EMPLOYMENT TRIBUNALS

Claimant: **Mr Wictor Sobczyk**

Respondent: **Cambridge Hotel**

Heard at: **London South Hearing Centre**

On: **12 October and 14 December 2021**

Before: **Employment Judge Mclaren**

Representation

Claimant: In person

Respondent: Mr. C Price, Counsel

JUDGMENT

1. **The claims against Ms N Hall are dismissed.**
2. **The claimant is an employee. He is entitled to receive four weeks' pay in lieu of notice.**
3. **The claimant was dismissed by reason of redundancy, and he is entitled to receive statutory redundancy pay.**
4. **The complaint to the Employment Tribunal that the employer has made a deduction from wages in contravention of section 13 is not well-founded.**

REASONS

Telephone final Hearing

1. This has been a remote hearing by video conference call. A face-to-face hearing was not held because it was not practicable. The parties did not object. The claimant was assisted by the services of an interpreter and the language was Polish.

2. I confirmed that I have been provided with a number of documents. These were a statement from the claimant and a bundle paginated to page 141. Both parties confirmed that those were the relevant documents.

3. I heard evidence from the claimant on his own behalf and from Ms Hall on behalf of the respondent. I was also provided with a written statement from Mr Ali Nisangah, the hotel manager.

Background

4. The claimant was engaged as a driver by the respondent, a hotel in Surrey. He brings a complaint of unlawful deductions from wages arising from what he describes as underpayments in August, September, October and November 2020, and for unpaid holiday. He believes he was an employee and also seeks notice pay and redundancy pay.

5. The respondent contends the claimant was not an employee but a worker. No notice or redundancy pay therefore arise. There were no underpayments and all holidays had been taken.

6. The claims have been brought against Natalie Hall as the named respondent. The claimant accepts that Ms Hall is an accountant working at the Cambridge Hotel and that the intended respondent is the organisation he believes is his employer, that is Cambridge Hotel. That is the organisation named on his payslips. It was agreed that the proper respondent is the Cambridge Hotel.

7. In reaching my decision I considered all the evidence I heard, and I took into account the documents to which I was referred, as well as submissions from both parties.

The issues

Status/breach of contract

(i) Was the claimant an employee?

(ii) If so, has his employment been terminated? is he entitled to pay in lieu of notice?

(iii) Was his employment ended by reason of redundancy? If so, is he entitled to a redundancy payment?

Unlawful deductions

(iv) The claim is for unlawful deduction of wages pursuant Section 13 of the Employment Rights Act 1996 (ERA). The claim relates to £2,399.50 for underpaid wages in August, September, and October 2020.It also includes £1301.58 for accrued but untaken leave in October 2020 and £217 for holiday pay in November 2020, together with unpaid wages for November of £2,018.50.

(v) The Tribunal is to determine whether the claimant suffered such unlawful deduction of wages and to determine the amount.

(vi) In relation to annual leave the tribunal must determine,

a. What was the claimant's leave year?

b. How much of the leave year had passed when the claimant's employment ended?

c. How much leave had accrued for the year by that date?

d. How much paid leave had the claimant taken in the year?

e. Were any days carried over from previous holiday years?

f. How many days remain unpaid?

g. What is the relevant daily rate of pay?

Findings of Fact

Job duties

8. Both parties agreed that there was no written contract of employment. The claimant explained that he had begun work for the hotel in April 2016.
9. He was engaged as a relief/emergency cover driver to drive guests to and from the airport in a shuttle bus. It was agreed that the hotel provided the vehicle, kept it on the road and insured it. No uniform was required but the claimant, in common with all staff, had a name badge which displayed his name and that of the hotel. The shuttle bus was a free service for hotel guests and the hotel paid the claimant.

