EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110609/2021

Held in Glasgow (by CVP) on 12 October 2021

Employment Judge B Beyzade

Mrs. D McConnell	**Claimant** **In person**
Skoolz Out Ltd	**Respondent** **Not present and not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

1.1 the complaint of unauthorised deduction from wages in respect of holiday pay between 15 August 2020 and 16 July 2021 is well founded and the respondent is ordered to pay the claimant the sum of TWO THOUSAND AND FIFTY-SIX POUNDS AND EIGHT PENCE (£2,056.08) from which tax and national insurance requires to be deducted, provided that the respondent intimates any such deductions in writing to the claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

1.2 the complaint of non-payment of 11 weeks' pay in lieu of notice to the claimant is not-well founded and is dismissed. The Tribunal did not have jurisdiction to hear this claim as the claimant was not an employee of the respondent.

1.3 the complaint of non-payment of a statutory redundancy payment to the claimant is not-well founded and is dismissed. The Tribunal did

not have jurisdiction to hear this claim as the claimant was not an employee of the respondent.

REASONS

Introduction

1. The claimant presented a complaint of unlawful deduction from wages (holiday pay), breach of contract (notice pay) and statutory redundancy pay to which the respondent replied stating that it did not defend the claim.

2. A final hearing was held on 12 October 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

3. The parties did not send a Bundle of Productions in advance of the hearing. The Tribunal was provided with a copy of the Claim Form, Response Form, orders made by Employment Judge Robison and Employment Judge Whitcombe, Notice of Hearing with standard directions, email from claimant of 22 August 2021 setting out the amounts that she claimed, a copy of her P60, and several correspondences between parties and the Tribunal.

4. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

   (i) Is the claimant entitled to be paid her notice pay in respect of 11 weeks' pay in lieu of notice in the sum of £4,751.34 gross?

   (ii) Is the claimant entitled to be paid her holiday pay in respect of the period of time between 15 August 2020 and 16 July 2021 in the sum of £2,159.70 gross?

   (iii) Is the claimant entitled to be paid statutory redundancy pay in the sum of £7,127.01?

5. In relation to issues (i) and (iii) the claimant had to be an "employee" of the respondent in order to be able to pursue a breach of contract claim for notice and a statutory redundancy payment, whereas with regards to issue (ii) and the claimant's holiday pay claim the claimant was required to be a "worker." The relevant legislation is set out below.

6. The claimant gave evidence at the hearing on her own behalf.

7. The claimant made closing submissions.

Findings of fact

8. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

9. The claimant worked for the respondent as an Accounts Manager/Director between 28 April 2010 and 16 July 2021.

10. The respondent was a private limited company which provided services for children. The company was set up by the claimant and her former co-director. It was agreed that the claimant would carry out financial work for the company whereas the other director would manage the service as she had a childcare qualification. The claimant's duties included bookkeeping, dealing company finances, banking, payroll and on occasions she would conduct pickups from schools.

11. The claimant worked 25 hours per week on average, albeit this was on an as required basis. The amount of work she conducted would depend on whether it was a quiet or busy time of year. At busy times she worked a full day, but she did not have fixed working hours. She had a 30 to 60 minutes unpaid lunch break depending on the hours worked. If the claimant did not work 25 hours in any particular week, she would not be disciplined for this and she would attempt to make up those hours in a subsequent week. She did not work for another company in the same or a similar role.

12. Her gross weekly wages were £431.94. She received a weekly wage into her bank account directly approximately on a 4-weekly basis. The company deducted and paid income tax and national insurance on her behalf. She received regular payslips and annual P60s. The claimant was not paid a separate salary for her role as a director, nor did she receive any dividends.

13. It was agreed with the claimant's co-director at the time that the claimant would be entitled to 28 days' paid holiday in line with her statutory holiday entitlement in each holiday year. The claimant's holiday year was from 15 August 2020 until 14 August 2021.

14. There was no requirement for the claimant to agree any holiday dates with the respondent, although the claimant notified her co-director of these as a matter of courtesy. The claimant was not required to notify the respondent if she were off sick from work, although she could claim statutory sick pay if she provided a doctor's note. When the claimant was absent, one of the other workers may cover some of her administrative work, but she would complete the majority of her work before she went on holiday. She was not required to wear a uniform except where she was picking up children from schools.

15. The claimant was never subjected to the respondent's disciplinary procedure, and she did not raise any grievances during the course of her employment.

16. The respondent ceased trading on 16 July 2021. On that day, the claimant contacted the bank to advise them that the bank account should be frozen and that no further business would be conducted. Employees of the respondent had been on furlough for a substantial period of time up until that date. The claimant also contacted HMRC and the company accountant in relation to the business no longer trading. At the time the business ceased trading, the claimant was the sole director as the other director had resigned in April 2021. However herself and the former director were still shareholders, they each owned 50% of the respondent's shares. The former director would not sign the relevant documents to enable a liquidator to be appointed for the company.

