EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Joe Fowler	AND	Bluesnow Limited T/A Richard Thomas Conservatories, Extensions & Windows

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (VHS) **ON** 8 to 10 November 2021

EMPLOYMENT JUDGE GRAY

Representation
For the Claimant: **Mr M Curtis (Counsel)**
For the Respondent: **Miss C Evans (Counsel)**

JUDGMENT

The judgment of the tribunal is that the Claimant is an employee within the meaning of section 230(1) of the Employment Rights Act 1996 and a worker within the meaning of regulation 2(1) of the Working Time Regulations 1998.

With this finding the Claimant is potentially owed holiday pay and the amount of that was still to be determined.

The Claimant was not dismissed so his complaints of Unfair Dismissal and Wrongful Dismissal fail and are dismissed.

The Claimant was not provided with written particulars and is awarded 2 weeks' pay (capped at £538 a week) amounting to £1,076.

Further to the above Judgment in respect of holiday pay, the parties have agreed that the Tribunal award the sum of £18,904.

JUDGMENT having been delivered orally on the 10 November 2021 and written reasons having been requested by email from the Respondent dated 22 November 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and this Hearing

1. By a claim form presented on 14 October 2020 the Claimant brought the following complaints;

   (a) Unfair dismissal;

   (b) Breach of contract (relating to notice);

   (c) Accrued but unpaid holiday pay;

   (d) Other payments;

   (e) Failure to provide written particulars.

2. The dates of the ACAS early conciliation certificate are 31 July 2020 until 14 September 2020. An act occurring on or after the 1 May 2020 will be in time.

3. The Claimant says he was employed from 1 May 2008 to 3 June 2020 as a Glazier/Conservatory Fitter, and unfairly and wrongfully dismissed. If not an employee then he says he was a worker, and claims, either as an employee or a worker, unpaid holiday and for failure to give written particulars.

4. The Respondent says that the Claimant was self-employed and there was no dismissal.

5. For reference at this hearing I was presented with:

   5.1 An agreed PDF bundle of 307 pages with separate index

   5.2 A witness statement from the Claimant

   5.3 Two witness statements of behalf of the Respondent one from Mr Kevin Clark ("KC") and the other from Mr Michael Cook ("MC")

6. The parties presented the Tribunal with the following agreed list of issues:

   Jurisdictional issues

   Employment status

   1) Was the Claimant an employee under s.230(1) ERA?

   2) If not, was the Claimant a worker under s.230(3) ERA?

   3) Was the Claimant a worker under regulation 2(1) of the Working Time Regulations 1998?

Unfair dismissal (ss. 94, 95, 98 and 111 ERA)

4) If the Claimant is found to be an employee, was the Claimant dismissed or did he resign of his own volition?

5) If the Claimant was dismissed, was the Claimant dismissed for a potentially fair reason pursuant to s98 (2) ERA, namely capability?

6) If so, did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant pursuant to s.98(4) ERA?

7) Did the Respondent have a genuine belief as to the Claimant's capability and any underlying cause?

8) Was it reasonable for the Respondent to hold that belief?

9) Did the Respondent reach that belief after it had carried out a reasonable investigation as was reasonable in the circumstances?

10) Was the dismissal of the Claimant fair in all the circumstances (having regard to equity and the substantial merits of the case)? In particular, was the dismissal within the band of reasonable responses available to the Respondent?

11) Did the Respondent follow a fair procedure when dismissing the Claimant?

Remedy (unfair dismissal)

12) If the Claimant was unfairly dismissed, should compensation be awarded to the Claimant?

13) If so, what level of compensation should be awarded to the Claimant?

14) In particular:

    a) Was the Claimant's conduct before dismissal such that it would be just and equitable to reduce the basic award? If so, by what proportion would it be just and equitable to reduce the basic award?

    b) Did the Claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

    c) If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by how much would it be just an equitable to reduce the compensatory award?

    d) If the Respondent failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code'), was its failure reasonable? If the Respondent's failure to comply with the Acas Code

was unreasonable, is it just and equitable to increase any award made to the Claimant? If so, by how much should the award be increased?

e) Has R proved that C has unreasonably failed to comply with his obligation to mitigate his losses?

