Case Number: 3302110/2020
3302111/2020

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
1. Cesar Raul Masaquiza	v	C Palace Living Limited
2. Carlos Mamani Quino		

Heard at: Watford (via CVP) **On**: 1 October 2021

Before: **Employment Judge Allen sitting alone**

Appearances

For the Claimants: Ms D Warden, Caseworker
For the Respondent: Ms Letts, Filex

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

"This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The order made is described at the end of these reasons."

RESERVED JUDGMENT

1. Claimant 1 was a limb(b) worker contracted to provide personal service to the Respondent.
2. Claimant 1 suffered unauthorised deductions from wages.
3. Claimant 1 was entitled to a payment in respect of accrued and outstanding holiday allowance at termination.
4. Claimant 2 was a limb(a) employee of the Respondent.

5. Claimant 2 suffered unauthorised deductions from wages.

6. Claimant 2 was entitled to a payment in respect of accrued and outstanding holiday at termination.

7. Claimant 2 was denied a weekly rest break on two occasions between Monday 1 July 2019 and Friday 19 July 2019.

8. Remedy will be decided at a separate hearing at 10am on 3 December 2021 by video - CVP.

REASONS

Findings

9. The Respondent is a construction company and primary contractor responsible for a number of building sites using subcontractors and employees to deliver a variety of specialist trades. It has 5 employees according to the response to claim including the respondent's witness, sales manager Mr Colyer.

10. Mr Colyer has been employed by the Respondent for 4 years. Mr Colyer gave evidence he had seen both Claimants around the Respondent's building sites in 2019. He had no involvement in their selection, appointment or in fact any other managerial function towards either of them not least because the Respondent asserts Claimant 1 was a sub-contractor and Claimant 2 was employed by a sub-contractor. In the circumstances he could only rely on the documents relating to payment of each claimant; documents relating to Claimant 2 were available to the Respondent because of Mr de Silva's association with the sub-contractor it says employed him. Mr de Silva is a director of the respondent companuy. The Respondent did not address me on the status of either Claimant as 'worker'.

11. Mr Colyer gave evidence that Mr Carlos de Silva was the managing director of the Respondent company and was also managing director of Beckenham Heating & Plumbing Limited, of which more below. Mr Colyer confirmed Mr de Silva was associated with Beckenham Heating & Plumbing Limited in 2019 but could not be specific as to his role at that time.

Claimant 1. Cl1

12. The Respondent accepts it owes Claimant 1 (Cl1) the sum of £1,758.38 in respect of work carried out between July and August 2019. Its' representative, Ms Letts had no instructions as to why after 2 years this sum remains outstanding.

13. Cl1 gave evidence he worked as a tiler/builder on the Respondent's building sites from 20 February to 20 September 2019. He stopped working on the sites because the Respondent consistently underpaid him from July 2019 onwards despite

repeated attempts to resolve that. I do not accept the Respondent's suggestion the Claimant's decision to leave without notice was unreasonable given the issue of payment and the Respondent's admission the sum of £1,758.38 remains outstanding to date.

14. Cl1 was introduced to the Respondent through the Neto Recruitment Agency and commenced work on the Respondent's sites on 20 February 2019.

15. Cl1 asserts he was taken on as an 'employee' and signed a document when he got the job but he doesn't know what it said and he wasn't given a copy. The Respondent did not challenge this evidence nor did it produce a copy of the document. Since Cl1 does not know what the document was, I cannot draw any conclusions about its nature other than to say had it established the Claimant's status as a sub-contractor I am confident the Respondent would have produced it.

16. The only evidence the Respondent produces in support of its assertion Cl1 had his own company is a number of sub-contractor invoices issued by the Respondent under the Construction Industry Scheme (CIS).

17. Cl1 asserts the day rate of pay was set by the Respondent and there was no negotiation; the Respondent asserts in the response to claim that this was initially £90 amended to £110 in July 2019. I accept the Respondent's evidence regarding the uplift to the day rate in July 2019. It was not clear when this uplift took effect either 1 July 2019 or some other date in July. In the absence of evidence to the contrary I conclude it was 1 July 2019.

