltime employee if they were “on the cards”.
75. There is no doubt that the Claimant met all of the various criteria indicating that he was an employee of the Respondent, these were largely agreed when put to Mr Beresford Senior in cross-examination.
76. There was no change in status in April 2019 – the only difference was

Unfair dismissal - ordinary

77. Having determined that the Claimant was an employee from 2 April 2018, it follows that he has the minimum length of service to bring an unfair dismissal claim, regardless of which termination date is applied.
78. I reject the various reasons for dismissal put forward by the Respondent – there was no evidence before the Tribunal that any issue of conduct or capability was raised with the Claimant until the situation regarding covid-19 arose. There was one reference to Mr Beresford Jnr considering the claimant failing to return to work as misconduct, but no disciplinary process followed.
79. The Respondent was aware of the Claimant’s instruction to shield before the end of the initial furlough period. They could have sought to investigate options, including extending furlough for a short period.
80. I accept that as a small business who were continuing to work during the pandemic, it may not be workable for the Respondent to continue to employ the Claimant indefinitely, even with the support of the furlough scheme. However, in that case they could and should have followed a proper procedure to terminate the Claimant’s contract.
81. I reject the Respondent’s suggestion that they dismissed the Claimant on 11 April 2020. If that was the case Mr Beresford Senior’s texts on 14 April wouldn’t have been asking if the Claimant really wanted his P45, and he wouldn’t have requested written confirmation of the claimant’s decision. The text exchange between the claimant and respondent on that date clearly indicated an intention on both sides to continue the employment relationship.

82. There was no other communication from the respondent about termination of contract until the letter of 5 May. This was received by the claimant on 8 May – that was a dismissal without notice, and therefore the effective date of termination (EDT).
83. The 5 May letter was the first time the claimant's capability to perform the work was raised, and again there was no process followed.
84. It is not uncommon that those running small businesses such as the Respondent are unfamiliar with employment law, but this does not excuse them from their obligations.
85. The respondent followed no procedure at all, opting simply for dismissal when faced with the claimant being unable to return to work. Their actions were not within a band or reasonable responses, and so the claimant's dismissal was unfair.

Automatic unfair dismissal

86. Having concluded that the claimant was unfairly dismissed above, I do not necessarily have to consider the alternative claim of automatic unfair dismissal. However, having heard evidence and submissions on it I will make some conclusions.
87. It is clear that the claimant had been identified as clinically extremely vulnerable, and a letter confirming this – with advice to shield – was issued on 9 April 2020. The claimant advised the respondent of this on 11 April, and provided a copy of the letter by text on 14 April. That was a proper copy of the letter: the accompanying message says 'letter attached'; the well-known symbol for download is present to the bottom right; and any smartphone user would be familiar with the ability to click on a photograph to increase its size and then zoom in further. Whether he did this or not, Mr Beresford was certainly able to do so, or ask for assistance from his son or other family member.
88. Having received that letter the claimant describes in his witness statement that he "was naturally concerned. I had heard that it could be fatal to people with underlying health conditions. I was concerned that if I caught Covid 19, I could become seriously ill and could even die. I understood that the virus was highly contagious and could be passed on by being around people who were carrying the virus. I understood people carrying the virus may not be showing any symptoms and yet still pass it on."
89. It is not relevant whether the respondent had prior knowledge of the claimant's immune condition, as they were aware at the relevant time.
90. The Claimant refused to come back to work on the advice contained within the NHS letter – it was not a decision he took of his own accord.

Wages

91. Having determined that the EDT was 8 May 2020, the Respondent was liable to pay the claimant wages until that date.
92. The last wages the claimant received was furlough pay on 17 April 2020.
93. In failing to pay the claimant wages that were due for the weeks commencing 19 April, 26 April, and 3 May, the respondent made unlawful deductions.
94. The Respondent could have extended furlough in order to recover 80% from the government. It was their responsibility to do this, the fact that they didn't does not mean the Claimant is not entitled to those wages.

Holiday

95. The Claimant is entitled to holiday pay for any holiday entitlement accrued but not used, between the start of the holiday year in January 2020 and 8 May 2020.
96. There are discrepancies and inconsistencies between accounts of holidays taken.
97. The first week of furlough was taken as holiday, and paid at full salary, as permitted by the JRS.
98. Neither party has provided any record of annual leave to the Tribunal – whether or not there is any unused entitlement, and therefore any additional holiday pay, is to be determined at the remedy hearing on 20 October 2021.

Remedy

99. All issues related to remedy will be dealt with at the hearing on 20 October 2021 – directions will be sent to the parties.

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Employment Judge K Douse

Dated: …2 October 2021……

Sent to the parties on: 4 October 2021

For the Tribunal Office