EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Adeyemi**

Respondent: **Shield Logistics Solutions Ltd**

Heard at: **Bury St Edmunds** **On:** **30 March 2022**

Before: **Employment Judge Boyes**

Representation
Claimant: In Person
Respondent: Mr. M. Welsh, representative, Solutions Legal

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because of the Coronavirus pandemic.

RESERVED JUDGMENT

1. **The claim was received out of time. The Tribunal therefore does not have jurisdiction to deal with the claim.**
2. **Had the claim been in time, it would have succeeded on the basis that the Claimant was entitled to pay in lieu of annual leave by virtue of regulations 14 and 36 of The Working Time Regulations 1998.**

REASONS

1. The Claimant asserts that he was previously employed by the Respondent and is entitled to holiday pay accrued over a one-year period whilst he was in that employment. He also asserts that he is entitled to compensation for having to make the claim and for the stress of having to work continuously without holiday.
2. The Respondent denies that the claimant was an employee. The Respondent asserts that the Clamant was a self-employed sub-contractor and that all day to day work arrangements were agreed between the Claimant and the end client.

The Proceedings/Hearing

3. After a period of early conciliation through ACAS on 6 August 2019, the claim form (ET1) was lodged with Tribunal on the 16 October 2019.

4. Default judgment was made against the Respondent on the 6 April 2020 in the following terms:

    1. *No response having been received from the Respondent judgment is entered for the claimant's claim of unpaid annual leave.*

    2. *The claimant was entitled to but was not given 5.6 weeks paid annual leave.*

    3. *The respondent is ordered to pay to the claimant the total sum of £2500.05 in respect of this entitlement (average weeks' pay for last 12 weeks of employment £453.58).*

5. On the 14 August 2020, the Respondent made a written application for the default judgment be set aside.

6. On the 8 January 2021, Employment Judge Laidler set aside the default judgment for the following reasons:

    1. *Judgment was entered in default of a Response on the 6 April 2020. It was not sent to the parties until the 17 July 2020.*

    2. *By application of the 14 August 2020 the Respondent applied to set aside the judgment. It had not received the original claim form and did not receive the default judgment until the 10 August 2020.*

    3. *From the Respondent's application it appears that it has a defence to the claim and it is only in accordance with the overriding objective that have the opportunity to argue that.*

7. The Respondent subsequently filed a response to the claim.

8. A hearing was listed for 15 October 2021 but was adjourned due to lack of judicial resources.

9. The matter was then listed for hearing on the 26 January 2022 before Employment Judge Laidler. At that hearing, the Respondent requested an adjournment in order to call a witness that was not present. The hearing was adjourned as there was no witness statements from either party and there were also key matters that required further clarification, in particular relating to the claimed dates of employment. In addition, the Respondent had not received a copy of the ET1 form, or payslips previously filed by the Claimant on the 13 March 2020.

10. At the hearing, further Case Management Orders were made. These included that the Claimant was to confirm to the Tribunal and Respondent the start and end dates of his employment by the 9 February 2022. The Respondent submitted that the Orders made should be 'Unless Orders' but no such orders were made.

11. The matter was then listed before me on the 30 March 2021 for a full merits hearing.

12. At the hearing I heard evidence from the Claimant. As he had provided only a brief witness statement, I asked him a series of questions to establish what his evidence was. He was not cross examined.

13. The Claimant indicated at paragraph 2 of his statement (provided on the day of the hearing) that he had a witness, referred to as Mr Kevin P, who could support his claim. There was no application for an adjournment before me, but as the Claimant was unrepresented, I explored this issue with him further.

14. He says in his statement that Mr Kevin P was also an agency worker, was one of many managers on site and was aware of the tasks that he undertook on site. I explained to the Claimant that the Respondent was not in any way disputing what he did on site or how his day to day work was managed. I explained to the Claimant that from what I could see from the information before me the witness was unlikely to provide any additional evidence material to the matters that I must decide. In those circumstances I did not consider that this potential witness's evidence would be material to the outcome of his claim. The Claimant confirmed that he was content with this.