17. Following advice, the claimant made the decision to notify employees that the business had ceased trading and their employment had to be terminated. Her employment ended on 16 July 2021. This was because it was no longer financially viable for the business to continue, and the economic forecast showed that demand for the respondent's services would continue at a decreased amount.

18. From 15 August 2020 until the date her employment terminated, she had taken two days of her holiday entitlement.

Observations

19. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

20. The claimant did not have a written contract of employment with the respondent. She did not have a service contract as a director of the respondent. There was a Shareholders' Agreement, but this document was not sent to the Tribunal.

21. There was no written or verbal contractual notice period for terminating the claimant's employment nor were there any contractual redundancy pay entitlement.

22. The claimant agreed at the start of her employment with her co-director that she would be entitled to 28 days paid holiday which was in line with her statutory entitlement. She stated that this was an oral agreement, and I accepted the claimant's evidence in relation to this matter.

23. The claimant had some obligation to perform her duties for the business, albeit she did not have fixed working hours and she had a degree of autonomy. She was not subject to a significant amount of control from the

respondent, but there was a degree of control. She had fixed duties that she conducted personally on a regular basis.

24. During her employment, she was a director and shareholder of the business and she made key decisions, but she was not the business manager. However after her co-director resigned in April 2021, she was the sole director and made the key decision in July 2021 that the business must cease trading and that all employees' employment were to be terminated.

Relevant law

25. To those facts, the Tribunal applied the law –

26. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

27. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA 1996).

28. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less that the total amount of the wages properly payable by him to the worker on that occasion.

29. Under Section 27(1) of the ERA 1996 "wages" means any sums payable to the worker in connection with their employment including holiday pay.

30. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

31. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker's employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu of any leave not taken. Less than half a day's leave is rounded up to half day's leave and if more is rounded up to a whole day. The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A worker is entitled to leave paid at the rate of a week's pay calculated under the ERA 1996.

32. Under Regulation 14 of the Working Time Regulations 1998 ("WTR"), employees are entitled to be paid in lieu of accrued untaken holiday outstanding at the date of termination. A failure to pay in lieu the worker's entitlement in whole or in part can be enforced by way of a claim for unauthorised deductions from wages under section 13(1) of the Employment Rights Act 1996.

33. In order to qualify for statutory holiday pay, the claimant would need to satisfy the Tribunal that she was a worker. A worker is defined in section 2 of the Working Time Regulations 1998 as:

> *"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;*
>
> *and any reference to a worker's contract shall be construed accordingly;"*

34. In *Clyde & Co LLP and another v Bates Ban Winkelhof [2014] UKSC 32* the Supreme Court gave guidance in relation to the consideration of worker status in the context of a member of an LLP who was a Solicitor. In paragraph 40 of Lady Hale's decision it was stated:

> "*It is accepted that the appellant falls within the express words of section 230(3)(b). Judge Peter Clark held that she was a worker for essentially the same reasons that he held Dr Westwood to be a worker, that she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. They were in no sense her client or customer. I agree."*

35. In the more recent decision of the Court of Appeal in Stuart Delivery Ltd v Warren Augustine [2021] EWCA Civ 1514 Lord Justice Lewis analysed the provisions of section 230(3) of the ERA 1996 as follows:

> *"That reflects a distinction between (1) persons employed under a contract of employment (2) persons who are self-employed, carrying on a profession or a business on their own account and who enter into contracts and provide work or services to clients and (3) persons who are self-employed and provide services as part of a profession or business carried on by others: see Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730 at para. 25. If it is relevant or helpful to talk of categories at all, those are the three categories. The persons in (1) fall within section 230(3)(a) of the Act. The persons in group (3) are those who fall within section 230(3)(b) of the Act. Those in the second group are not workers within the meaning of section 230 of the Act."*

36. Lord Wilson, with whom the other Justices agreed, observed at paragraph 32 of his judgment in *Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 61* that:

> *"The sole test is, of course, the obligation of personal performance: any other so-called test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in*

which it is helpful to assess the significance of [the claimant] Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part."

37. In *Uber BV and others v Aslam and others [2021] UKSC 5* , per Lord Leggatt, the Supreme Court stated in relation to the irreducible minimum of obligation:

"126. The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation": see Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623 (Stephenson LJ), approved by the House of Lords in Carmichael v National Power plc [1999] 1 WLR 2042, 2047. In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work."

38. In the same case at paragraph 87 the Supreme Court also stated in relation to the control test:

"In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the

stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"."

39. Section 86 of the ERA 1996 provides:

"The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more."

40. Whereas the provisions in section 13(1) of the ERA 1996 apply to notice pay claims where a worker is required to work their notice, they do not apply to payment in respect of pay in lieu of notice. That would need to be brought as a breach of contract claim.