18. Cl1 asserts he received some payment direct into his bank account which corresponds with the CIS invoices and some he received as cash (2 payments of £500, 1 in July 2019 and 1 in August 2019). According to the invoices; of which more later, 20% was deducted from the payment before he received it which he believed was for income tax purposes. He has since discovered the Respondent company made no tax payments for him in respect of PAYE.

19. Mr Colyer stated the day rate was open to negotiation but as sales manager with no involvement in the management of staff and sub-contractors I place this no higher than opinion on his part. I accept the Claimant's evidence the day rate was set by the Respondent.

20. Cl1 gave evidence his hours were 8-5pm daily; he also worked overtime and weekends. I have seen what appears to be a screen shot of a time sheet (page 53 of the bundle) unchallenged by the Respondent which shows between Saturday 22 June and Tuesday 2 July 2019 he worked 6 days per week; did not work Sunday 23 or 30 June and up to 7pm on 2 days; Wednesday 27 and Thursday 28 June. He raises no issues regarding payment received between February and June 2019.

21. Taking the time sheet at page 53 as a jumping off point together with the schedule of days worked each month (at page 71), also unchallenged by the Respondent, the Claimant ought to have been paid sums significantly in excess of those stated by the CIS invoices (pages 64-70). These show he was paid £1,500 gross (less 20% deducted under the construction industry scheme) every month except February and October which reflects the short months worked due to commencement and termination; the October Invoice shows £2,050 gross this additional £500 does not address the shortfall nor does the sum conceded as outstanding by the Respondent, £1,758.38. If these invoices are to be believed the Claimant was paid for less than 14 days' work each month (£1,500/£110 per day). Even taking into account the 2 occasions when he was paid £500 cash in hand, he was still significantly underpaid what was agreed. If these documents are to be accepted as reliable there should at the very least have been an increase in gross payment between June and July when on the Respondent's own evidence, the day rate changed from £90 to £110. I am satisfied that these documents are unreliable and reject them.

    In my opinion the CIS invoices are neither a reliable account of the amounts paid to the claimant, what was due to the claimant or indeed his status as a sub-contractor.

22. Cl1 stated Mr Carlos de Silva, managing director of the Respondent company gave him instructions each day either in person or over WhatsApp as to which site he would be working on and what was required of him. He also stated Mr de Silva gave instructions to Claimant 2. Mr Colyer struck me as being at pains to minimise Mr de Silva's involvement stating he was involved in a great many decisions and may 'sometimes' give such instructions. Given his limited knowledge of the management of either claimant on site, I reject his evidence on this point.

23. Cl1 asserted he could not send anyone in his place to carry out his assigned tasks, again not challenged. He received no instructions about arrangements for taking holiday or sick leave but in his statement says he believes he could take time off. This is consistent with the message thread at page 54 of the bundle when someone called 'Epre' (and not otherwise identified) asks him when he wants to book vacation.

24. Effective Date of Termination (EDT) 20 September 2019; the Claimant stopped coming into work; after weeks of trying to resolve under payment issues he had lost any confidence the Respondent would pay him as agreed.

<u>Claimant 2. Cl2</u>

25. Carlos Mamani Quino commenced employment on 24 June 2019. He too was recruited through the Neto Recruitment Agency.

26. Cl2 was employed laying bricks and gave evidence about how particular Andre and Alex Rodrigues were on how it was done. Cl1 also mentions receiving instructions from Alex but couldn't identify his role. No further explanation of who Messrs Rodrigues might be is offered by the Respondent. Cl2 states he was told he would receive a day rate of £100 plus overtime although he wasn't sure of the overtime rate. The Respondent asserts Cl2 was an employee of Beckenham Heating and Plumbing (BH&P) not of the Respondent.