15. The Claimant mentioned in his evidence that he had hoped to get a transcript of a telephone call that he had with ACAS, although he did not apply for an adjournment in order to try to do this. Despite this, I did consider whether I should adjourn to provide the Claimant with the opportunity to seek to obtain a transcript if available. However, I did not consider that it was in accordance with the overriding objective to do so. This was because there was no evidence before me to demonstrate that any attempts had been made to obtain any such transcript to date despite the claim having been lodged over 18 months prior to the hearing. I did not consider that any further delay was proportionate in the circumstances of this case or that the position would be any different on a subsequent occasion if an adjournment were to be granted.

16. The Respondent did not call any witnesses to give evidence.

17. I heard closing submissions from both parties.

18. I reserved my judgment.

Documents

19. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle (prepared by the Respondent) of 17 pages, payslips submitted by the Claimant on the 13 March 2020 (covering the period from 21 April 2019 to 7 July 2019), the Claimant's witness statement dated 30 March 2022 (there are two versions; the version relied upon comprises 4 paragraphs), and the witness statement of Gareth Bough, Director for the Respondent, dated 10 March 2021.

Issues to be determined

i. What were the start and end dates of the work undertaken by the Claimant.

ii. Was the claim submitted in time (that is three months from the last date that the Claimant worked).

iii. If the claim was not submitted in time, was it not reasonably practicable for the complaint to be presented in time and, if not, was it presented within a further reasonable period.

iv. If the Tribunal has jurisdiction to decide the matter, was the Claimant a "worker" for the purposes of the Working Time Regulations 1998 ("the WTR").

v. If the Claim succeeds on points 1 to 4 above, what pay in lieu of annual leave is the Claimant entitled to under the WTR.

20. In respect of point v., Mr Welsh confirmed that if the Claimant overcame the time limit issue and then succeeded on liability, it was accepted that the amount payable would be as determined previously by Employment Judge Laidler as set out in the default judgment.

Findings of Fact

21. The Claimant's evidence was not challenged by way of cross examination. The Respondent acknowledged in closing submissions that the Claimant presented as an open and honest witness. The Respondent confirmed that the factual matrix as presented by the Claimant regarding the roles of the Respondent, Tradeline and Spitfire accorded with the Respondent's position.

22. I found the Claimant to be a straightforward and truthful witness. There was nothing about his evidence that caused me to doubt the credibility of his account. There were some aspects of his account that were vague but, as it was around 20 months since the Claimant ceased the work in question, it is unsurprising that he cannot recall all of the details, dates and timelines.

23. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.

My findings of fact are as follows:

24. The Claimant commenced working as a labourer at a construction site at Hadley Wood on or around the 6 April 2018. He worked on that one site throughout. The developer of that site was Spitfire Bespoke Developments ("Spitfire"). He obtained the work through an agency called Tradeline which has relationships with various developers. He was asked a few questions by Tradeline, and then Tradeline approached the end client, Spitfire. Tradeline did not have any other involvement. Tradeline also gave him the Respondent's telephone number and asked him to contact them. It was explained to him that the Respondent was an umbrella company facilitating payments for the work.

25. Before he started work on site, he had to sign a contract with the Respondent. Arrangements regarding payment were made. The Claimant acknowledges that he may well have been sent a copy of a contract dated 20 March 2019, although he does not remember it specifically. He understood that this new contract was issued on 20 March 2019 because the Respondent changed its name.

26. The agreement between the Claimant and Respondent is entitled 'Contract for Services' and is dated 20 March 2019. It was sent to the claimant electronically. The version provided to the Tribunal is not signed by the Claimant, but he does not deny that he received it.

27. In the agreement the Claimant is described throughout as '*the Sub-Contractor'*. Key clauses include the following:

1.7 The rights and obligations arising out of this Agreement are personal to the parties but may be sub-contracted by either party, with the consent of the other party, whose consent shall not be unreasonably withheld or delayed.

1.8 The parties agree that the relationship between the parties is not one of employer and employee.

1.9 On each assignment where control exists the sub-contractor will remain working in a self-employed capacity although his tax status will be that of 'employed' in accordance with the Agency Legislation. This will have no effect upon his employment status which will remain that of a self-employed Sub-contractor.

1.10 There is no obligation for the Sub-contractor to provide his services personally and so, he does not meet the criteria of an Agency Worker as defined in the Agency Workers Regulations 2010, nor of a worker in the National Minimum Wage Act 1998, nor of a worker in the Pensions Act 2008, nor of a worker in the Employment Rights Act 1996 and nor of a worker in the Working Time Regulations 1998.