Wrongful dismissal (breach of contract)

15) If the Claimant is found to be an employee, and that he was dismissed by the Respondent, did the Respondent breach the Claimant's contract of employment by dismissing him without notice, or without pay in lieu of notice?

16) If so, how much compensation ought to be awarded to the Claimant?

Failure to provide written statement of employment particulars (s.38 Employment Act 2002)

17) If the Claimant is found to be an employee or a worker, the Respondent accepts that it did not provide the Claimant with a written statement of employment particulars as required under s.1(1) ERA or s.4(1) ERA. How much compensation ought to be awarded to the Claimant?

18) Are there exceptional circumstances which would make an award unjust or inequitable?

Holiday pay (reg. 30 WTR and s.23 ERA)

19) Has any claim been brought in time:

a) In the case of any unlawful deductions from wages, no more than three (3) months following the deduction complained of, or following the last of a series of any deduction complained of?

b) In the case of any breach of the WTR, no more than three (3) months from the date payment is alleged to have been due?

c) Has there been a break of three (3) or more months between any alleged deduction/ non payment?

20) Does the Tribunal have jurisdiction to hear any complaint relating to any alleged deduction of wages of more than two (2) years from the date of the claim (*Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322*)?

The Facts

7. The Respondent describes itself as a window and conservatory installer.

8. The Claimant says he worked as a glazier and conservatory fitter for the Respondent from 1 May 2008 to 3 June 2020. For the vast majority of this time the Claimant worked with a colleague Paul Essex as part of a two-man team.

9. The Claimant says he was an employee of the Respondent, and if not that then at least a worker.

10. The Respondent says that the Claimant was genuinely self-employed.

11. While working for the Respondent the Claimant acts on the basis that his status is that of self-employed. He completes accounts with the assistance of an accountant recording profit from self-employment as can be seen from the account papers included in the bundle relating to April 2010 to April 2017 (see in particular pages 114, 148, 156 and 157).

12. It is not in dispute that the Claimant was taxed under the Construction Industry Scheme (CIS) while working for the Respondent, see paragraph 20 of MC's witness statement and page 76 of the bundle.

13. The Claimant confirmed in oral evidence that he worked in a self-employed capacity before working with the Respondent and in his witness statement that he did so after the Respondent, see paragraph 14 of his statement. The Claimant has therefore benefitted as being treated as self-employed for tax purposes for all that time.

14. It is the Claimant's expressed position after the working relationship ended, in the letter sent on his and Mr Essex's behalf by Mr Essex dated 24 July 2020, that he thinks he is a worker after taking advice (see pages 67 and 68 of the bundle). The letter states that the Claimant seeks holiday pay.

15. During the course of the hearing I was made aware of the Employment Tribunal Judgment of Employment Judge Roper dated 7 April 2021, which was Mr Essex's claim against the Respondent, where all his complaints (including for holiday pay) were found to be out of time, save for his complaint for a redundancy payment which was left to the parties to resolve, terms of settlement having been agreed by the parties.

16. The Claimant says in paragraph 4 of his statement that … "I worked a standard 40 hours per week, eight hours per day Monday to Friday. Up until 2017 I earned £800 per week and, after tax was deducted, took home £640. In 2017 we received a pay rise and I earned £850 per week, taking home £680 per week.".

17. In the particulars of claim the Claimant states that he worked 40 hours a week Monday to Friday, with an extra 10 hours a month on Saturdays (see page 14).

18. At paragraph 10 of his witness statement the Claimant says … "I did not take that many holidays, never more than a couple of weeks at a time. I was never paid for holidays, which I now understand I should have been as a worker and employee.".

19. The Claimant confirmed in supplemental oral evidence that he had not taken any holidays since his honeymoon six years ago.

20. He recalled five large holidays while working with the Respondent:

    20.1 Two to Australia

    20.2 One to Egypt

    20.3 One to Halkidiki; and

    20.4 One to Turkey.

21. Although the Claimant initially thought these were all taken before 2015, he then confirmed it was in 2017 or 2018 for the most recent, but then confirmed it was June 2019 and this seems to correspond to what is recorded at page 83 of the bundle.

22. The Claimant confirmed that he would take public holidays off (or at least one of them if they spanned a Friday to Monday) and the Christmas period off, for example see the 8 days referred to at page 84 of the bundle.