27. Page 56 of the bundle is a screen shot of an appointment for interview with Carlos Silva on 21 June 2019 for a handyman job; Mr Colyer confirmed this was indeed the same Carlos de Silva, director of the Respondent. The contact number for this Mr Silva is the same number as the person identified as 'Jefe C' in the exchange of messages at pages 48-53 and translated on pages 54-55. ['Jefe C' translates as either 'Chief C' or 'Boss C' which is consistent with this person being Mr de Silva. The messages also demonstrate the extent to which Mr de Silva was in control].

28. Mr Colyer accepted Mr de Silva did indeed interview Cl2. He also stated Mr de Silva often interviewed prospective tradesman and following interview decided which sub-contractor they ought to be placed with; in this instance with Beckenham Heating and Plumbing. That sub-contractors would simply accept a new member of the team who had been interviewed by the primary contractor without their involvement demonstrates in my view a level of control exercised by that primary contractor that far outstrips the norm.

29. When asked what Cl2 brought to this particular sub-contractor as a general handyman Mr Colyer explained that sub-contractors employ a variety of other trades not just the obvious heating and plumbing engineers BH&P's name suggested in this instance. Cl2 on his evidence was bricklaying at Mr de Silva's direction which does beg the question what if any benefit did BH&P gain from his employment at all?

30. Notwithstanding the respondent's documentation produced to show Cl2 was employed by BH&P Claimant 2 gave evidence he had never seen them before they were included in the bundle and I believe him.

31. It is significant in my view that Mr Colyer accepted Mr de Silva is a director of BH&P although as the evidence progressed, he was at pains to explain that whilst Mr de Silva was 'involved' with BH&P in 2019 he was not clear in what capacity; just that he was not a director in 2019. This in my view is significant to the question whether Cl2 was employed by the respondent or BH&P. Since Mr Colyer was so keen to persuade me Mr de Silva was not a director of BH&P in 2019 this points to Cl2 having been hired by the respondent.

32. Beginning at page 72 are pay advices addressed to Cl2. These differ from those issued to Cl1. Those issued to Cl1 are under the CIS scheme for sub-contractors.

33. Those issued to Cl2 were standard PAYE pay advices. The basic pay is £1,500 gross per month with deductions made for both income tax and national insurance. Cl2's deductions were under £200 per month and consequently on the basis of the pay advices, he was receiving more per month than Cl1. The final pay advice issued on 4 October 2019 was different, it was for £1,850 and this time included a deduction for employee pension contributions which had not featured in the previous 2 pay advices.

34. At page 75-78 of the bundle is an unchallenged schedule of the hours and days worked by Cl2 from commencement to EDT on 20 September.

35. From 1 July Cl2 worked 19 days straight (1-19 July 2019) without a break; the foundation of his claim for denial of rest break; over this period, he worked 5 days standard hours (8-5pm) the remainder included between 1 and 4 hours overtime each day; the Saturdays and Sundays during this period being at least 8 hours overtime on each day, yet no overtime is reflected in any of the pay advices. Clearly the pay advices are inconsistent with the unchallenged schedule of hours. I accept the schedule as evidence of Cl2's hours, overtime and that he worked all weekends that fell between 1-19 July 2019.

36. The Respondent has provided no rebuttal evidence on this point on the grounds it was not the claimant's employer. It certainly provided no evidence that there was any agreement that might permit such a working arrangement. In the circumstances I am satisfied Cl2 did work 19 days straight and in excess of the 48-hour weekly limit contrary to the Working Time Regulations; at the very least he was working a 56-hour week and having seen the unchallenged schedule of hours significantly more.

37. I find it significant that both Claimants experienced similar issues with under payment and the documentation entered into evidence by the Respondent suffers similar issues in respect of accuracy namely it records the same payment every month regardless of hours worked; £1,500 gross each claimant. This is evidence that these documents were being produced at the very least under the same instruction if not by the same person. This makes it more likely than not both claimants were employed by the same entity. Since the Respondent accepts it engaged Claimant 1 and given the similarity of issues both claimants experienced with under payment and documentation, I conclude it is more likely than not the Respondent employed both claimants.

