Case No. 2303754/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr G Kulatilleke

Respondent: Capital Staffing Services Ltd

Heard at: London South Employment Tribunal **On**: 22 June 2022

Before: Employment Judge Barker

Representatives

For the claimant: no attendance
For the respondent: no attendance

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant is entitled to payment for accrued but untaken annual leave outstanding at the termination of his engagement, which amounts to £1907.14 gross.

2. The claimant is owed unpaid wages for July 2018 of £91.60 gross.

3. The claimant was not provided with a statement of terms and conditions and is awarded 4 weeks' pay, which is £1474.80.

4. The claimant was not an employee of the respondent and his claims for wrongful dismissal fail and are dismissed.

5. The Tribunal does not have jurisdiction to order the respondent to provide the claimant with a P60 or to refund any overpaid tax and the claimant should make enquiries of HM Revenue & Customs.

REASONS

1. The claimant was engaged from 17 October 2017 until 23 July 2018, providing IT services to the respondent. The respondent is an employment agency.

2. The information publicly available on the UK Government's Companies House register records that the respondent is subject to a Company Voluntary Arrangement (CVA) lasting for 5.5 years, which began in March 2020 and is expected to continue until 29 September 2025. The most recent report by the supervisor of the CVA is on the Companies House register and is dated March 2022. It does not indicate that any moratorium is or was in place as part of the CVA and the respondent continues to trade. The existence of the CVA therefore does not affect the Tribunal's jurisdiction to determine the claimant's claims against the respondent, nor the claimant's ability to be awarded compensation.

3. The claimant's claims are for unfair dismissal, breach of contract, holiday pay and other unlawful deductions from wages, as well as for his P60. The claimant currently resides out of the jurisdiction. It is his case that he was engaged by the respondent on a "zero hours" contract of employment. The respondent denies this, and states that he was a self-employed contractor. The parties agree that the claimant worked up to 20 hours per week.

4. ACAS Early Conciliation took place from 29 August 2018 until 29 September 2018 and the claims were lodged at the Tribunal on 15 October 2018.

5. It is the respondent's case that the Tribunal does not have jurisdiction to hear the claims of breach of contract or unfair dismissal as the claimant was not an employee of the respondent within the scope of s230 Employment Rights Act 1996 ("ERA") as is required to bring either of those complaints to the Tribunal.

6. The respondent further submitted that even if the Tribunal finds that the claimant was an employee, he is not entitled to bring a claim of unfair dismissal because he does not have two years' service with the respondent, as required by s108 ERA.

7. The respondent's Grounds of Response further state that the claimant was not entitled to holiday pay as he was not an "employee". However, it is the case that an individual does not need to be an "employee" in order to be entitled to holiday pay, but a "worker" within the definition in regulation 2 of the Working Time Regulations 1998.

8. By letters to the parties dated 11 April 2019 and 28 June 2019, the Tribunal (Employment Judges Spencer and Ferguson respectively) noted that the claimant may have difficulties establishing his entitlement to bring an unfair dismissal claim and that he had subsequently withdrawn that claim, which was

then dismissed by the Tribunal on withdrawal by the claimant. The parties agreed for the matter to be determined on the papers, given that the claimant was at the time resident overseas. The respondent had applied for an order that the Tribunal strike out the claimant's claims, but this was refused.

9. The matters to be determined by the Tribunal were therefore set down on 28 June 2019 to be:

    a. Whether the claimant was a worker, an employee or self-employed, and
    b. Whether he was entitled to be compensated for:
        i. Unpaid wages of £91.60;
        ii. Alleged unlawful deductions for tax of £873.60;
        iii. Holiday pay of £4,437; and
        iv. Notice pay of £2,400.

10. As the matter has been directed to be heard on the papers, no sworn evidence has been heard in determining the claims. However, there are a number of documents submitted by both parties and witness statements, which have been read and considered and which are referred to in the findings of fact below. It is noted that the respondent's evidence is relatively limited and the claimant's evidence is extensive, both in terms of the witness evidence provided and the documents to support the witness statements.