23. The Claimant explained that the handwritten notes (at pages 82 to 94) are records he approved of a fund held by the Respondent that he says was made up of Saturdays he worked, that he would then use against holidays he took.

24. It is not in dispute that the Claimant was provided with a company van to use and had Respondent branded clothing. To an outsider looking at the Respondent's marketing position the Claimant would appear to be part of the Respondent's team, which can be seen from the reviews, comments and company web pages (see pages 101 to 108).

25. The position as to tools and equipment seems to be generally accepted in that the Claimant would provide his own basic tools such as hammers, saws and screwdrivers, as well as specialist power tools. The Claimant like other contractors would often take spare parts from the Respondent without objection. The Claimant could use company step ladders and if scaffolding was needed at a site this would be provided by the Respondent.

26. It is not in dispute the Claimant had training facilitated by the Respondent that he did not need to pay for (see paragraph 6 of the Claimant's witness statement and paragraph 17 of MC's statement).

27. There is no evidence presented to disprove what the Claimant says in his statement at paragraph 5 that … "I never did work for anyone else during my whole time with the Respondent, other than a few jobs for family and friends at weekends. Over the twelve years I worked for the Respondent I did this no more than ten times in total.". I therefore accept what the Claimant says about this.

28. The Claimant was not required by the Respondent to provide (and did not provide) his own public liability insurance.

29. The Claimant states at paragraph 8 that … “My working week was completely controlled by the company. I always expected them to provide me with work and I was expected to turn up at the yard by 7.30am Monday to Friday and to be on site between 8.00am and 8.30am. We did sometimes finish early if a job was completed, sometimes between 3.00pm and 4.00pm, but I also worked through a lot to 5.00pm. I could not simply say I was not going into work and was never aware that I could provide a substitute. I certainly never did so during my whole time working for the company.”.

30. MC in his statement at paragraph 5 says … “The Respondent offered work to the Claimant and Mr Essex and they would work together on it as a team. The Respondent did not interfere with how the Claimant decided to carry out the work. The Claimant and Mr Essex decided between them who would do what and how the work would be carried out. Due to our experience in the industry, we know roughly how long specific jobs take to complete. However, there is always scope for change and contractors, such as the Claimant, would call up and ask for more time or let us know that they had finished ahead of schedule.”

31. Then at paragraph 12 says … “The Respondent usually books jobs several months in advance. This is based on the fact we need to schedule work in for clients when they purchase products. The Claimant would let us know when he was not available and he had a right to choose the work he did [49]. He had a right to turn down work and he did exercise this right. There was no obligation for the Claimant to accept work. The Claimant turned down work because he was on holiday or was doing other work. The Claimant also turned down window work as he preferred to do conservatory work which pays better.”

32. The Claimant did not accept MC’s evidence on these matters in cross examination.

33. There is no written agreement governing the working relationship between the Claimant and the Respondent.

34. Although at paragraph 18 of MC’s witness statement he refers to a template written contractor agreement in the bundle (pages 49 to 51) to explain what was expected of the Claimant in respect of work and hours, the Claimant never entered into such an agreement, in writing, nor is there any evidence that the Claimant agreed to these terms or worked to them. Nor is there evidence for example that the Claimant … “was expected to rectify any errors in his own time and at his own expense [50] …”, as asserted by MC. It was accepted that the Claimant would be given time to finish jobs if they did overrun due to there being problems with the original surveys for example.

35. MC agreed in cross examination that the Claimant worked most Monday to Fridays and some Saturdays. MC accepted in cross examination that the Claimant would usually start on average between 7am and 8:30am.

36. MC states (at paragraph 18) that … “The Claimant's pay was transferred into a fund from which the Claimant and Mr Essex could withdraw however much they wished [85-94].” And … “19. Although the Claimant and Mr Essex tended to

withdraw the same amount from the fund each week, it was their choice to do so [163-261]. There were occasions where the Claimant would withdraw a higher amount [167 and 175]. The amount of money placed into the fund varied depending on what work had been done [163-260]. If the Claimant withdrew less than he had earned, there would be a surplus in the fund. [201, 225 and 259]. The Claimant used this surplus for weeks he did not work as much or when he was not providing services to the Respondent as he was not entitled to holiday pay [165, 176, 205, 212 and 224]. We tracked the amount of money paid into the fund and this record was agreed by the Claimant on behalf of himself and Mr Essex [85-94].".