38. Finally, the P45 at pages 82-84 issued in Cl2's name. Cl2 asserts he had never seen this document until it was included in the bundle by the Respondent. Whilst the figures stated correspond with the gross pay and tax stated on the pay advices the P45 records the leaving date at 30 September 2019 and not 20 September 2019 as stated by both Claimants. It is in my view more likely than not the leaving

date was indeed 20 September although it is possible 30 September was a simple typing error.

39. The issue of personal service does not apply to this claimant as the Respondent accepts Cl2 was an employee.

40. I accept the claimant's unchallenged evidence he had accrued an outstanding holiday entitlement for which he ought to have been paid at EDT.

The Law

41. Employee v Worker

Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under):

- a contract of employment ('limb (a)'), or
- any other contract, whether express or implied and (if 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 ('limb (b)').

For the purposes of this definition, a contract of employment is defined as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing' — S.230(2) ERA.

42. *Uber BV and ors v Aslam and ors 2021 ICR 657, SC*, a case concerning claims to 'worker' status by drivers working in the 'gig economy'. **Uber's** position on the legal relations between it, the drivers and passengers is that it is a technology platform facilitating the provision of PHV services. **Uber** insists that it does not provide these services itself; rather, they are provided by the drivers under a contract concluded between driver and passenger for each journey, with UL Ltd acting as agent for the driver using the **Uber** app. **Uber's** characterisation of the legal position is set out in complex contractual documentation describing the drivers as self-employed and **Uber** as their agent. There is no written agreement between UL Ltd and drivers — any written terms between **Uber** and its drivers are entered into with UBV. UL Ltd.'s agreement with passengers states that the contract for the transportation service is between the driver and the passenger.

43. A majority of the Court of Appeal agreed with the decisions of an employment tribunal and the EAT that, despite the characterisation of the legal position in the written contractual documentation, the drivers were limb (b) workers employed by **Uber**. It was not realistic to regard **Uber** as working 'for' the drivers. The reality was the other way round — **Uber** operated a transportation business and the

drivers provided the skilled labour through which that business delivered its services and earned its profits. The Supreme Court has now given its judgment, dismissing **Uber's** appeal and confirming the employment tribunal's finding that the drivers were 'workers' of **Uber**. It held that, given the extent of **Uber's** control over the drivers' terms and conditions and the way in which they provided their services, the drivers were clearly 'workers' rather than self-employed contractors.

44. *Byrne Brothers (Formwork) Ltd v Baird and ors* Mr Recorder Underhill reasoned that the basic effect of limb (b) is to 'lower the pass mark', so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless reach that necessary to qualify for protection as workers.

45. *Redrow Homes (Yorkshire) Ltd v Wright* the Court of Appeal considered that the expression 'lower the pass mark' does not assist a tribunal in determining whether the necessary obligation of personal service is present. The Court noted that the comments in **Byrne** Brothers had been addressed to the final clause of limb (b), which focuses on whether the services are being provided to a client or customer of the individual's professional or business undertaking (considered under 'Client or customer exception' below).

46. But subsequently, in *Windle and anor v Secretary of State for Justice 2016 ICR 721, CA* (which concerned the extended definition of 'employment' in S.83(2) EqA), Lord Justice Underhill stated: 'The factors relevant in assessing whether a Claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in ***ByrneBros** (Formwork) Ltd v Baird*), in considering the latter question the boundary is pushed further in the putative employee's favour — or, to put it another way, the pass mark is lower'.

47. If the concept of a lowered pass mark does indeed extend to the requirement of personal service, then it might follow that, even where there is a wide-ranging right of substitution which would be incompatible with employee status, a contract could nonetheless still give rise to limb (b) worker status if there is an obligation to do at least some of the work personally.

48. In *Ferguson v John Dawson and Partners (Contractors) Ltd 1976 3 All ER 817, CA*, F was engaged by a firm of building contractors as a general labourer and was told expressly that he was working as part of a 'lump' labour force. He was paid an hourly rate without deductions for tax or national insurance. The site agent told the workers what to do and where to do it, and provided tools where necessary. The Court of Appeal held that, despite the express intention of the parties that F was to be a self-employed, labour-only subcontractor, in reality he was employed under a contract of service. However, this was a majority decision, which is indicative of the difficulties courts and tribunals had, and still have, with this category of worker.