Findings of Fact

11. The claimant responded to a job offer at the respondent for an "*IT Consultant… needed on an ongoing basis*" in October 2017. The job was to repair the company database and links to the website. The role was therefore to perform work for the agency itself, rather than as an agency worker to be supplied to third parties. The Tribunal accepts that the claimant attended an interview at the respondent's offices.

12. The claimant has supplied an email sent to him and dated 13 October 2017 which is from Joaquim Rivera, Chief Executive at the respondent, which states:

    "Thank you for your time on Wednesday. I have attached a copy of the NDA [Non-Disclosure Agreement] *signed in the office. We will [sic] like to offer you the job to fix our current in-house system. The offer will be a zero hours contract with an hourly rate of £30ph. Please confirm if you agree to the above and time you can start next week. "*

13. It is the claimant's case that at the time he attended the respondent's offices about the offer, he was a full-time postgraduate student on a full-time student visa. He therefore submits that he informed the respondent that he was not allowed to work freelance or self-employed, and was only allowed to work part-time, and that the respondent agreed to engage him on this basis. The

respondent now disputes this and claims that the claimant was self-employed, but there is no evidence supplied to contradict the job offer of a "zero hours contract".

14. The NDA was signed by the claimant in his name. He therefore entered into the agreement personally. The Tribunal finds that the NDA had the purpose of providing additional protection for the respondent in engaging the claimant because he was to be given access to the respondent's confidential database.

15. The claimant's evidence, which is accepted by the Tribunal, is that his engagement with the respondent had the following features:

    a. He was added to the company pension scheme and pension deductions were initially made from his pay (although given his temporary residence in the UK, as his visa was due to expire in 2019, the claimant subsequently stopped the pension contributions);
    b. PAYE tax and National Insurance were deducted from his salary;
    c. He was given an office computer (laptop) and a desk, and his own email address at the respondent;
    d. His role at the respondent changed part-way through his engagement, in that the respondent decided to install a new IT system rather than repair the old one, and so the claimant was subsequently directed to complete a variety of IT-related tasks such as preparing ad-hoc reports and reconciling "*large collections of billings/transactions, merge Credit notes with invoices, match Nursing staff names to payments, develop outlook macros) and troubleshoot IT issues later on.*"
    e. Gerry McHugh and Joaquim Rivera, an owner and the CEO of the respondent respectively, arranged the claimant's hours of work with him in advance and subject to their agreement.
    f. The claimant was not permitted to send another individual in his place. This is supported by the NDA, signed personally by the claimant.

16. The witness statement provided by Mr Rivera states that the claimant's engagement had the following features, which I accept:

    a. That he worked as and when required and had no fixed hours and could work from home or the office, at his discretion; and
    b. That the claimant submitted detailed invoices each month in order to be paid.

17. On 23 July 2018, the claimant had informed the respondent that he would attend the office at 9am. However, his debit card was rejected at a cash point, and as he was flying overseas the following day, he delayed coming in to the office and spent the morning in the bank resolving the issue. On attending the

office at 12 noon, Mr McHugh, on the claimant's evidence, informed him that the claimant was "*deceitful*" and that he would not be paid for the three hours he was late.

18. I accept the claimant's evidence that "*as per the verbal agreement I had with Capital…. I am paid for the hours I work and not on the 9 to 5 basis, so Gerry's [McHugh] outburst was totally uncalled for and made no sense*".

19. The claimant took exception to being called "deceitful" and asked Mr McHugh to retract the remark, which he refused to do and instead, on the claimant's evidence, ejected him from the office and threatened to call the police for "trespassing" if the claimant did not leave. The claimant left the office and did not return thereafter, but he did ask Mr Rivera the same day to investigate what had happened with Mr McHugh and provided a photograph of the cash machine, the screen of which showed that his card had been rejected.

20. No explanation was ever provided by Mr Rivera. The claimant, having been locked out of all of the respondent's systems, was unable to do any more work for them and subsequently considered himself dismissed. His submission to the Tribunal is that he was never paid for the work he did in July 2018, which I accept, although he does acknowledge that he was paid twice for June 2018 and that he is owed only the difference in pay for the two months, which is £91.60.