41. The starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. The statutory provisions dealing with the relevant employment protection rights are set out in the Employment Tribunals Act 1996, at Section 3 read with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 for the notice pay claim, Part II of the Employment Rights Act 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claim. The Tribunal

had regard to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

42. Article 3 of the *Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624* require the claimant to be an employee in order to bring a breach of contract claim including in respect of notice pay.

43. Section 135(1)(a) and section 155 of the ERA 1996 govern the rights of employees to a statutory redundancy payment. If an employee is dismissed by reason of redundancy and he has two years' qualifying service, he has the right to a statutory redundancy payment (section 135 of ERA 1996). The dismissal will be by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for the purposes of which the employee was employed or to carry on that business in the place where the employee was employed (section 139(1)(a) of ERA 1996); or the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to do so (s.139 (1)(b)).

44. There is a presumption, for the purposes of entitlement to a redundancy payment, that the employee has been dismissed by reason of redundancy (s. 163(2) of ERA 1996), although there is no onus placed on the employer to rebut the presumption; rather it is a matter of deciding the issue on the facts found (*Greater Glasgow Health Board v Lamont UKEATS/0019/12/BI*).

45. There are several principles that have emerged in cases that have been considered by the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court that need to be considered in respect of whether the claimant is an employee.

46. The starting point of any consideration of these matters was the case of *Ready Mixed Concrete v Minister of Pensions and National Insurance (1968) All ER 433* and a consideration of whether there was mutuality of obligation. It was stated by MacKenna J:

> *"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."*
>
> He continued: *" There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted…"*

47. The learned judge also referred to control over how the work was carried out by the employee as being an important requirement.

48. This case essentially instructs the Tribunal to adopt a multi-factorial approach but also sets out the minimum requirements for a Contract of Employment. These are, personal service, control in the performance of the services and any other provisions that are consistent with a contract of service. In the case of *Carmichael v National Power Plc [1999] 1 WLR 2042* the House of Lords held that mutuality of obligation was an irreducible minimum for employment such that without it the person was not an employee. All elements of the test must be present for employment status to be obtained. The recent case of *Uber BV v Aslam [2021] UKSC 5* confirmed that worker status is a question of statutory interpretation rather than contractual interpretation. Lord Leggatt urged Tribunals in applying the statutory language to apply a purposive interpretation bearing in mind the purpose of the legislation.

49. The case of *Autoclenz v Belcher [2011] UKSC41* provides that in many cases the Tribunal is entitled to look behind the written contract between the parties and look at the overall factual matrix.

50. The case of *Clark v Oxfordshire Health Authority [1997] EWCA Civ 3035* makes it clear that abundance of work available and the fact that a claimant will generally accept the work offered does not indicate employment status.

Discussion and decision

51. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

> *Is the claimant entitled to be paid her holiday pay in respect of the period of time between 15 August 2020 and 16 July 2021 in the sum of £2159.70 gross?*

52. Firstly, in order to enable the claimant to claim holiday pay, the Tribunal is required to determine whether the claimant's employment status with the respondent fell within the statutory definition of a 'worker'.

53. As observed earlier, there was no written agreement between the claimant and the respondent. The Tribunal therefore had to consider all the circumstances of the relationship between the parties.

54. The claimant exclusively provided her services as in her finance skills to the respondent and she was an integral part of their business. She was in no sense the respondent's client or customer.

55. There was an obligation on her to perform work personally. When she went on annual leave she would ensure the majority of her work was completed as there would only be limited cover in relation to her administrative duties only. She had a specific responsibility for the respondent's finances and duties were assigned to her in respect of these. She had a degree of flexibility in relation to how those duties were to be carried out and the days and hours she worked. The claimant was able and willing to accept work from the respondent. She was incorporated in the respondent's business. The irreducible minimum of mutual obligation that was necessary in order to determine that the claimant was a worker was present.

56. She was required to perform specific tasks relating to her role, she attended work during the agreed dates and times, and she would let the respondent

know if she was due to be on annual leave. There was a sufficient degree of control present in the relationship between the claimant and the respondent in order to enable her to be classified as a worker.

57. The Tribunal having considered all the circumstances accepts that the claimant was a worker for the purposes of the *Working Time Regulations 1998,* and her holiday pay claim. The claimant's employment status falls within the express words which define a worker in section 230(3)(b) of the ERA 1998 and Regulation 2 of the *Working Time Regulations 1998*. The Tribunal was satisfied that the claimant entered into or worked under "*any other contract*" whereby she undertook to perform personally work for the respondent who was not a client or customer of any profession or business undertaking carried on by the claimant.

