



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr Barber

v

Mr Brewer  
t/a Brewer and Jackson Homes

**Heard at:** Norwich (by CVP)

**On:** 4 and 5 November 2021

**Before:** Employment Judge Postle

## Appearances

**For the Claimant:** Miss May, Solicitor

**For the Respondent:** Mr Brewer, Sole Trader

## JUDGMENT

1. The Claimant is an employee within the meaning of Section 230 of the Employment Rights Act 1996.
2. The Claimant was dismissed by reason of redundancy.
3. Had a fair procedure been followed, there was a hundred percent chance the Claimant would have been dismissed by reason of redundancy.
4. The Claimant is entitled to a redundancy payment in the sum of £12,093.30
5. The redundancy payment is subject to an uplift of 25% for failure to follow the Acas Code and the Respondent are Ordered to pay £3,023.32.
6. The Respondents were in breach of contract and failed to pay notice. The Respondents are Ordered to pay damages in the sum of £5,374.80.
7. The Claimant had accrued holiday pay at the termination of his employment and the Respondents are Ordered to pay £797.62.
8. The Respondent's made an unlawful deduction of wages and are Ordered to pay £3,975.90
9. The Claimant is also entitled to an award for loss of statutory rights in the sum of £450.00.

10. The total award payable is **£ 25,714.94**
11. This award is not subject to recoupment.

## **REASONS**

1. There are a number of issues to be determined in this case. The starting point is whether the Claimant's status with the Respondent is that of an employee, worker or self-employed. Depending on the answer to that question will depend whether the Tribunal has to decide further issues as set out in Judge Ord's Case Management Hearing on 11 May 2021. Particularly, if the Claimant was an employee, was the Claimant's resignation a dismissal within the meaning of Section 95(1)(c) of the Employment Rights Act 1996? If so, did the Respondent have a potentially fair reason to dismiss? Further issues falling to be determined as set out in that Case Management Hearing at paragraphs 7.3 and 7.4.
2. In this Tribunal, we have heard evidence from the Claimant through a prepared witness statement and from the Respondent, Mr Brewer, through a document entitled 'Respondent's Replies to the Claimant's Issues'. The Tribunal has also had the benefit of a Bundle of documents consisting of 203 pages.
3. The facts of this case are somewhat muddled between the parties. The Tribunal, therefore, making the best of the evidence which has been given.
4. The Claimant appears to have started working for a company 'Wetzi Brewer' in June 1985 as a Painter and Decorator and General Maintenance. He was initially self-employed with a CIS Card, page 197. Some time thereafter, Mr Wetzi left the business, possibly in 1989, and the new company was formed and became known as 'Brewer and Jackson Limited'.
5. The limited company was then dissolved, and Mr Brewer operated with Mr Jackson in the name of Brewer Jackson Homes. It would appear there was a period between 1993 and 1999 that the Claimant was not engaged by the Respondent. If he were, it might have been on an ad hoc basis.
6. Around 2000, the Claimant was engaged by the Respondent, again on a self-employed basis, until 2003 where the Claimant clearly became an employee of the Respondent. The P60s following that period show that. For a period of years from that date [2003] the Claimant appears to have been continuously employed by the Respondent and engaged by the Respondent up until his dismissal in 2020. Throughout that period, it is clear and indeed in part common ground, that the Claimant was paid holiday pay every year by Mr Brewer and if he was off sick, Mr Brewer paid him sums of money over and above statutory sick pay. The Claimant would also inform Mr Brewer of holiday which appeared to have been

taken two weeks in the summer, with one week at Christmas and it also appears the Claimant was paid for bank holidays. If the Claimant was sick, he would clearly notify Mr Brewer. It is also clear that Mr Brewer found the work and directed the Claimant to that work and where to go. It appears the Claimant had, on average every week, regular hours. There was clearly an expectation the Claimant would turn up for work every day and work for Mr Brewer. That would be five days a week. The Claimant was clearly provided with his tools and equipment required for jobs and there was clearly no right to send someone in the place of the Claimant to carry out his work on his behalf. It is accepted throughout the period 2003 to 2020, the Claimant was allowed to do jobs for friends at weekends or in his own time. The rest of his working week, normally between the hours of 8am and 4 or 5pm, he was expected to work exclusively for Mr Brewer.