21. The respondent has not, I find, provided evidence which would establish on the balance of probabilities that the claimant was paid this sum. The respondent's sheet of hours worked by the clamant is incomplete, as it does not cover periods past March 2018, even though they have also submitted the claimant's own invoice for June 2018. I therefore award the claimant this sum which was an unlawful deduction from wages properly payable contrary to s13 Employment Rights Act 1996.

The Law

22. In order for the claimant to pursue his claims of breach of contract, he must establish that he is an "employee" of the respondent as per s230(1) Employment Rights Act 1996. For breach of contract, it is not sufficient for him to establish that he is a "worker" of the respondent as per s230(3)(b) Employment Rights Act 1996, which is a less onerous hurdle to overcome.

23. An "employee" is defined in s230 ERA 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.*

24. The case of *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance [1968] 2 QBD 497* identified the principal requirements for an individual to be considered an employee. They are firstly control, secondly, mutuality of obligation and thirdly that there are no terms of the relationship that are inconsistent with the existence of an employment relationship.

25. Section 27A(1) Employment Rights Act 1996 defines a zero-hours contract as a contract under which the worker's obligation to do work or perform services is conditional on the employer making work or services available, and under which '*there is no certainty that any such work or services will be made available to the worker*'. There is no obligation on the employer to make work available, and no obligation on the worker to accept any work offered.

26. If a relationship between a worker and an employer is to amount to a contract of employment, there must as a minimum be a degree of mutual obligation on the parties; on the employer to offer work and on the employee to accept it. In *Cotswold Developments v Williams [2006] IRLR 181* it was established that the issue is not whether there may be circumstances when the employer can choose not to offer work, or the employee refuse to do it, but rather whether there is an obligation to offer some work and some corresponding obligation to do it. Therefore, a contract of employment can still exist even where the hours worked every week are not fixed and completely consistent.

27. Employment Tribunals must not simply focus on the wording of contractual documents or on how the parties themselves describe their relationship, but on the factual reality of the situation (*Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*).

28. An individual is a "worker" for the purposes of the Working Time Regulations and the Employment Rights Act if he, as per s230 (3) of ERA, can show he was

> *"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."

29. Therefore to establish that he was a "worker", as per the guidance given in *Sejpal v Rodericks Dental Ltd 2022 EAT 91* he must show:

    a. He must have entered into or work under a contract (or possibly, in limited circumstances, some similar agreement) with another party; and
    b. He must have agreed to personally perform some work or services for the other party.
    c. However, A is excluded from being a worker if:
        i. A carries on a profession or business undertaking; and
        ii. B is a client or customer of A's by virtue of the contract

30. As has long been established for a statutory right such as the right to paid annual leave, it is the words of the statute that should be the starting point for analysis and not the words of any contract or agreement.

31. Workers are entitled to statutory minimum annual leave of 5.6 weeks which is pro-rated in the case of workers who are not full-time (as per the Working Time Regulations 1998). For the claimant, he would be entitled to 5.6 weeks per year based on the average of the hours worked in the annual leave year which in the claimant's case began on the first day of his employment on 17 October 2017. An individual is only entitled to the full 5.6 weeks pro-rata entitlement if he has worked the whole of the leave year to accrue this entitlement. If he has worked less than a full year, he would be entitled to the percentage of the annual entitlement in accordance with how much of the year he had worked.

32. Employees have the right to a minimum period of notice as per s86 Employment Rights Act 1996 if no contractual period of notice has been agreed with the employer. The amount of a week's pay for this purpose is calculated on the basis of the average earned in the previous 12 weeks (s224 ERA).

33. Workers have the right to a written statement of terms and conditions as per s1 ERA . Under S.38 of the Employment Act 2002 successful claims brought under any of the jurisdictions listed in Schedule 5 to that Act entitle the claimant to recover compensation where the employer has failed to provide the claimant with a statement of his or her employment particulars as required under S.1 of the Employment Rights Act 1996 (ERA). This includes a failure to pay holiday pay under the Working Time Regulations 1998, regulation 30.