Hours/Rate of pay

10. The respondent said that the claimant's hours always varied. The claimant said he worked 6 days a week from 6 a.m. to 3 p.m. He confirmed that on average he worked 225 hours per month. The claimant believes that he was paid at an hourly rate of £9 per hour and has calculated that his average pay was £2018.50 per month.
11. Ms Hall told me the claimant was engaged at £7.50 an hour, and his rate was increased in June in line with the minimum wage every year. They agreed £9 an hour from August 2020.
12. The pay slips in the bundle showed a variable picture. The schedule of payments for 2018 showed the claimant earned between £2016-£1512 a month. The payments varied most months. Payslips for 2020 show £1621 for April. May – July are similar to each other at around £1624, August is £657,

October at £1269 and November £144.

13. Considering the payment schedule and the pay slips in the bundle I find that the claimant's pay varied each month which I conclude reflects a different number of hours. I find that the claimant was paid the minimum wage and did not have specified hours. He worked around 50 plus hours most weeks, but this was not on any guaranteed basis or on any fixed shift. It was common ground that he worked around the need to care for grandchildren, and I find that he generally finished at 3 pm to allow this, but this was not a pattern guaranteed by the respondent.
14. Ms Hall explained how hours were allocated. She explained that there was a shift board which identified which driver was working at which hours and she told me that the claimant always chose the hours he worked and agreed those with the manager. She told me that the claimant chose his own shifts. Ms Hall also told me that while they offered the claimant more hours on occasions, he generally turned these down.
15. In particular, the bundle contained an exchange of telephone messages which covered some dates from the end of August until October 2020 when the claimant is asked if he could start at different times. These appear to be instructions to the claimant to begin work at different start times. The claimant says okay to some of these. On some occasions these appear not to be answered. The claimant said that this could have been because at the time the message was sent, he was driving, or he may have given a verbal reply to the manager as he could have seen him relatively shortly after the message was sent. He believed that he did reply to messages and did do the extra or varied shifts as the hotel required.
16. On balance I accept the claimant's account that he generally did reply to such texts. Ms Hall was not directly involved in the management of the driving service and would not have first-hand knowledge of what the claimant was or was not doing at the time these texts were sent. I do not find that they evidence the claimant being unresponsive.
17. The claimant did not dispute that he agreed the hours he was going to work with the manager. I find that there was in effect a mutually agreed pattern. I also find that the claimant was asked to work differing shift times on occasions, and that the claimant was able to refuse a shift if he wished.

Furlough

18. The claimant states he was put on furlough from March 2022 until July 2020.The respondent disagrees and says it was not March but April 2022. The bundle contained a furlough agreement dated 1 April 2020.The bundle also showed the calculation of furlough payments and covers April- July
19. It is agreed that the claimant returned to work in August 2020. It is also agreed that in August, September, and October the claimant was not

provided with the same number of hours of work as previously which was as a result of the reduction in hotel guests because of the lockdown.

20. The claimant states that he was furloughed again in November 2020.The respondent said he was not furloughed as there was work for him which he refused to do, and as a result of this refusal his arrangement with the hotel was ended,
21. I prefer the documentary evidence to that of the claimant on this point as the documents are contemporaneous and the claimant is relying on memory. I find he was put on furlough from April – July 2020 but not thereafter, whatever he may have been told or understood.

Employment status

22. I have already found that the claimant was held out by the hotel as a driver and offered to its passengers to drive them to the airport on a complimentary basis. The claimant wore a name badge in the same way as all other staff which identified him to guests as a hotel driver. I find he was therefore integrated into the business.
23. The hotel provided the claimant with the equipment and insured the vehicles and maintained them at its cost. The claimant did have to look for customers, these were provided to him by the hotel, and he drove for the hotel who paid him, not the individuals using the hotel minibus. He did not, therefore, have to market his services, bear the cost of any equipment or take any financial risk arising from any fault, which would have been covered by the hotel's insurance.
24. Both parties gave evidence in relation to control. Despite the fact that Ms Hall explained there had been complaints from staff and customers throughout the period of the claimant's engagement, Ms Hall told me that the hotel did not institute any disciplinary action because the claimant was not an employee. The written statement of the manager also referred to complaints from customers and from the receptionist. It also said that the claimant was not subject to discipline because they did not control his work.
25. The claimant's account was that there was no need for any such disciplinary action as there were no complaints. There was no written documentation provided by the respondent to support the existence or the nature of these complaints. I give little weight to the written statement of a witness who did not attend. There is a conflict of evidence between the claimant and Ms Hall. Ms Hall was not involved in the day-to-day operation of the drivers or the hotel and on balance, I find that if there had been the volume of complaints suggested, some would have been in writing and some would have been provided by the respondent in the bundle before me. I conclude that the reason the claimant was not disciplined was not to do with control, but because his conduct did not warrant it. This evidence therefore does not indicate any control or lack of it as the circumstances did not arise.