1.11 The Sub-contractor confirms his understanding of the fact that, as a self-employed Sub-contractor, he has no claim to any employment rights such as holiday pay, redundancy pay, grievance rights or sick pay (this list is not exhaustive) throughout the duration of this contract.

2.1 The Sub-Contractor confirms that he is self-employed running his own business and agrees that he has no authority to bind the Company in any way and shall not represent that any such authority exists. The Sub-Contractor must not incur any liability on behalf of the Company and must not make any arrangement, formal or informal, on behalf of the Company without seeking the approval of the Company.

2.2 The Sub-Contractor is entitled to accept and perform engagements from other contractors or third-parties at any time. By entering into this Contract for Services the Sub-Contractor agrees that he will make himself available to execute Works Orders as required (subject to other business commitments) but shall not be obliged to accept all Works Orders. ……

2.6 The Sub-Contractor is required to provide, at his own expense, sufficient insurance to cover third party risks in relation to persons and property and against liability in respect of accident or injury to employees of the Sub-Contractor whilst undertaking the contract. This certificate must be presented to a company representative prior to undertaking work under this contract for services. The Company may be able to provide a list of suitable insurers if required.

2.7 In the event that the Sub-Contractor accepts an assignment, and is unable or unwilling to undertake the work personally, he will be required to engage a substitute Sub-Contractor in order to fulfil the terms of the contract. In the event that the Sub-Contractor is unable to locate a suitable substitute, the Company

will make the necessary arrangements to ensure that the contract is completed. Any costs associated with replacing the Sub-Contractor will be re-charged by the Company to the Sub-contractor or monies will be withheld from future payments. ……

2.9 The Subcontractor confirms that both the Client to whom the services will be provided has been informed, and accepted, that the Subcontractor may use a substitute or representative to fulfil the terms of the contract.

2.10 The Sub-Contractor will provide, at his own expense, all tools and other equipment as shall be necessary to carry out the assignment.

2.11 Pursuant to Regulation 3 (2) (a) (b), the Sub-Contractor agrees that the Agency Worker Regulations 2010 will not apply to this Contract for Services. …….

4.1 The company is under no obligation to offer or provide assignments on a continuous basis to the sub-contractor and nothing in this agreement shall commit or shall be construed as committing the company to offer or provide such work. A works order will be issued for each assignment under this contract for services.

4.2 The Works Order will stipulate whether, in accordance with the Agency Legislation, the remittance payable to the Sub-Contractor will be treated as employment income and so, subject to tax and National Insurance contributions (NIC).

4.3 In the event that a Sub-Contractor accepts a Works Order and is unwilling or unable to fulfil the Works Order personally, the Company will give the Sub-Contractor the opportunity to find a substitute Sub-Contractor within the original contract timeframe. The Sub-Contractor named on this agreement will be responsible for payment and the quality of workmanship.

4.4 In the event that the Sub-Contractor is unable or unwilling to provide a substitute Sub-Contractor, the Company may, at its discretion, offer the contract to a replacement Sub-Contractor to meet client requirements. Any charges associated with engaging with a replacement Sub-Contractor will be re-charged to the Sub-Contractor.

4.5 Under no circumstances will the Company pay the Sub-Contractor for any hours where no services are provided.

4.6 The Company accepts that the Sub-Contractor is acting in a genuine business to business relationship pursuant to Regulation 3(2) (a) (b) Agency Worker Regulations 2010. Consequently, the AWR will not apply to this Contract for Services. …….

5.1 The Sub-Contractor shall maintain an accurate timesheet detailing the number of hours worked. At the end of each week of an assignment, the Sub-Contractor shall deliver to the Client a timesheet duly completed to indicate the number of hours worked by the Sub-Contractor during the preceding week and signed by an authorised representative of the client.

5.2 The Sub-Contractor agrees to allow the Company to prepare invoices on its behalf and shall confirm to the Company whether the Sub-Contractor is registered for VAT. Invoices raised shall, where applicable, constitute a VAT invoice and will include tax and NIC deductions as appropriate when the Agency Legislation applies.