37. Evidence was presented on what the Claimant was paid and the creation of the pay fund.

38. MC agreed that there was the equivalent of a "day rate" of £160 per person per day, which increased to £170 per person per day for conservatories (this is also confirmed in the rates document at page 43). It is clear from the invoices and "Fitters Wages" documents produced by MC that the Claimant would regularly work on a number of jobs for the Respondent's clients spread over the Monday to Friday period, and on occasions Saturdays as well (see for example page 79).

39. As to the "fund" MC confirmed that it was started after the original owner of the business Mr Thomas left in 2016 and that it was the idea of the Claimant and Mr Essex initially because they liked to have money when they wanted holidays. The other installers became aware and requested the same which MC agreed to. The money in the fund earnt by the Claimant was paid to the Claimant as an individual.

40. MC confirmed that the handwritten notes about the fund started to be produced by him in June 2016 (see pages 77, 78 and 79). The handwritten notes are titled invoices. He confirmed that the typed ones were produced from May 2017 (see page 260). They are titled "Fitters Wages". MC said he had given copies of the notes to the Claimant for the first 12 months, so this would be from June 2016, stopping in June 2017 and would mean that probably only 2 or 3 typed ones were given to the Claimant. The Claimant denies seeing or receiving any of them, save the fund notes at pages 82 to 94 of the bundle which he saw and approved at the time.

41. MC explained that the handwritten fund records, that the Claimant has agreed/signed (pages 82 to 94), record where the Claimant works more that the weekly figure of £850 gross (£680 net) and does not relate to just Saturday work. This can be seen to be correct when looking at the notes for example at page 83 of the bundle which records £140 being paid into the fund for 17 June 2019 (which is a Monday) and which maps to page 198 of the bundle.

42. The handwritten notes and the "Fitters Wages" documents also match when recording holiday. This can be seen from page 197 which records … "Joe on hols but his money comes out of pot" (w/c 24 June 2019) and page 196 (w/c 1 July 2019), which map to page 83 which records … "2 weeks off".

43. Several of the typed "Fitters Wages" documents created by MC refer to "holiday". See pages 180 and 181 for example. MC said that he did not intentionally use the word "holiday" to record the Claimant's absence and that he was not keeping a holiday record. MC has though used the word in the description section, see page 181, and confirmed that he knew what the word holiday meant when he used it.

44. There was evidence presented of an agreed amount being paid out of the fund at the Claimant's request that does not relate to holiday in February 2020 (see page 167, which says it is for Solicitors fees) which maps to the bank account screen shot the Claimant provided as a new document after the lunch break on day one of the hearing. As the money in the fund has been earnt by the Claimant, so would appear to be his money, it would be surprising if the Respondent had not agreed to hand it over.

45. It has been suggested by the Respondent that the Claimant had an unfettered right of substitution. However, the evidence presented does not support that.

46. The Claimant worked in the vast majority with Mr Essex, save for when he could undertake work on his own, when Mr Essex had a heart attack and after Mr Essex stopped working for the Respondent.

47. The evidence presented is that the Claimant worked with Bernie (another contractor) when Mr Essex had his heart attack (for a period of three weeks in January 2018), then with Harry on the 3 June 2020 who was an employee of the Respondent.

48. Mr Essex ceased to work for the Respondent either in March 2020 according to the Claimant (as stated in paragraph 7 of his statement … "Paul was eventually dismissed on 27 March 2020.") … or in May 2020 according to the Respondent (see paragraph 5 of KC's witness statement … "Around the beginning of May 2020, the Claimant no longer completed jobs with Mr Essex."), although KC agreed in cross examination that it may have been the earlier date.

49. The typed "Fitters Wages" document for w/c 16 March 2020 show the last week the Claimant and Mr Essex worked together (see page 164), there is then a gap for the COVID lock down, with MC confirming that the Respondent was not using subcontractors until the end of May 2020, to the next "Fitters Wages" document for w/c 25 May 2020 (see page 163) that just has the Claimant's name in the heading.

50. About the appointment of Bernie, MC confirmed in cross examination that Bernie was self-employed and agreed that Bernie worked with the Claimant by the Claimant asking the Respondent who was available, the Respondent saying Bernie, could have Bernie and the Claimant saying fine.