49. The Privy Council's decision in *Lee Ting Sang v Chung Chi-Keung and anor 1990 ICR 409, PC*, The case concerned the employment status of a mason for the purposes of the Hong Kong Employees' Compensation Ordinance, an order that was modelled on its English equivalent. It was accepted that the relevant principles were those of the English common law applicable to many statutes under which the same or a similar question arose, including the ERA. At the beginning of his judgment, Lord Griffiths (who delivered the judgment of the Privy Council) stated that the Council 'fully appreciate that the construction industry in Hong Kong relies upon a large pool of casual labour employed upon a job-by-job basis and… that the present appeal may set a precedent against which the status of many of those employed in the building industry may be judged in the future'. However, this was no reason, Lord Griffiths said, for the relevant common law principles to be departed from. Applying the test of whether he was 'in business on his own account' and considering the relevant factors, the Privy Council held that the claimant was clearly an employee: he did not provide his own equipment, he did not hire helpers, he carried no financial risk, and he did not set his own charges but was paid either a piece-work rate or a daily rate according to the nature of the work he was doing.

50. Similarly, in *Lane v Shire Roofing Co (Oxford) Ltd 1995 IRLR 493, CA*, L was a builder/roofer/carpenter who traded as a one-man firm. He was categorised as 'self-employed' for tax purposes. SR Ltd was a roofing contractor that hired men for individual jobs. It hired L to work on a large roofing subcontract, then to re-roof a porch at a private house. While L was working on the porch, he sustained serious injuries. In determining whether L was an employee or self-employed, the Court of Appeal was of the opinion that, while the element of control is important, the question should be broadened to ask whether the worker was carrying on his or her own business or carrying on that of his or her employer. It formulated the question as 'whose business, was it?' Answering this question involved considering where the financial risk lay and whether the worker had an opportunity of profiting from sound management in the performance of the work. In the instant case the Court said that these questions must be asked in the context of who was responsible for the overall safety of those doing the work in question. It decided that L was an employee and that SR Ltd was liable for his injuries. Although L had his own one-man business and was self-employed for tax purposes, his relationship with SR Ltd was much closer to the 'lump', where workers are engaged only for their labour and are clearly employees whatever their tax status might be, than to a specialist subcontractor engaged to perform some part of a general building contract.

Conclusion

51. Was the First Claimant a worker for C Palace Living Limited pursuant to Uber BV and others v Aslam [2021] UKSC 5? In this case no written agreement has been

produced. That there was a document signed at engagement on the claimant's evidence is not disputed however the absence of evidence as to its nature means it sits tantalizingly on the periphery and without further information that is where it must stay. A court or tribunal however, has more scope to look beyond the terms of the agreement than it would in a commercial context. The Respondent has approached this case on the basis Cl1 was not an employee and has failed to address the issue of whether he was a worker.

52. Fortunately, the courts have dealt with building sites, their sub-contractors and practices many times. 'Self-employed' labourers may contract directly with the main contractor or indirectly through a sub-contractor who then contracts their labour to the main contractor, or workers may have a service contract with a sub-contractor who then hires them out to the main contractor.

53. If they are not employees, such labourers may nonetheless be 'workers' if their contracts include an undertaking to perform the work personally and they are not in business on their own account.

54. Cl1 is clear in his evidence he believed following interview he was being taken on as an employee of the Respondent. Whilst the Respondent has produced CIS sub-contractor invoices this is not conclusive of his status. I have found these documents are inaccurate and unreliable.

55. In the case of *Ferguson v John Dawson and Partners (Contractors) Ltd 1976 3 All ER 817, CA*, above the court set down a number of questions to be addressed in identifying the claimant's status. In that case the claimant was employed as a general labourer and in this case, Cl1 was a tiler/general builder. In the Ferguson case the claimant was paid an hourly rate without deductions for tax or national insurance. In Ferguson the site agent told the workers what to do and where to do it, and provided tools where necessary. The Court of Appeal held that, despite the express intention of the parties that F was to be a self-employed, labour-only subcontractor, in reality he was employed under a contract of service.