5.3 The Contract Sum will be agreed between the Company and the Sub-Contractor. Any rate specified by the Client on the Works Order will represent the rate agreed between the Company and the Client for the supply of services and will have no relevance to the Contract Sum agreed with the Sub-Contractor. ……

5.5 The Sub-Contractor acknowledges and accepts that he is trading as a business and, as such, the Company will not pay statutory sick pay, holiday pay, and statutory maternity pay or contribute to or make available a pension scheme to the Sub-Contractor or his representatives. …….

8.1 Save for when the Agency Legislation applies, the Sub-Contractor shall be responsible, for all taxes in relation to the provision of services to the Company together with all employment obligations in connection with any person engaged by the Sub-Contractor in carrying out assignments for the Company. …….

9.1 This Agreement may be terminated by either party with immediate effect by giving one week's written notice to that effect to the other party. …….

9.4 The Company may terminate this contract without notice in the event of:

(a) the Sub—Contractor being convicted of a criminal offence which the Company believes would adversely affect the business of Company or its Client or the provision of the services,

(b) the Sub-Contractor acting in breach of the rules and regulations in operation at the Client's place of work,

(i) the Client has requested the Sub-Contractor to leave the Client's place of work,

(ii) the Client has requested the Sub-Contractor to cease performing the services for whatever reason,

(iii) for any reason, the Sub-Contractor proves to be unsatisfactory to the Client

(iv) if the Sub-Contractor becomes insolvent, subject to a winding-up petition or bankruptcy order, has a receiver appointed over his property or makes a proposal to enter into any voluntary arrangement pursuant to the Insolvency Act 1986. ……

28. The Respondent was responsible for making payments to the Claimant on a weekly basis once they were told how many hours he had worked on any given week. On the payslips, the payments are referred to as 'Subcontractor Payments'. Deductions were made for income tax, national insurance contributions and a student loan.

29. The Claimant took day to day instructions from the site manager. He did whatever he was told to do. He had no tools of his own. He was provided with whatever equipment was required. He was subject to standard hours of work, but the site manager had discretion to allow flexibility with his hours. He would also sometimes work additional hours. The site manager told him when to take his lunch break. He was paid an hourly rate which was always the same.

30. Spitfire provided personal protection equipment such as hard hat, high visibility clothing and gloves. The only item he ever purchased for use on site was boots. He never purchased building materials. He has never sent a substitute labourer to undertake the work instead of him. Whilst there is reference in the agreement

to the Respondent providing "Works Orders", he has never received any written or verbal orders from the Respondent: he was just told that whatever Spitfire told him to do he should get on with it.

31. The Claimant's understanding was that he was undertaking the work as an employee. He did not set up his own business in connection with the labouring work that he was undertaking. He has never been registered with HM Revenue and Customs as self-employed. He did not file self-assessment tax returns. He took some time off whilst he was working on the Spitfire site. This was so that he could undertake crane operator training. He paid for this training himself. It was not undertaken in anticipation of him undertaking crane operating work on the Hadley Wood site.

32. He did make enquiries about entitlement to holiday at one point whilst he was working. He spoke to Gary from Tradeline about it. He spoke to Tradeline rather than the Repsondent because they had been his first point of call. He did not get a concrete answer to the question, and that is why he did not pursue it.

33. At section 5.1 of the claim form, the Claimant stated that his employment ended in August 2019. In an email to the Tribunal dated 13 March 2020, he stated that the dates of his employment were 30 July 2018 until 15 March 2019.

34. I asked the Claimant what was the last day that he worked. He replied that it was in July but that he could not remember the exact date. Mr Welsh stated that the Respondent's position is that he last worked on the week ending the 7 July 2019.

35. The most recent payslip provided by the claimant is entitled "*Tax Period 14 - Week Ending 07.07.2019"*.

36. Whilst the Claimant stated in the claim form that he was employed until August 2019, no evidence has been provided to substantiate this initial assertion and it was also contradicted by what he said in live evidence.

37. It is not suggested by the Claimant that there was a later payslip that he is not able to provide and he has not provided any other documentary evidence to demonstrate that he was still working subsequent to the 7 July 2019. Taking in to account the vagueness of the Claimant's oral evidence in this respect and what is recorded in the last payslip that has been provided, on the balance of probabilities, I find as a fact that the last day of work was the 7 July 2019.