26. It was accepted that the claimant was expected to ask for his holidays in advance, but Ms Hall said these were always agreed.
27. Ms Hall also explained that the claimant was working for another hotel as a driver from May to September 2019 and on a few occasions used the respondent's minibus to drop customers from other hotels. She said she had seen this herself. The hotel manager also referred in his written statement to the fact the claimant was working elsewhere.
28. The claimant agreed that he did drive a minibus for another hotel for a few months. He said that this was part of the handover arrangement because the other premises had been owned by the owner of the Cambridge Hotel and to help out for a few months they provided an interim service. He said he was not paid any money for this by the other hotel. Ms Hall disputed this because she said the claimant had come into her office and asked to be paid cash by the Cambridge Hotel in future because he was now being paid in cash by Acorn.
29. I accept that, as the claimant has agreed, he did work for another organisation for a short period. This does not appear to have prevented him from nonetheless carrying out his duties for this respondent. I also find that this second job was limited in time and was in 2019.
30. The issue of substitution was touched on in evidence. Mr Nisangah in his written statement said that when the claimant left his shifts early, he filled in and took over the claimant's driving. Ms Hall confirmed this was the case. The respondent presented this as evidence of the claimant's attitude and clearly expected him to honour any shift he agreed to work and to work it in full.
31. The claimant explained that there was a system between the drivers covering each of the shifts. He would therefore sometimes work an extra shift to cover a colleague's shift. He was adamant, however, that the shifts would only be done by drivers from the pool. Neither he nor any other driver was free to send anybody else along to cover their shift.
32. While Mr Nisangah in his witness written statement said that the claimant was free to send a substitute worker if he wanted to, I find this to be unlikely. Driving a minivan with hotel guests is a responsible job. On the balance of probabilities, I find that the respondent would want to ensure that an appropriately qualified and suitable person was undertaking this work. I find that, as the claimant said, drivers could ask each other to provide cover. If a driver did not attend for a shift and no other driver covered then it was the manager who provided that cover. I find that the claimant did not have even a fettered right to provide a substitute.
33. Ms Hall's evidence was that the claimant asked to be an employee when he was first engaged because he needed this status to get a mortgage. She explained that this was refused, and the claimant was not engaged as an employee at any point.
34. The claimant is described as an employee on a number of occasions.

The bundle shows that the accountants described the claimant as an employee and made furlough claims for him with that described status. At page 51 in a letter dated 22 September 2021, they confirm that as per their records the "employee" has been paid at least 80% of furlough salary. The furlough agreement Ms Hall issued the claimant described him as an employee. The payslips issued to the claimant identify him as an employee.

35. I accept Ms Hall's explanation for this. I find that payroll companies have little ability to flex payslips for small customers and generally do not use the designation worker. Similarly, I accept that the furlough agreement did not allow an amendment to use the description worker. Furlough could of course be claimed for workers and there is nothing inappropriate with the claim having been made and paid in this way. I find that when the accountants described the claimant an employee, they did not do so from any knowledge of his circumstances but were using the label that applies to the majority of those for whom furlough was relevant. I find that there is nothing in this labelling of the relationship that in itself creates employment relationship or indicates that is in fact what the respondent believed.
36. The respondent, however, also refers to the claimant's status in an exchange of texts. In this exchange of telephone messages at page 137 is what seems to be a response to a complaint from the claimant. It states that following his letter the respondent increases his hours in September and refers to him being on a zero contract from the start of his employment.