51. As to Harry, this is when Mr Essex stopped working for the Respondent, and MC confirmed that Harry was an employee and was proposed by the Respondent, and the Claimant then agreed.

52. As mentioned, the matter of Mr Essex no longer working for the Respondent business has been the subject of another Employment Tribunal, and I was informed by the Respondent that the reasons around the termination are subject to confidentiality. MC could confirm that the current owner of the Respondent had the conversation with Mr Essex, but that he (MC) had a conversation with the Claimant at the beginning of the lock down period to say that they were happy to continue with him.

53. From all this it is clear the Claimant does not have unfettered control over the substitution of himself or indeed of Mr Essex.

54. It is on the 3 June 2020 that the working relationship between the Claimant and the Respondent ends, the Claimant says he was dismissed, the Respondent says he just left of his own accord and never resumed work.

55. So, was the Claimant dismissed?

56. The Claimant says at paragraph 13 that on the 3 June 2020 … "He [Kevin Clarke] then said he did not like the way I had dealt with the issue and felt we could no longer work together. He then dismissed me, I collected my tools and left. I was asked to return the company van by the following Monday morning, I actually returned it on the Sunday, after having it fully cleaned and valeted.".

57. In cross examination about the alleged dismissal the Claimant confirmed that KC came onto the site as there was a problem. The Claimant explained that he arrived on the job working with Harry (in replacement to Mr Essex) who had no experience. The job required them to take a wall down, and what was left was not high enough which changed how the job had to be fitted. After returning to the office the Claimant then returned to site and KC attended and didn't understand all the issues. The Claimant says that he and KC spoke as to how it could be dealt with and KC asked if the Claimant could do the lead work. The Claimant explained to the Tribunal that he could do, but they normally have a specialist do it. The Claimant then says KC said to him don't think we can work together, then had conversation.

58. The Claimant was asked to clarify his evidence on this as he has referred in paragraph 13 of his statement as "he then dismissed me" and in answer to questions raised in cross examination that "then had conversation".

59. The Claimant explained that he was in the client's back garden and KC said, "he felt he could no longer work with us". As to who was "us", the Claimant said this meant him, Harry and KC. So, the Claimant says he collected his tools and left.

60. The Claimant then received the WhatsApp from KC the next day (see page 59). There is no suggestion in this that the Claimant has been dismissed, but instead that he may have been offended about the comments concerning lead work.

61. The Claimant says in oral evidence that he had telephone calls with MC after that to try and arrange a meeting between them at the suggestion of ACAS, but there is no detail of any of that in his witness statement. The Claimant writes on

the 9 June 2020 (see page 62), where he refers to ACAS and HMRC, which is consistent with the Claimant's oral evidence, also the WhatsApp on the 15 June 2020 (at pages 59/60) and then as can be seen in the bundle again on 16 September 2020 (pages 70 and 71), where the Claimant says over two WhatsApp messages that he is going to ACAS and HMRC and that he thinks he is an employee and he writes … "sorry its gone this way".

62. KC says at paragraph 9 of his witness statement … "I asked the Claimant whether he would like Mr Bell to help him as I didn't know if he was able to do leadwork himself. I knew that Phil Huckle usually did this part of the job. I was not criticising the Claimant, I was trying to help him and make sure he had the assistance he needed. I think the Claimant took this as an insult and felt as though I was belittling him, suggesting he was not capable of doing leadwork. The Claimant said, "why don't you get the A team to fit the conservatory". He was referring to Mr Bell & Mr Lillington. The Claimant then said, "I am not doing this anymore". He picked up his tools and walked off site to the van. I called the Claimant back saying, "Don't be like this" and I told him not to go. I followed the Claimant to his van to try and reason with him and find out why he was leaving the site, but the Claimant stayed silent and got into his van and drove off. Mr Hocking and I did not understand what had happened. At no point did I tell the Claimant he was dismissed or that his engagement with the Respondent was being terminated. The Claimant simply walked off site.".

63. KC was consistent with his account in cross examination which is also consistent with the contemporaneous documents. KC explained matters as the Claimant being stressed with the job after the departure of Mr Essex and that may be why he walked.

64. I accept the evidence of KC and that the Claimant has not proven on the balance of probability that he was dismissed.