38. The Claimant contacted Acas on the 6 August 2019 and, according to the Early Conciliation Certificate, conciliation ended on the same date. Adding on the one day of early conciliation, the Claimant therefore had until the 7 October 2019 to lodge his claim with the Tribunal. His claim was therefore made 9 days after the three-month time limit.

39. I asked the Claimant a series of questions to explore why he did not lodge his claim within the three-month time limit. His evidence can be summarised as follows.

40. He cannot remember the exact date when he decided to make a holiday pay claim to the Tribunal. He was looking at his payslips, and he noticed that he had not taken any holiday: the situation came to light at the end of his contract. He thought this occurred in the week after the work ended, that is around the 11 or 12 July 2019.

41. Prior to contacting Acas, he undertook his own research online looking at what rights he had and what the legislations says. He did not seek legal advice as he could not afford this. He thought that Citizens Advice directed him to Acas. He initially stated that it was not made clear to him when the three-month time limit would start. He was not sure if it ran from after he made contact with Acas or when he left work. He then clarified that he thought that he found about the time limit from Acas when he called them in August and that he understood that the clock would start running from when that telephone call was made.

42. He stated that Acas had tried to resolve the situation with the Respondent. For some time, he tried to reach out to the Respondent but he did not hear from them. Acas told him to try this method before making a claim to the Tribunal. He therefore contacted the Respondent by email and telephone.

43. I asked him if he was in good health at the time and he replied that he was in "working health" but he was under stress and was frustrated. Physically he was okay, although mentally he was not at his best. He has since been treated for high blood pressure. There was no contact with his GP regarding his mental health at the time and he has not been prescribed any medication or other treatment for mental health problems.

44. On the basis of the Claimant's oral evidence, I find that the reason why the claim was made out of time was because the Claimant had not checked, or clarified, how the three-month time limit was calculated and, on the basis of the information that he had acquired, had misunderstood how it was calculated. He advances no other reason for missing the three-month time limit for submitting his claim with the Tribunal.

45. The Claimant's oral evidence regarding what was said when he spoke to the Citizens Advice and Acas and how he came to misunderstand the time limit was vague. I am therefore not satisfied, on the evidence before me, that his misunderstanding of the time limit arose from being given the wrong advice or information by any third party.

The Relevant Law -Time Limit for bringing the claim

46. The time limiting for bringing a claim under the WTR is governed by regulation 30(2) of the WTR, the relevant excerpt from which reads as follows:

30…(2) [Subject to [regulation 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented–

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

47. Further guidance is given in caselaw as to how the "not reasonably practicable" test should be applied in individual cases.

48. The term, "*not reasonably practicable*" should be given a "*liberal construction in favour of the employee*"[*Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA]. What is reasonably practicable is a question of fact and thus a matter for the Tribunal to decide. The onus of proving it was not reasonably practicable to lodge a claim in time rests on the claimant. There is "*a duty upon him to show precisely why it was that he did not present his complaint*" [*Porter v Bandridge Ltd* 1978 ICR 943, CA].

49. If a claimant fails to show that it was not reasonably practicable to present the claim in time, the Tribunal should find that it was reasonably practicable to do so [*Sterling v United Learning Trust* EAT 0439/14]. '*Reasonably practicable*' does not mean reasonable, and does not mean physically possible, but means something like 'reasonably feasible' [*Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372, CA]. In *Asda Stores Ltd v Kauser EAT 0165/07* Lady Smith stated that "*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*".

50. Where the claimant is generally aware of the right to make a claim, ignorance of the time limit on its own will not usually be sufficient reason for the delay. If a claimant is aware of their right to complain, they are under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the Tribunal to reject the claim. As per *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA, in reaching its decision, the Tribunal is required to establish what opportunities the Claimant had to find out about his rights and whether he took those opportunities? If not, why not? Was he misled or deceived?

51. The correct test is not whether the claimant knew of their rights but whether they ought to have known of them *[Porter v Bandridge Ltd* 1978 ICR 943, CA]. In the case of *Avon County Council v Haywood-Hicks* 1978 ICR 646, EAT, the Employment Appeal Tribunal found that the claimant in that case, who did not find out about the possibility of bringing a claim until he read an article in a newspaper, ought to have investigated his rights within the time limit and claimed in time.

