Case Number: 3320184/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Drewniak	**v**	Futturo Limited

Heard at: Watford (by CVP) **On**: 12 January and 11 June 2021

Before: Employment Judge Cowen

Appearances
For the Claimant: Mr Soszynski (paralegal)
For the Respondent: Mr Hendley (consultant)

JUDGMENT having been given orally on 11 June 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided subject to

AN APPLICATION made by the claimant by letter dated 28 June 2021 to reconsider the oral judgment dated 11 June 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

1. By way of an ET1, the claimant made claims for unpaid statutory holiday pay on the basis of his status as a worker. The ET3 denied these claims on the basis that the claimant was not a worker.

2. At the final hearing of the case on 12 January and 11 June 2021 I had before me a joint bundle of documents and additional documents which were added on second day.

3. Both the witnesses were assisted by a Polish translator whilst giving evidence and the claimant had the use of the translator throughout the hearing. I heard evidence from the claimant and from Mr Nowicki on behalf of the respondent.

4. The parties agreed that the claimant did not have the status of an employee and therefore before any holiday pay issue could be considered, the Tribunal had to consider whether the claimant was a worker under s.230 Employment Rights Act 1996, or whether he was self- employed. If the Claimant was a worker then he was entitled to be paid holiday pay, but if he was self employed he could have no claim for holiday pay.

5. Submissions were made by both representatives. The respondent asserted that the claimant was self employed and not entitled to holiday pay, alternatively that if the claimant was a worker, then he had been paid rolled up holiday pay. The claimant's representative asserted that he was a worker and therefore eligible for holiday pay. He referred to Robinson Steel v RD Retail Services Ltd as saying that the claimant must be given a comprehensive and clear document on how rolled up holiday pay is calculated and that this had not occurred. He argued that the claimant had not received any holiday pay and claimed 2 years of 28 days per annum at £100 per day.

6. The claimant's representative wrote to the tribunal on 28 June 2021 requesting that the judgment be reconsidered. He made new submissions that rolled up holiday pay was contrary to Robinson Steel v RD Retails Services Ltd and that the respondent had failed to pay the claimant at the time of his holiday, nor set out in a transparent and comprehensive manner the amount paid in rolled up pay. He asserted that the respondent should therefore pay the claimant holiday pay. No response to this application was made by the Respondent.

The Facts

7. The claimant worked for the respondent between 1 Oct 2104 and 29 March 2019 as a carpenter. The claimant worked in the respondent's workshop and also on various sites.

8. The agreement between the parties was that the claimant would register as a Construction Industry Scheme subcontractor. This meant that the respondent would deduct 20% from the claimant's payments each month to be paid to HMRC directly.

9. The claimant worked Monday to Friday from 7am to 5pm for the respondent. Occasionally he would work on Saturdays for half a day. He was allowed two breaks per day. The respondent provided him with tshirts with the company logo to wear, and supplied the claimant with some of the tools he required to carry out the work.

10. The arrangement for work was that the claimant would arrive to work and be told what jobs he was required to do. This was allocated by the respondent on the basis of matching the skills of those available to the tasks required. If the claimant or his colleagues didn't have the required skills or knowledge, the jobs could be moved around. The claimant was not offered work which he could accept or decline. Nor did he offer to, nor work for anyone else during this period.

11. The claimant was initially paid £7 per hour, but by 2017 he was being paid £10 per hour net of CIS payment (but gross of NI and any further tax contribution). The Claimant believed this to be the rate that he was paid. In fact he was being paid £12.50 per hour that he worked.

12. He was able to take holiday when he wanted, as long as this did not interfere with the respondent's ability to complete projects.

13. No written contract or terms and conditions were provided to the claimant. In the first few years the claimant issued an invoice to the respondent each month, but he stopped doing this in 2017 and was not asked to restart. The claimant filled in a timesheet each day and this was used in order to calculate his pay. The respondent took the information on the timesheets and formed them into a spreadsheet setting

out payments to the claimant. A record was therefore kept of the days on which the claimant worked or took holiday. Payment was made by bank transfer every two weeks.

14. The documents provided to me do not show a complete set of timesheets for the claimant as these are disposed of at the end of each project. The claimant did not provide any documents to show the hours he had worked or payments received, but listed the payments in his witness statement. The claimant was not able to provide evidence of holidays accrued or taken.

15. The spreadsheets provided by the respondent match with the payments made to the claimant except for some small errors from time to time. These represent an accurate breakdown of the payments made and hours claimed by the claimant. These were not given to the claimant during his work for the respondent.

The Law

Employment status

16. 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'

17. A further requirement of a limb (b) worker is that there needs to be an element of mutuality of obligation, in the provision of work and the acceptance and completion of that work.

18. In *Uber BV and ors v Aslam and ors 2021 ICR 657, SC*, the Court made it clear that the tribunal must now consider the statutory interpretation rather than the contract to decide the status of a claimant. The tribunal must remember that the purpose of the legislation is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate position. The key question in such cases is "whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work."

19. If the claimant does not satisfy that test, then the claimant should be regarded as self-employed.

20. If the claimant is a worker under limb (b) of s.230(2) ERA, then the issue of holiday pay should be considered. Holiday pay is included in the definition of "wages" in the ERA. A failure to pay holiday pay is therefore a claim for unauthorised deduction from wages.