34. Section 38(3) Employment Act 2002 states

"If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996……,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead."

35. The "minimum amount" and the "higher amount" are 2 and 4 weeks' pay respectively, but are subject to a maximum amount set in s227 ERA, which is calculated at the date of termination which was 23 July 2018. The maximum amount in July 2018 was £508. A week's pay for the claimant for these purposes is to be calculated on the basis of the average earned in the previous 12 weeks (s224 ERA).

Application of the Law to the Facts Found

36. The claimant asserts, in his submissions dated 4 August 2019, that he is entitled to £6000 for breach of contract. This is claimed both on the basis of what he says the remainder of the term of his contract would have been (10 weeks) and also because *"for 2.5 months I was waiting in anguish and uncertainty for any update on what was going on, and as a result I was not able to look for work elsewhere."* He is consequently claiming 10 weeks salary for the period on the basis of 20 hours per week X 10 weeks X £30 per hour.

37. There is no evidence to suggest that the parties agreed a fixed term contract such that the claimant is entitled to be paid to the end of the contract. The emails of October 2017 refer to the role being on an "ongoing basis". The initial engagement was to renovate the respondent's IT system but this was abandoned part-way through the engagement, and the role changed.

The claimant's status as an employee, worker or self-employed and his entitlement to notice pay for wrongful dismissal

38. The parties did not, despite the claimant's requests, enter into any kind of written terms and conditions of service or of employment or other worker's contract. There is no evidence that they agreed any particular terms relating to notice. What was agreed, in the claimant's submissions, was a <u>maximum</u> weekly working limit of 20 hours per week and "*non-freelancer status*", to comply with the terms of his student visa. Therefore, if the claimant is able to establish that he was employed on a contract of employment such that he is entitled to a period of notice, that period of notice would be in accordance with

the statutory minimum notice periods in s86 ERA, which for his period of service would be one week's pay as there is no evidence of any agreement between the parties for a longer period of notice.

39. I accept that the claimant was employed on a zero hours contract as per s27A ERA. This was the terms on which the job was offered to the claimant as per Mr Rivera's email, which the claimant accepted.

40. Was this a "worker's contract" or a contract of employment? The starting point for this analysis must be the words of s230(3) ERA and the guidance in *Seipal v Rodericks Dental* (above). The evidence given by the claimant, which I accepted, indicated that although the weekly hours of work were not consistent (which is consistent with a zero hours contract), the claimant was subject to an obligation for personal service (as evidenced by the NDA and the email from Mr Rivera offering the claimant the job personally) and was subject to a degree of control and integration. Indeed, I accept that his contract was terminated because he was late for work. Once the claimant's hours of work were agreed, there was an obligation on him to turn up to work and on the respondent to provide him with that work. He used the respondent's equipment, had an email address at the respondent and was given a wide variety of ad hoc tasks to do. He was a member of the respondent's pension scheme. There was no evidence that he carried on a profession or business undertaking or that the respondent was a client or customer of the claimant's. He is therefore at least a "worker" as per the ERA and was not self-employed.

41. Is the claimant also an "employee"? I find that it was not a contract of employment. The claimant provided evidence in an email dated 13 March 2018 which shows, on the balance of probabilities that there was insufficient mutual obligation and control that would be expected to be found in a contract of employment, in that the claimant was indicating that he would withdraw from the parties' future working arrangements if invoices were not paid by the respondent promptly. He was also setting down the terms on which he would accept further work, in that he wrote "… *when invoices are submitted for work already done, these should be paid, rather than asking for further work. Also, payment for work carried out should be made before new work is asked to be carried out…. If you are not satisfied with my work* ***we should make a professional decision*** *on future continuation"* [emphasis added].

42. Applying the words of the statute in s230 ERA and considering the guidance in *Ready Mixed Concrete* and *Cotswold Developments* to the above evidence, there was insufficient evidence of the degree of control and mutuality of obligation required for the claimant to be an employee. He is therefore not entitled to a statutory minimum period of notice of termination as per s86 Employment Rights Act 1996.