The Law

65. I was assisted by the written legal summary provided by Mr Curtis with copy case authorities and the confirmation and written summary of Miss Evans, that the law in the main was not in dispute.

66. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("ERA").

67. An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. 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.

68. Under section 230(3) of the ERA a 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. (A worker who satisfies this test in sub-paragraph (b) is sometimes referred to as a "limb (b) worker").

69. Under section 13 (1) of the ERA the right not to suffer an unlawful deduction from wages applies to workers, and not just employees.

70. A complaint of unfair dismissal can only be made by an employee.

71. This tribunal has jurisdiction to hear breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). This jurisdiction is subject to certain preconditions, including that in paragraph 3 (c) of the Order, namely that the claim arises or is outstanding on the termination of the employee's employment. Accordingly, the right to bring a breach of contract claim before this tribunal is limited to employees.

72. The Claimant's claim for accrued but unpaid holiday pay is brought under regulation 14 of the Working Time Regulations 1998 ("the Regulations"). The Regulations apply to workers, rather than just employees. The definition of "worker" for the purposes of the Regulations effectively replicates the definition under section 230(3) of the Act.

73. Employee or Worker or Self-Employed?

74. Whether the Claimant was an employee or not is a question of mixed fact and law for the tribunal.

75. It ought to be approached in three stages (per ***Express & Echo Publications Ltd v Tanton [1999] IRLR 367***, paras 20-23):

    75.1 What were the terms of the contractual agreement between the parties? (a question of fact)

    75.2 Were any of the terms of the contract inherently inconsistent with the existence of a contract of employment? (a question of law)

    75.3 If there are no inherently inconsistent terms, was the contract a contract of service or for services, having regard to all of the terms? (a mixed question of law and fact)

76. The starting point for cases like this is the judgment of McKenna J in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, [1968] 1 All ER 433,*** where he said as follows:

"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 …"

77. Also, considering ***Autoclenz v Belcher [2011] UKSC 41, [2011] IRLR***, there are four questions to be asked:

    77.1 first, what are the terms of the contract between the individual and the other party?

    77.2 Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)?

    77.3 Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer?

    77.4 And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?

78. To determine whether an individual carried on business on his own account it is necessary to consider many different aspects of the person's work activity and this is not to be done by way of a mechanical exercise of running through items on a check list to see whether they are present or absent from a given situation. Rather: "The object of the exercise is to paint a picture from the accumulation of detail… 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" (***Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171***, para 11)

79. It is accepted in this case that no written agreement was in place between the parties.

80. It is accepted that the Claimant has been registered as self-employed for tax purposes. About this I was referred by Respondent's Counsel to paragraph 20 of ***Massey -v- Crown Life Insurance [1978] IRLR 31***. I also note, as referred by Claimant's Counsel …. "A tribunal must always take an objective approach to status -a person should not be estopped from contending that he was an employee merely because he has been content to accept self-employed status for some years. That was the position in **Autoclenz v Belcher [2011] UKSC 41, [2011] IRLR**".

81. Also noted … "it does not follow that, because an absent master has entrusted day-to-day control to such retainers, he has divested himself of the right to give instructions to them" (***White v Troutbeck SA [2013] IRLR 286*** at para 41).

82. The law re substitution, and the need for personal performance, is helpfully set out by Sir Terence Etherton MR at para 84 of ***Pimlico Plumbers v Smith [2017] ICR 657***:

"In the light of the cases and the language and objects of the relevant legislation, 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"

83. About worker status when considering whether the Respondent is a 'client or customer' of the Claimant's 'profession or business', there is helpful guidance from Langstaff J in ***Cotswold Developments Ltd v Williams [2006] IRLR 181***, at para 53:

"a focus on 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 a 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"

84. I was also referred to ***Byrne Bros (Farmwork) Ltd v Baird [2002] IRLR 96***, and ***Wright v Redrow Homes (Yorkshire) Ltd [2004] IRLR 720***.

85. Unfair dismissal

86. Pursuant to section 94 of the ERA an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with section 98 ERA.

87. A preliminary question that often arises, particularly in claims of unfair dismissal, is whether there has in fact been a dismissal at all. In these circumstances, the burden of proof falls on the employee to show a dismissal. The standard of proof is that of the 'balance of probabilities' as normally applied in civil courts: the tribunal must consider whether it was more likely than not that the contract was terminated by dismissal rather than, for example, by resignation or by mutual agreement between employer and employee.