Holiday pay

21. A worker is entitled to 5.6 weeks paid leave each leave year (including any bank holidays the worker is entitled to take).

22. The principle of holiday pay was to ensure that workers took a break from work for health and safety reasons, without risking a downturn in their pay. The courts have therefore indicated that a payment which gives incentive not to take that time off, is contrary to the purpose of the EU Directive from which the right came.

23. The Working Time Regulations, regulation 16 specifies the way in which a worker is paid in respect of any period of annual leave: this is at the rate of a week's pay in respect of each week of leave.

24. There were authorities that held both for and against the entitlement of an employer to pay a worker 'rolled-up' holiday pay. Marshalls Clay Products Ltd v Caulfield and ors and other cases 2004 ICR 436, EAT, came out in favour. This was considered by the ECJ in Robinson-Steele v RD Retail Services Ltd and two other cases 2006 ICR 932, ECJ. Whilst the ECJ disapproved of rolled up holiday pay as contrary to Article 7(2) of the Directive, an exception was noted where employers continue to use this method as against an entitlement to payment when leave is taken. The court held that if there was a 'transparent and comprehensible' record of what was paid, separate to wages (Lyddon v Englefield Brickwork Ltd 2008 IRLR 198, EAT) then this method could be used; so that the worker could distinguish between their hourly pay and the amount attributable to holiday pay. The burden is on the employer to prove such transparency and comprehensibility. However, Robinson- Steele indicated that EU countries should not allow this method to continue. The UK government have indicated that they accept that this must be followed, but have created no specific regulation to ensure that such method is not used.

25. In Smith v AJ Morrisroes and Sons Ltd and other cases 2005 ICR 596, EAT, it was said that there ought to be provision for such pay in the contract, clear labelling of it in the payslips and records kept of holidays taken.

Decision

26. In order to claim holiday pay, the claimant must have the status of a worker within s.230 ERA. The first point to consider is whether there is a contract between the parties.

27. The CIS scheme is an agreement between the construction industry and HMRC whereby those who are not employed as employees (and therefore not enrolled on PAyE) will have 20% tax deducted at source by the contractor and paid direct to HMRC. This tax arrangement does not dictate the employment status of the individual.

28. In looking to see if the claimant is a worker, I must consider what the contract was between the parties, even where it was not written down. In this case it can be found in the actions and agreements between the claimant and Mr Nowicki.

29. The evidence shows that there was a mutuality of obligation between them – an agreement, although not in writing, whereby the respondent was obliged to offer work to the claimant and for the claimant to do the work on the days he said he would do so. The respondent controlled the work done and provided at least some of the tools to do so. The work was at the order of the respondent, when Mr Nowicki indicated.

30. The respondent expected the claimant to do the work personally and the claimant also expected to do it himself without the suggestion that he could nominate others to do it for him.

31. The claimant did not work for anyone else and was not selling his skills to the respondent as a customer, but as an integral part of the respondent's business and not a separate business.

32. The evidence provided by both the claimant and Mr Nowicki indicated that they both felt that there was a contract for personal service. I find that there was such a contract and that the claimant's position was that of a worker.

33. This finding allows the Claimant to make a claim for unlawful deduction from wages and/or breach of the Working time regs.

Holiday Pay

34. Turning therefore to what the Claimant was paid; His 'net' rate of pay after deduction of CIS tax was £10 per hour. The parties agreed the sums paid, but not what the sum represents. The respondent provided a spreadsheet which broke down the payments.

35. Looking at the spreadhsheet, it is noticeable that the rate of pay is £12.50 ph. This clearly indicates that a deduction was taken from this prior to payment (of 25%).

36. The second issue is that the number of hours paid are more than the hours worked. To take an example the second 2 weeks of April 2018 – the Claimant worked for 45 hours the first week and 53 the second week – 98 in total. However, he was paid £1090, which is payment for 109 hours. The additional 11 hours of payment are holiday pay. It is therefore seen on the spreadsheet that for every day worked, the claimant received one hour of additional holiday pay.

37. This method of payment is not in line with the decision in Robinson- Steele as it does not pay the claimant at the time his holiday is taken. Nor was the spreadsheet available to the claimant to allow him to see the separate payments between wages and holiday pay. The practice used by the respondent was therefore unlawful.

38. However, I note that the claimant agreed that the payments listed on the spreadsheet were made. He has therefore received more in pay per hour and an additional hour per day in pay than the amount he has worked. Neither party set out in the evidence or submissions the additional amount which the claimant has therefore received

above his agreed pay. Any amount which he has received above his agreed pay should be set-off against the claim he makes for holiday pay.

39. The parties are asked to make written submissions as to the amount of holiday pay outstanding, given that the whole claim by the claimant was or £5,600 and that he acknowledged that he had received the amounts as referred to in paragraphs 34 and 35 above. Submissions should be sent to the Tribunal by 18 November 2021.

Employment Judge Cowen

Date: 4 November 2021

JUDGMENT SENT TO THE PARTIES ON

10 November 2021

FOR THE TRIBUNAL OFFICE