56. I can see a number of parallels between the two cases (but note the decision in Ferguson was a majority decision). In this case the claimant was paid a day rate and believed deductions were made for income tax and national insurance; the company director gave him instructions on what to do and where to do it and provided the materials for the job although the claimant did provide his own specialist tools, hard hat and high viz vest.

57. *Lee Ting Sang v Chung Chi-Keung and anor 1990 ICR 409, PC*, is a 1990 case from Hong Kong heard by the privy council, before the islands were returned to China in 1997. It was accepted that the relevant principles were those of the English common law and at the beginning of the judgment the court acknowledged that the construction industry in Hong Kong relied upon a large pool of casual labour employed upon a job-by-job basis. Applying the test of whether the claimant

was 'in business on his own account' and considering the relevant factors, the Privy Council held that the claimant was clearly an employee: he did not provide his own equipment, he did not hire helpers, he carried no financial risk, and he did not set his own charges but was paid either a piece-work rate or a daily rate according to the nature of the work he was doing.

58. Again, a number of parallels between that case and this one with the exception this claimant provided his own specialist tools, hard hat and high viz vest.

59. *Lane v Shire Roofing Co (Oxford) Ltd 1995 IRLR 493, CA*, L was a builder/roofer/carpenter who traded as a one-man business. He was categorised as 'self-employed' for tax purposes. The Respondent hired L to work on re-roofing a porch at a private house where he sustained serious injuries. In determining whether L was an employee or self-employed, the Court of Appeal was of the opinion that, while the element of control is important, the question should be broadened to ask whether the worker was carrying on his or her own business or carrying on that of his or her employer.

60. Applying *Lane* to the facts of this case I think finally answers whether the claimant's use of his own tools is significant. It isn't. Notwithstanding Mr Lane's self-employed status, he had been employed purely for his labour as was the first claimant who was solely engaged in the Respondent's business nor did he stand to profit from a well-managed development or carry any of the financial risks associated with it.

61. Drawing all these cases together including **Uber** I have no difficulty in concluding Claimant 1 was a Limb (b) worker. He worked exclusively for the Respondent between 20 February and 20 September 2019 and whilst he provided his own hard hat, high viz vest and specialist tools he was hired purely for his labour, had no say in what, where or how he worked and was not able to send anyone to perform his assigned tasks for him nor did he have any financial stake in a well-run development or carry any of the financial risks.

62. I am unable to draw a conclusion on whether he might have been a limb (a) worker because whilst Cl1 recalls he was asked to sign a document on engagement he was not given a copy and cannot recall what was in it.

63. Does the Second Claimant have any employer/employee relationship with the Respondent? I have serious doubts about the reliability of the documents provided by the Respondent in support of its assertion that Claimant 2 was employed by BH&P. It is agreed by both parties that he was interviewed by Mr de Silva, engaged by him and received instructions on what tasks to perform. These all point to him being employed by Mr de Silva. Cl2 is adamant he was never employed by BH&P, never saw pay advices from them nor did he see the P45 until exchange of documents took place in preparation for this hearing.

64. One thing is clear he was a limb (a) worker. In fact, the Respondent insists upon it although on the grounds the employer was BH&P. Mr de Silva's association with BH&P has afforded him access to the company's records which do not include any kind of contract of employment. Mr Colyer was unclear as to Mr de Silva's role with BH&P in 2019 initially stating he was the director and then saying he wasn't sure. The only explanation Mr Colyer offered for Mr de Silva's absence from this case was that English was not his first language. A perfectly reasonable explanation but for the fact nobody (other than Mr Colyer) in this case speaks English as a first language. It was helpful to hear from Mr Colyer just how much control Mr de Silva exercised over the sites, the hiring, allocation of work and allocation of hired staff to sub-contractors.