88. Wrongful Dismissal

89. The Claimant's claim for breach of contract (notice pay) is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

90. The Claimant needs to prove a dismissal to claim he was wrongfully dismissed.

91. Holiday Pay / unauthorised deductions

92. The Claimant also claims in respect of deductions from wages (for holiday pay) contrary to section 13 of the ERA.

93. The Claimant also claims in respect of holiday pay for accrued but untaken holiday under the Regulations.

94. The Deductions from Wages (Limitation) Regulations 2014 apply to claims issued on or after 1 July 2015. These regulations have introduced section 23(4A) to the ERA which limits claims for unlawful deductions to the period of two years ending with the date of presentation of the complaint.

95. Through a combination of the list of issues, written and oral submissions this complaint was clarified as being asserted by the Claimant primarily as a breach of regulation 30 of the Regulations and upon reliance of the case authorities of ***King v Sash Window Workshop [2018] IRLR 142*** and ***Smith v Pimlico Plumbers Ltd [2021] IRLR 654***. In short it is submitted that the Claimant had no holiday for all 12 years of service and is therefore due the equivalent of 4 weeks times 12.

96. If the Claimant did have some holiday then it was unpaid, and it would be argued for in line with the agreed list of issues, that is raising time limit jurisdictional issues about the claims for unpaid holiday pay, as well as what was accrued each year but not taken.

97. The Respondent's primary position is the Claimant is not an employee or worker so has no holiday rights. If that is not right, and he is found to be an employee or worker, then it is argued that he took all his holiday entitlement and any unpaid holiday claimed for is out of time to be claimed now, save for any that was accrued in the final leave year.

98. In ***Smith v Pimlico Plumbers Ltd 2021 ICR 1194***, the EAT clarified that the ECJ's ruling in Sash Window does not allow a worker to accumulate a right to payment for annual leave where the worker has been allowed to take leave but has not been paid for it. Having undertaken a detailed analysis of the ECJ's reasoning, the EAT decided that its conclusions with regard to carry-over and the availability of an allowance in lieu on termination can only apply in respect of leave that has not been taken. The EAT considered whether, in light of Sash Window, a worker who takes unpaid leave should not be considered to have taken leave within the meaning of Article 7. The EAT acknowledged that, given the ECJ's powerful statements as to the importance of being remunerated during

leave, it could be argued that any unpaid leave is tainted by uncertainties that would deprive a worker from fully benefitting from the rest and relaxation that Article 7 leave is intended to afford. However, the EAT did not consider that the ECJ went so far as to suggest this. Its focus was on the situation where a worker declines to take leave as a result of the uncertainties as to pay. Had the ECJ intended to develop a carry-over right in respect of leave that is taken but unpaid, it could have been expected to say so in terms, especially since such a right would negate the procedural limits applicable to such claims.

99. Both Counsel agreed that the Tribunal was not presented enough evidence to determine this matter both as to liability and remedy, if either of their primary positions are not found.

100. <u>Written particulars</u>

101. Under section 38 of the Employment Act 2002, if the Respondent was in breach of its duty to give a written statement of initial employment particulars and the employment tribunal finds in favour of the employee/worker or makes an award to the employee, then the tribunal must increase the award by an amount equal to two weeks' pay, and may, if it considers it just and equitable in all the circumstances, increase the award by four weeks' pay instead.

The Decision

102. There is no written agreement governing the working relationship between the parties which was in place for just over 12 years from 1 May 2008 to 3 June 2020.

103. I find as fact the contractual terms between the parties to be:

    103.1 The Claimant worked a standard Monday to Friday with occasional Saturdays for a contractual amount of £170 gross a day which has been set by the Respondent.

    103.2 The Claimant received a regular payment of £850 gross a week with 20% tax deducted by the Respondent. The Claimant did not have to submit invoices for such payment, all pay records being maintained by MC of the Respondent.

    103.3 Earnings for work done in excess of £850 gross a week were retained by the Respondent to pay the Claimant when he is absent on holiday or if as otherwise requested by the Claimant.