My Conclusions - Time Limit for Bringing the Claim

52. The Claimant started to consider whether he had any right to holiday pay around a week after he finished work. He began to undertook research online regarding his potential rights. He contacted Citizens Advice who suggested he contact Acas. He contacted Acas more than two months before the expiry of the three month time limit.

53. The Claimant therefore had some awareness of the general right to holiday pay in the week after his work ended when he looked at his payslips and began to give consideration as to whether he should have received payment in lieu of holiday pay. At that stage he had the opportunity to check the time limit for making a claim, such information being readily available online from a variety of sources such as the Citizens Advice website. Equally, he had the opportunity to check this information when he spoke to the Citizens Advice on the telephone. Further, even if the discussions with Acas left him confused or unclear as to the next steps to take and the relevant time limits, he had ample time after that to establish what the actual position was.

54. The Claimant was not suffering from any impairment or mental health problems preventing him from making such enquiries during the period in question. He could easily have checked or clarified the time limits at the same time as undertaking the steps that he did take.

55. There is no evidence before me to show that he was misled by Acas or given the wrong information about time limits. On the basis of the Claimant's evidence, on the balance of probabilities, I find that he did not apply his mind fully to the issue of time limits, misunderstood the situation, that he did have adequate opportunity in the two months after he first made contact with Acas to clarify the position, but he did not do so.

56. Taking in to account all of the above factors, I find that it was reasonably practicable for the Claimant to lodge his claim within the three month time limit. As he did not do so this Tribunal has no jurisdiction to determine his claim.

Employment Status - The Relevant Law

57. The Claimant is only entitled to pay in lieu of annual leave under the provisions of The Working Time Regulations 1998 ("the WTR") if he can show that he was an employee of the Respondent or a "worker".

58. For this purpose, the relevant sections of the WTR are as follows:

2.-Interpretation *…….*
"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;

'***Agency workers not otherwise "workers"***

36.—(1) This regulation applies in any case where an individual ("the agency worker")—

(a)is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but

(b)is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and

(c) *is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.*

(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—

(a)whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b)if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work, and as if that person were the agency worker's employer.'

59. There have been various tests established over time to guide the Tribunal in deciding whether a claimant is an employee, "worker" or an independent contractor/self-employed.

60. The starting point when deciding this is the relevant statutory provisions followed by a fact sensitive assessment applying the relevant principles established by caselaw.

61. The Tribunal must not only focus on what is in any written contract or agreement but also look at the reality of the situation and how the parties conduct themselves. Consideration should be given as to whether the written contract represents the true intentions or expectations of the parties. [*Autoclenz Ltd v Belcher* [2011] UKSC 41 and *Consistent Group Ltd v Kalwak and Ors* 2007 IRLR 560, EAT]

62. The tax regime that an individual is subject to is one factor that the Tribunal must consider in determining employment status, but is only one of many factors that must be taken in to account.

63. In *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229, the Court of Appeal has confirmed that an 'irreducible minimum of obligation' is not a prerequisite of "worker" status. Under the statutory definition, it is sufficient that the contract includes an obligation on the individual to perform work or services personally, and that the other party is not a client or customer.

My Conclusions - Employment status and "worker" status

64. In case I am wrong about the time limit issue, I have gone on to consider whether the Claimant is a "worker" for the purposes of the WTR. I have not given separate consideration as to whether the Claimant is an employee because, for the purposes of entitlement to pay in lieu of annual leave under the WTR, the outcome would be the same whether he was an employee or a "worker".

65. The Claimant cannot bring himself within the definition of a "worker" that is found within regulation 2 of the WTR. This is because the Claimant was not carrying out the work concerned <u>for the other party to the contract,</u> that is the Respondent. He was working for Spitfire who was not a party to the contract of the 20 March 2019. He therefore cannot bring himself within regulation 2(b).

66. However, specific provisions are made under regulation 36 of the WTR for individuals whose work is facilitated via an agency. The Claimant obtained the work through Tradeline, a recruitment agency. Once he had secured that work, he was then paid by the Respondent throughout the time that he was undertaking that work.

67. In order to come within regulation 36, the Claimant must not be a *"party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual."* In other words, he must not have been providing his services as a labourer in business on his own account.