65. Applying the same case law above to claimant 2 I have no difficulty concluding Claimant 2 was a limb(a) employee. The Respondent accepts as much but asserts Claimant 2 was employed by a sub-contractor. I am not persuaded of that. I have no faith in the reliability of either the pay advices or the P45 produced not least because Claimant 2 states the first time he saw them was when they were disclosed during pre-hearing preparation; but also, because if they had been generated contemporaneously, they ought to have included information about the overtime worked by Claimant 2 (and set out in his unchallenged schedule). As stated above I find it significant that both Claimants experienced similar issues with under payment and the documentation suffers similar issues in respect of accuracy namely none show variance for overtime and change of day rate. I have concluded this is evidence that points to the documents being produced, at the very least under the same instruction if not by the same person. This makes it more likely than not both claimants were employed by the same entity. Since the Respondent accepts it engaged Claimant 1 and given the similarity of issues both claimants experienced, I conclude both claimants were its 'workers'.

UNAUTHORISED DEDUCTIONS OF WAGES

66. Did the Respondent unlawfully deduct the First Claimant's wages by failing to pay them the amount owed for the hours worked between July to September 2019?
Yes. Not least because the Respondent accepts it is still in debt to Claimant 1 in respect of monies owed for work performed between July and September 2019. But further, based on the sub-contractor invoices there should at least have been an uplift following the change of day rate from £90 to £110 in July 2019. The invoices issued for August (5 September), July (31 July) and June (28 June) are identical; there is no variation at all. In fact, with the exception of the first and last invoices (February and October) every invoice produced shows £1,500 gross per month. The sum acknowledged by the Respondent and the Claimant's evidence he received 2 payments in cash (£500 each) does not satisfy the sum owed in full. If the invoices were to be relied upon, they should at the very least reflect the

Respondent's version of events and demonstrate the July uplift either in the July or August invoices depending on when the uplift became effective; they don't.

67. If there was an employer/employee relationship between the Respondent and claimant 2 did the Respondent unlawfully deduct the Second Claimant's wages by failing to pay them the amount owed for the hours worked between July to September 2019? Yes. Based on the pay advices produced by the Respondent they should demonstrate a substantial amount of overtime for the month of July with variations for the overtime worked in August and September as set out in the unchallenged schedule of hours worked. They don't. As before these documents (with the exception of the last) show no variation which might reasonably be expected in the circumstances. I have no difficulty in dismissing these documents as wholly unreliable I prefer the claimant's evidence supported as it is by his schedule of hours worked which details every day, he worked for the respondent together with the hours he worked on each day.

DENIAL OF ACCURED HOLIDAY PAY

68. If the answer to 51 is yes, did the Respondent fail to pay the First Claimant their accrued holiday pay upon their resignation? Yes. The Respondent proceeded on the basis the claimant was a sub-contractor and not a worker. It did not dispute that the claimant received no accrued holiday pay at EDT. I accept the claimant's assertion he was not paid for accrued and outstanding holiday at EDT.

69. If the answer to the question at 63 above is yes, did the Respondent fail to pay the Second Claimant their accrued holiday pay upon their resignation? Yes. The Respondent disputed that it was his employer and offered no rebuttal that he received payment in respect of accrued and outstanding holiday at EDT. I accept the claimant's assertion he was not paid for accrued and outstanding holiday at EDT.

DENIAL OF WEEKLY REST PERIOD

70. If the answer to the question at 63 above is yes, has the Second Claimant been denied a weekly rest break on two occasions between Monday 1 July 2019 and Friday 19 July 2019? Yes. The evidence is clear and unchallenged the claimant worked 19 days without a rest break. No rebuttal evidence was offered by the Respondent other than to say he was employed by BH&P. I accept the claimant's assertion he was denied a weekly rest break on 2 occasions between 1 and 19 July 2019.

Employment Judge Allen

Case Number: 3302110/2020
3302111/2020

Date: ……28th October 2021..……

Sent to the parties on…1st November 2021..

THY

For the Tribunal Office