    103.4 The Claimant is provided with a company van, and clothing with the company logo. To an outsider looking at the Respondent's marketing position the Claimant would appear to be part of the Respondent's team, which also appears the case from the reviews, comments and company web pages (pages 101 to 108).

103.5 The Claimant is provided with training facilitated by the Respondent and not at his cost.

103.6 The Claimant is not required to have in place public liability insurance.

103.7 The Claimant is contractually obliged to carry out the work or perform the services himself. The Claimant does not have an unfettered control over the substitution of himself or indeed of Mr Essex. If the Claimant and Mr Essex were genuinely engaged by the Respondent as a self-employed contracting team, then the Respondent could not have unilaterally removed Mr Essex, this would be a matter for the Claimant and Mr Essex.

104. I do not find that the Claimant is performing the work for the Respondent in the capacity of client or customer. There is no evidence presented to disprove what the Claimant says in his statement at paragraph 5 that … "I never did work for anyone else during my whole time with the Respondent, other than a few jobs for family and friends at weekends. Over the twelve years I worked for the Respondent I did this no more than ten times in total.". I accept what the Claimant says about this.

105. In my view the Claimant is clearly a worker, and on balance I find him to be an employee.

106. There is nothing to suggest that the Claimant is negotiating rates for each job, nor that he loses out if a job over runs. It was accepted that the Claimant would be given time to finish jobs if they did overrun due to there being problems with the original surveys for example. There is insufficient evidence presented to support that the Claimant had real control over the work he did and when, he is provided with details of the jobs that have been pre-planned by the Respondent. I would add that the accepted interaction between KC and the Claimant on the 3 June 2020 demonstrates that the Respondent did have control over the work the Claimant was doing. This all demonstrates a mutuality of obligation.

107. As to the tax position, a tribunal must always take an objective approach to status, a person should not be estopped from contending that he was an employee merely because he has been content to accept self-employed status for some years (**Autoclenz**). From the evidence presented the Claimant's position was subsequently informed by legal advice, he was also keen to stress to the Respondent following the termination of the relationship that he would be contacting HMRC. On this basis the Claimant clearly intends to rectify any advantage he may have obtained from a self-employed tax status, and this is commendable. With this Judgment it is expected that the Claimant will now, if he has not already done so, deal with any shortfalls in tax or NI that are due from him.

108. Addressing the complaints of unfair dismissal and wrongful dismissal, I accept the evidence of KC, so that the Claimant has not proven on the balance of probability that he was dismissed. Therefore, those complaints fail and are dismissed.

109. In respect of holiday, the Claimant's own evidence is he took holiday, but I accept that he was not paid for the holiday he actually took and that would have acted as a disincentive against him potentially using all of his holiday entitlement each year. However, what holiday was taken and unpaid, and what was not taken each year needs to be evidentially clarified and jurisdictionally, in respect of time limits, determined.

110. This is a matter for remedy to be determined subsequently by the Tribunal if the parties are unable to reach agreement on this matter.

111. It is accepted there are no written particulars for the Claimant. From the evidence presented and the findings of fact made there is nothing to support that it is just and equitable in all the circumstances, to increase the award from two weeks to four weeks' pay instead. An award of two weeks' pay is therefore made.

112. The judgment of the tribunal is that the Claimant is an employee within the meaning of section 230 of the ERA, and a worker within the meaning of regulation 2(1) of the Regulations.

113. With this finding the Claimant is potentially owed holiday pay and the amount of that is still to be determined.

114. The Claimant was not dismissed so his complaints of unfair dismiss and wrongful dismissal fail and are dismissed.

115. The Claimant was not provided written particulars and is awarded 2 weeks' pay amounting to £538 x 2. This is on the basis that a 'week's pay' is calculated in accordance with sections 220 to 229 ERA and is limited to the maximum under section 227 (Section 38(6) Employment Act 2002). The date of calculation is either the date on which main proceedings were commenced or, if the employee was no longer employed at that date, the effective date of termination of employment (Section 38(7) of the Employment Act 2002). In this case it will be the maximum that applied from 6 April 2020 (£538).

116. Further to the above Judgment in respect of holiday pay the parties, after a short adjournment, then agreed that the Tribunal award the agreed sum of £18,904.

Employment Judge Gray
Dated: 6 December 2021

Reasons sent to parties: 21 December 2021

FOR THE TRIBUNAL OFFICE