Holiday pay issues

37. The claimant complains that he has been paid insufficient holiday pay. In particular for accrued but untaken leave in October 2020 and what he says is incorrect payment holiday pay in November 2020. The respondent did not keep records of the claimant's holiday. Ms Hall confirmed that the holiday year was 1 May to 30 April in each year.
38. In order to calculate the claimant's holiday, she looked at the hours he had worked since beginning his employment and applied 12.07% as his holiday entitlement. Ms Hall's able to take me through the calculation and to explain how she had in fact, slightly overpaid the claimant. I accept her evidence.
39. The claimant did not provide any evidence as to how he said his holiday was calculated incorrectly or how much holiday he had taken in any year and therefore what he said was owed to him.

Termination of the arrangement

40. As touched on above, the claimant said that he was told in November he was being put on furlough again. He then didn't hear anything more than respondent until he received P 45. The respondent's account was very

different. Ms Hall explained that the claimant had been asked to deliver takeaway food and had refused to do so as he wished to drive passengers only. As a result, because they had no more work for him and because he had refused this request, they decided to end their contract with him.

41. The claimant said that the takeaway service had not been set up and was merely a proposal and suggest that the organisation did not have an appropriate kitchen to do this. Ms Hall's evidence was that the hotel had a fully equipped kitchen and a chef and that the takeaway service was up and running.
42. I accept Ms Hall's evidence on this point as she was in a better position to be aware of what was happening than the claimant. While the claimant may not have understood his expressed reluctance to deliver food would amount to his contract with the hotel being terminated, I find that this was the reason. In effect, the respondent had no work for the claimant if he was not willing to undertake other driving.
43. The respondent had no right to force the claimant to undertake other driving work as that was not the nature of his engagement. Any refusal by the claimant to deliver takeaway food would not mean that he was refusing to work in general. I find that he would therefore have carried out his normal duties during any period of notice and was willing to work.

Relevant law

Employment /worker status

44. The courts and tribunals have developed a number of tests over the years aimed at helping them to identify a contract of service and to distinguish between employees and the self-employed. The approach in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. was confirmed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, where Lord Clarke called it the 'the classic description of a contract of employment'. In essence, the Ready Mixed formulation of the multiple test can be boiled down to three questions:

    i. did the worker agree to provide his or her own work and skill in return for remuneration?

    ii. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

    iii. were the other provisions of the contract consistent with its being a contract of service?

45. Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but

impossible for a contract of service to exist. It is now widely recognised that this entails three elements, personal performance, and mutuality of obligation and control.

46. It follows that workers are not employees if they are free, without penalty, to accept or reject any offer of work made to them. Although the control element undoubtedly exists when a worker accepts an offer of casual work, the ability to reject such an offer at will, and without penalty, distinguishes such a worker from an employee.

Deductions

47. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13 and the exceptions in s. 14

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

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(4) (Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

14 Excepted deductions.

(1)Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a)an overpayment of wages, or

(b)an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

Holiday entitlement

48. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1)
49. Compensation related to entitlement to leave is set out in regulation 14

14.—(1) This regulation applies where—
(a)a worker's employment is terminated during the course of his leave year, and
(b)on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
(3) The payment due under paragraph (2) shall be—
(a)such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
(b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—
where—
A is the period of leave to which the worker is entitled under regulation 13(1);
B is the proportion of the worker's leave year which expired before the termination date, and
C is the period of leave taken by the worker between the start of the leave year and the termination date.
(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Termination of employment – minimum period of notice

50. Section 86 of the Employment Rights Act 1996 provides an employee with the right to minimum notice. This is not less than one week's notice for each

year of continuous employment if this period of continuous employment is two years or more but less than 12 years. Section 89 provides that where an employer does not have normal working hours in force during the period of notice the employer is liable to pay the employee for each week of the period of notice a sum not less than a week's pay.

51. The calculation of the week's pay is then set out in section 220. That provides at section 224 that where there are no normal working hours the amount of a week's pay is the amount of the employee's average weekly remuneration for the period of 12 weeks ending with the last complete week before the calculation date. In arriving at the average weekly remuneration, no account is taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks is brought in, so as to bring up to 12 the number of weeks of which account is taken.