43. Furthermore, he is not entitled to recover £2400 "*due to the lack of procedure, lack of any notice, falling to give me reasons (to date) why I was dismissed, humiliating me personally and professionally in front of peer staff and deceptively threating to charge me with trespassing in the office premises when asked for an apology. Gerry McHugh effectively forbade me to come to the Respondent's office and made it impossible for me to continue working."*

44. The claimant was informed by EJ Ferguson in her letter of 28 June 2019 that the basis of a claim for wrongful dismissal is as follows:

> *"the claimant should be aware that the measure of damages for a wrongful dismissal complaint is the amount the claimant would have received if proper notice had been given, i.e. notice pay only."*

45. The claimant is not pursuing a claim for unfair dismissal and so the Tribunal has no jurisdiction to consider the manner of his dismissal and whether a fair procedure was followed. The Tribunal has no jurisdiction therefore to compensate the claimant for any lack of procedure, humiliation or threats made by Mr McHugh, irrespective of the claimant's strength of feeling. The claimant is also not entitled to any compensation for future loss of earnings or loss of opportunity.

Holiday Pay

46. The claimant was engaged between 17 October 2017 and 23 July 2018, which is a period of 280 days or 40 weeks. The fraction of the leave year he worked was therefore 280/365 = 76%. He therefore accrued annual leave of 5.6 weeks x 76% = 4.3 weeks.

47. What was the average week's pay earned by the claimant during his engagement for the purposes of his annual leave entitlement? The claimant has not provided complete information as to how much he earned during his engagement, but payslips in March 2018 (before the financial year ended) show he earned £12000 to that date and a payslip near to the end of his engagement (in June 2018) shows he earned £5649. The claimant's case is that he was owed £91.60 (which I accept) in addition that remains unpaid, which would be £5740.60. Therefore, the most accurate calculation available to the Tribunal in the circumstances is that the claimant earned £17740.60 during his employment at the respondent, for 40 weeks. This is an average weekly wage of £443.52 gross. When this gross weekly wage is multiplied by 4.3, the claimant is entitled to accrued but unpaid holiday pay of £1907.14

Written Statement of Particulars

48. The claimant was not provided with a written statement of particulars of engagement during his service with the respondent, despite requesting it on more than one occasion. It was still outstanding on the termination of his

engagement. The lack of clarity in relation to the terms of his engagement has led in part to this litigation, at least some of which, if not all, could have been avoided. Therefore the higher amount of 4 weeks' wages is appropriate to be awarded under s38 Employment Act 2002.

49. This is to be calculated (as per the ERA section 224) on the basis of his average wages over the previous 12 weeks, ending with the date of termination of 23 July 2018. This therefore produces a different average weekly wage than the method of calculation for the claimant's holiday pay entitlement.

50. The last 12 weeks of employment was the period 30 April 2018 to 23 July 2018. This information is not available to the Tribunal, but the Tribunal does have the claimant's earnings from the beginning of the tax year 2018 to 23 July 2018 in the payslip of 15 July 2018, plus the £91.60 owed, which is £5740.60 over a period of 15 weeks and 4 days. In the interests of proportionality and finality in these proceedings, and by analogy with s228 ERA (which covers cases where fewer than 12 weeks have been worked), the average wages for that period will be calculated. 15 weeks and 4 days is 15.57 weeks, so the average weekly wage is £5740.6 divided by 15.57 = £368.70 per week. Four weeks' pay is therefore £1474.80.

Further matters

51. The Tribunal has no jurisdiction to order the respondent to provide the claimant with a P60 form and the claimant is directed to make enquiries of HM Revenue & Customs in the first instance.

52. Is the claimant entitled to recover "unlawful deductions of tax" from the respondent? Any deductions from the claimant's wages for tax or National Insurance that are, in hindsight, found to be more than the sums the claimant was obliged to pay in a particular tax year, are paid by the employer to HM Revenue and Customs and should be sought as a repayment by the claimant from HMRC.

Employment Judge Barker
Date 24 June 2022