7. In the Hearing Bundle we have seen the Claimant's bank statements at pages 81 – 96 covering a period from 2014 to May 2020. If one looks at those it is clear, that without exception, every week there are payments made by Brewer and Jackson paying into the Claimant's bank account of a similar sum.
8. In particular, the Respondent paid the Claimant, seemingly every week sums, in 2014, of £346 - £365; in 2015 of £340 - £390; in 2016 of £312 - £390; in 2017 of £382 - £396; in 2018 of £372 – 396; in 2019 of £314 - £397; and in 2020 up until April 2020 when the country went into lockdown, £314 - £392. That is virtually without exception, every week the Claimant is receiving a weekly sum from Brewer and Jackson. Mr Brewer says in his evidence, that these were net figures and that he has covered the tax due on those sums and indeed could prove it as he has paid, he says, many thousands of pounds to cover the Claimant's tax. Although that appears to be the subject of an investigation by the Inland Revenue because at the present time, we do not appear to have any record of any tax having been paid on behalf of the Claimant in those periods. Nor do they have any record of any National Insurance having been paid on behalf of the Claimant before 2011 to 2020. The Claimant's bank statements then show, following the shutdown of the construction industry and many other businesses and operations at the end of March 2020, there were payments being made by the Respondent to the Claimant's bank. Showing on his bank statement in April 2020 there appears to be a total sum of £1,092; in May 2020 £151; and in June 2020 there were no payments.
9. As a result of this, the lack of payments made by the Respondent to the Claimant, the Claimant wrote to Mr Brewer on 24 June 2020, the letter reads,

*“Dear Mr Steven Brewer*

*I have not been paid or had any work to do since 23 March 2020 and I have only been paid £300 in April, £200 in April, £200 in April, £151 in May and £100 in May and £100 in May and a final payment*

*of £100 in May when I should have been at least £392 net per week. Please pay the monies outstanding within 7 days.*

*As there is no work provided for me to do, I gave notice of intention to resign and claim a redundancy pay and / or unfair / wrongful dismissal.*

*Please respond within 7 days if you are intending to make me redundant or provide me with work and pay me the monies owed. In addition to the monies owed for back pay, whilst there has been no work, I would expect to be paid for my notice period which is 12 weeks and a redundancy payment and any outstanding holiday pay.*

*There is no agreement that I should not be paid my full rate of pay, in my contract I offered to accept 80% on furlough but this has not happened or been agreed because I believe you have not declared me as an employee to HMRC despite paying me as being employed, you pay me net of tax and National Insurance.*

*I will deal with you separately regarding my tax situation.*

*Yours sincerely  
S Barber”*

10. That letter met no response whatsoever by Mr Brewer. The Claimant therefore considered himself dismissed as the Respondent was unable to offer him any work.
11. The Respondent, Mr Brewer has confirmed during the course of these proceedings that there was no work available following the opening up of the construction industry in June 2020.

## **The Law**

12. The starting point is Section 230 of the Employment Rights Act 1996, which reads,
  - 230 Employees, workers etc.
    - (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
    - (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
13. Unfortunately, the statute is far from helpful in actually setting out the precise detail of what constitutes a contract of employment. The question

arises as to whether a person is an employee or self-employed is determined by reference to the contract under which he or she worked,

230 (3) ...

(a) ...

(b) ... whether oral or in writing, whereby the individual undertakes to do or perform personally work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer...