Conclusion

52. I have applied the relevant law to my findings of fact to conclude as follows, taking the issues in turn.

53. The first question I must answer is was the claimant an employee? As counsel for the respondent submitted there is no written contract between the parties. I must determine the nature of the relationship from the way in which it operated in practice.

54. I have found that the claimant did not have the right to send a substitute. The hotel covered shifts from its own resources. I conclude therefore this is a contract of personal service.

55. There was mutuality of obligation. While the claimant had some freedom over which shift he would accept, once he accepted a shift, he was obliged to carry out that shift himself.

56. There was a degree of control over the claimant. He drove the hotel's minivan over a set route. Once he had accepted them, the hours he was to do so were set by the hotel. He was not subject to disciplinary action because no issues arose that required this. He was required to ask for holiday in advance.

57. I've also found that he was integrated into the business and took no financial risk. I conclude that he was engaged as a zero-hour employee, which is consistent with the way he was treated and indeed described by the respondent. Having for a brief time another job is not inconsistent with this status.

58. The next questions that I was asked to determine was whether his employment had been terminated so that he was entitled to payment in lieu of notice and whether he was entitled to any redundancy payment. As I have concluded the claimant was an employee and his contract with the respondent was ended then I find he was entitled be paid in lieu of notice. I have found that, while he refused to take on other duties, there is nothing to suggest he would refuse to do his own duties, and this is not a case where an employee refuses to work out their notice.

59. As the claimant began work with the hotel in April 2016 and his employment was ended on 30 November 2020, he worked for 4 complete years and would be

entitled to 4 weeks' pay. Applying the relevant legislation, I find that he would be entitled to 4 weeks' pay calculated as his average remuneration in the period of 12 weeks prior to the date of termination.

60. I have found that the claimant's relationship was terminated because he would not undertake the work that was available, and the respondent did not have sufficient work to continue to engage him driving passengers. On that basis I conclude that his employment was terminated by reason of redundancy as the respondent's need for the work of a particular kind that was carried out by the claimant had diminished. He is therefore entitled to a statutory redundancy pay.

61. Given his age and length of service this would be calculated as 4 x 1.5 x a week's pay (as his week's pay is less than the statutory maximum). The amount of a week's pay would also be calculated based on the average of the prior 12 week's earnings.

62. The bundle contained a schedule of the claimant's earnings for 2020 together with payslips. Neither these, identify how much the claimant earned in any particular week as they show the monthly total. The information provided for November does not indicate whether the claimant worked in more than one week and I cannot attribute £144 pay that is shown to any particular time period. To calculate a week's pay both for the pay in lieu of notice and redundancy pay, taking the effective date of termination as of 30 November 2020 I would calculate back 12 weeks from that date which is the week beginning 8 September. However, if any of the weeks in November weeks in which the claimant did not work, I would need to add weeks prior to 8 September to make up a period of 12 weeks. I do not have sufficient information to be able to do this calculation. As an indication to the parties, if one took the 12 weeks as being the whole of August September and October then his week's pay would be £358 giving a payment in lieu of notice of £1432 and statutory redundancy pay of £2148. In order to correctly calculate this, I will need to list the matter for a remedies hearing to agree the relevant 12-week period and the earnings during that time.

63. The next issues were around unlawful deductions. The claimant's position is that as an employee he was entitled to a set number of hours per month when he wasn't paid for these that amounted to a deduction. I have found that, while he was an employee, he was a zero-hour employee and therefore there was no entitlement to any particular number of hours. The claimant accepted that he was paid for the hours he worked and on that basis this claim does not succeed.

64. The claimant was unable to provide any evidence of how he calculated his unpaid holiday. The burden of proof is on the claimant to discharge to show that there was a failure. The respondent has provided evidence of how it calculated the amount and I accepted Ms Hall's evidence. I therefore conclude that the claimant was paid all holiday pay that was owed to him. This claim does not succeed.

Employment Judge McLaren
28th December 2021