58. It was agreed at the outset of her employment with her co-director that she would receive statutory annual leave entitlement. Her annual leave entitlement from 15 August 2020 to 14 August 2021 was 28 days. The claimant's annual leave entitlement was in fact 25.8 days as the claimant's employment ended part-way through the leave year on 16 July 2020. The claimant indicated during her evidence that she took two days of annual leave since 15 August 2020. This meant that the claimant was owed 23.8 days' annual leave at the date that her employment ended.

59. The claimant's gross pay was £431.94 per week, which amounts to £22,460.88 gross per year or £86.39 gross pay per day. The claimant was therefore entitled to receive £2,056.08 gross in respect of holiday pay (£86.39 gross daily pay multiplied by number of days of holiday owed 23.8). The claimant did not receive any payment towards her holiday entitlement, and she did not consent to any amount in respect of her holiday entitlement being deducted from her salary. She has therefore suffered an unlawful deduction of wages and she is accordingly owed £2,056.08 gross by the respondent.

Is the claimant entitled to be paid her notice pay in respect of 11 weeks' pay in lieu of notice in the sum of £4751.34 gross?

Is the claimant entitled to be paid statutory redundancy pay in the sum of £7127.01?

60. In relation to her notice pay and statutory redundancy pay claims, the claimant must show that she was an employee of the respondent. The notice pay claim is a breach of contract claim as it relates to pay in lieu of notice that the claimant states she has not been paid by the respondent. Under section 86 of the ERA 1996 an individual claiming statutory notice must be employed by the respondent. The Tribunal considered the statutory definition of an employee in section 230 of the ERA 1996 which is narrower than the definition of a worker and states as follows:

> *"(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.*
>
> *(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
>
> *(5) In this Act "employment"—*
>
> *(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*
>
> *(b) in relation to a worker, means employment under his contract;*
>
> *and "employed" shall be construed accordingly."*

61. There is a requirement that there be an irreducible minimum of mutual obligation in terms of the work she conducted for the respondent such that this was consistent with a contract of employment. The claimant suggested that there was mutuality of obligation between the respondent and her, and that was another indicator that this was an employment relationship. However, while there was clearly a degree of mutuality of obligation, in that

the company expected her, in terms of the oral agreement she had with the company to conduct work, to fulfil certain service obligations to them, the degree of autonomy exercised by the claimant was, in my judgment, substantial. She was in a position to determine her own workload to a greater extent than employees would be, and in addition, to create her own workload to some extent. She would on occasions conduct additional work and on others, a lesser amount of work.

62. She did not challenge her status as a director at any time; she may be taken to have understood that what she was entering when the firm was started; she identified herself as a director both within the firm and she was registered as such with the Registrar of Companies, thereby holding herself out as a director; and she understood that there were risks to which she was subject as a director which did not apply to the position of an ordinary employee carrying out her role. This last point appeared to the Tribunal to bear some significance. There may be situations in which the claimant would bear financial risk in her capacity as a director. There are statutory obligations on directors and in certain contexts directors can be held personally liable for the company's debts. The claimant was the sole director towards the end of her employment, and she made the decision on advice from the company accountant for the company to cease trading due to the diminished levels of business and future financial forecasts. In my judgment, which was a clear indication that she understood that she was more than an employee. An employee in such circumstances would not bear any risk nor would an employee make such strategic and important decisions relating to a company. A director would have such a risk, and that is inconsistent with the status of employee to which she now appeals.

63. Additionally, the claimant needs to satisfy the Tribunal that she was subject to control, and she only took work, which was agreed that she would carry out, and that she could not refuse that work or find someone else to perform the tasks in question. There was no evidence that the claimant would seek work of her own volition. The claimant's role in terms of generating business

was minimal, if any. Although there was a degree of control, this was not consistent with a contract of employment.

64. The claimant would also need to persuade the Tribunal that she was required to provide personal service, in the way that an employee would be. Certainly, the evidence demonstrated that the claimant did require to provide personal service to the respondent. However, of itself, this is not determinative since that is equally true of a director in a company.

65. In my judgment, while the evidence demonstrated that there were some features of the claimant's work which suggested that she was in a similar position to that of other employees – for example, both had a fixed amount of leave, both had fixed tasks to perform, and both were required to attend work to perform those tasks – there were sufficient differences in terms of her position when compared with an employee to allow a distinction to be made.

66. Accordingly, the claimant's claims for pay in lieu of notice and, for a statutory redundancy payment, all fail for want of jurisdiction, and are dismissed.

Conclusion

67. The claimant's claims for holiday pay succeeds in the sum of £2,056.08, whereas her claims for notice pay and a statutory redundancy payment are dismissed.

Employment Judge: Beyzade Beyzade
Date of Judgment: 01 December 2021
Entered in register: 06 December 2021
and copied to parties

I confirm that this is my judgment in the case of 4110609/2021 Mrs D McConnell v Skools Out Limited and that I have signed the order by electronic signature.