14. There are still three essential elements that must be present to establish a contract of employment, these form the irreducible core of the contract of employment without which a contract of employment will not arise. And they are,

16.1 The contract must impose an obligation on a person to provide work personally;

16.2 There must be mutuality of obligation between the employer and the employee; and

16.3 The worker must expressly or impliedly agree to be the subject to the control of the person for whom he works to a sufficient degree.

15. In dealing with whether or not there was a dismissal or circumstances in which an employee is dismissed, Section 95(1)(c) states,

95 Circumstances in which an employee is dismissed

(1) For the purpose of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)-

(a) ...

(b) ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct or otherwise.

16. It is clear in Section 98 that there is a potentially fair reason to dismiss and that is redundancy. The definition of redundancy is set out at Section 139 of the Employment Rights Act 1996 which provides,

139 Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-

- (a) ...
  - (b) the fact that the requirements of that business-
    - (i) ...
    - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
- have ceased or diminished or are expected to cease or diminish.

- 17. In dealing with a redundancy situation, an employer has to act fairly and reasonably in regard to what is set out in s.98 of the Employment Rights Act 1996.
- 18. There is a further consideration that is known as the Polkey consideration in that had a fair procedure been followed by an employer, would the dismissal have occurred in any event, i.e. what was the percentage chances.

### **Conclusions**

- 19. The Tribunal are satisfied on the balance of probabilities, based on the evidence that we have heard, that the Claimant was an employee from 2003 to 2020. The reason for that is that clearly the Claimant was being paid a regular wage every week without fail. On Mr Brewer's evidence he was paying that net of tax and apparently accounting that to the HMRC. The Claimant had an obligation to provide work personally on behalf of the Respondent, he could not send a substitute and there clearly was a mutuality of obligation between the employee and the employer and the Claimant, albeit on a less formal basis, was subject to the control of Mr Brewer.
- 20. Furthermore, other elements which would suggest that the Claimant was clearly an employee are that he was paid holiday pay, he was paid a form of sick pay, he had to notify Mr Brewer when he was going to be absent and the bank statements show payments every week going into the Claimant's bank account from the Respondent, from 2014 right up until 2020.
- 21. Therefore, I am satisfied that the evidence points to a relationship between the Claimant and Mr Brewer of that of employee and employer for the period 2003 until the end of June 2020 when the dismissal occurred.
- 22. Clearly, there was a dismissal and I am satisfied that the potentially fair reason to dismiss would be redundancy, although clearly there was a complete lack of any procedure leading up to and including dismissal.
- 23. There clearly was a dismissal which took place at the end of June 2020 and the reason for that dismissal was a potentially fair reason, namely

redundancy. The definition of redundancy contained in the Employment Rights Act 1996 is clearly satisfied and that is that the requirement for the Claimant to carry out work of a particular kind had ceased or diminished.

24. The next question is, if a fair procedure had been adopted in the lead up to the decision to dismiss by reason of redundancy, whether the Claimant would have been dismissed in any event. He would as at the time I accept that Mr Brewer had no work available for the Claimant and therefore the only decision he could make at that stage was to make the Claimant redundant.
25. There was a failure to follow any procedure under the Acas Code of Conduct, therefore, the Claimant is entitled to a 25% uplift on the redundancy payment.
26. The Claimant is also entitled to his loss of statutory rights in the sum of £450.
27. The Respondent was in breach of contract for failing to give notice and given the Claimant's service he is entitled to 12 weeks' notice, amounting to £5,374.80.
28. The Claimant had also accrued 12.5 days holiday at the time of his dismissal at the end of June 2020. Working on his daily rate of £63.81, the Claimant is entitled to £797.62.
29. The Claimant was paid during the lockdown period £951.00, eleven weeks paid wages amounting to £4,926.90 giving credit for the amounts paid the balance due is £3,975.90.
30. The total award amounts to **£25,714.94**.

---

Employment Judge Postle

Date: 26/11/2021

Sent to the parties on: 13/1/2022

N Gotecha

For the Tribunal Office