68. The agreement between the Claimant and Respondent of the 20 March 2019 is called a "Contract for Services". The Claimant is referred to throughout as "the

Sub-Contractor". There is reference at various points in the agreement to it being agreed that the Claimant is self-employed and running his own business. At 1.7 it states that the parties agree that the relationship is not one of employer and employee.

69. The agreement states, at 1.10, that there is no obligation for the Claimant to provide his services personally so, inter alia, he is not a worker for the purposes of the WTR. At 1.11 it states that the Sub-Contractor confirms his understanding that he is not entitled, amongst other things, to holiday pay. The agreement provides for substitution. At 9.1, there is provision for the agreement to be terminated by one week's notice from either party. At 9.4 there is provision for the Respondent to terminate the agreement in certain circumstances, without notice.

70. Whilst there is reference throughout the document to the parties agreeing that the Claimant is a self-employed subcontractor and so does not have certain statutory rights, I am required to look at the reality of the situation and whether those statements actually reflect the true intentions and expectations of the parties.

71. The Claimant's oral evidence, which was not challenged, is that he was not registered as self-employed when he was working on the Spitfire site. He thought he was an employee. He had not set up his own business to undertake that work. He has never set up his own business as a labourer. He was not providing labouring work for anyone else at the time: he was working on the Hadley Wood site full time and that was all. He did not hold insurance. He did not provide his own materials. Whilst he was on site, his hours of work were controlled by Spitfire. He had little control over the hours that he worked and had to seek permission from the site manager to vary those hours. He was told when his lunch break was. He was told what jobs to do on a day to day basis. He was paid by the hour, not for completing a particular task or project. He did not invoice the Respondent; he just completed a weekly time sheet. He was provided with payslips each week and tax and national insurance was deducted on a PAYE basis. He has never provided a substitute. All of these factors point against him being in business on his own account.

72. There are a number of respects in which the agreement does not reflect the reality of the situation:

    i. At 2.6 there is a requirement that the Claimant provide third party insurance cover which was to be presented to the Respondent before any work was undertaken under the contract. The Claimant never held any such insurance and he was not asked to provide a certificate of insurance to the Respondent at any point.

    ii. At 2.10 there is a requirement that the subcontractor provide all his own tools and any equipment necessary to carry out the assignment at his own expense. However, all tools, equipment and materials were provided on site by Spitfire. Indeed, the Claimant was even provided with personal protection equipment and clothing by Spitfire.

    iii. There is reference in the agreement at various points to the execution of "Works Orders". The Claimant has never been provided with "Works Orders" and it was clear from his oral evidence that he did not know what one was.

73. Having considered the Claimant's oral evidence, as well as the terms of the

written agreement, I do not consider that the written agreement truly reflects the reality of the Claimant's status. The overall impression that I formed is that the clauses referring to substitution, works orders, third party insurance and provision of tools and equipment were included in the agreement to give the impression that the Claimant was operating on a self-employed basis, when, in reality his status was more akin to that of a "worker".

74. The Claimant had no economic interest in the arrangements other than being paid for the hours that he worked. He could not alter the arrangements in any way in order to increase the amount he was paid on a day to day basis or to generate a profit. Whilst there is a substitution clause, I do not consider that this reflects the reality of what was agreed between the parties, that is that the Claimant would turn up on site every day, undertake the work that he was told to do and then inform the Respondent of the hours that he had worked. I do not consider that the substitution clause, or the right to refuse to take work, were in the minds of the parties when the agreement was entered into.

75. All of the above factors when looked at in the round suggest that the Claimant was not running a business on his own account when undertaking this work. That being so the Claimant came within the requirements of regulation 36 of the WTR and so had entitlement to holiday pay, or pay in lieu of holiday pay, under the WTR. As per regulation 36(2)(a) responsibility for payment for annual leave fell upon the Respondent as the Respondent was responsible for paying the Claimant for the work concerned. **However, for the avoidance of doubt, as I have found that the claim was out of time, this Tribunal has no jurisdiction to make a Judgment in favour of the Claimant in this respect.**

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Employment Judge S.L.L. Boyes

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Date: 9 May 2022

Reserved Judgment and Reasons Sent to The Parties on
10 May 2022

FOR EMPLOYMENT TRIBUNALS