Case No: 2415257/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Bailey

Respondent: James' Places (Northwest) Limited

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the judgment and reasons sent to the parties on 18th August 2022 are corrected as set out in bold block type at paragraphs 4 of the judgment and paragraphs 73 and 75 of the reasons.

Employment Judge **Rhodes**
Date 6th October 2022

SENT TO THE PARTIES ON

7 October 2022

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Bailey

Respondent: James' Places (Northwest) Limited

Heard at: Manchester (by CVP) **On:** 17 June 2022

Before: Employment Judge Rhodes

Representation:

Claimant: In person
Respondent: Mr Halpin (Solicitor)

CORRECTED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant was not an employee of the respondent. The Tribunal therefore does not have jurisdiction to hear his complaint of dismissal in breach of contract which is hereby dismissed.

2. The claimant was a worker of the respondent for the purposes of the Working Time Regulations 1998 and he was therefore entitled to the benefit of paid annual leave in accordance with Regulations 13 and 13A.

3. The complaint of unauthorised deductions from wages was presented in time.

4. The respondent failed to pay the claimant in respect of **2.73 WEEKS'** holiday. The complaint of unauthorised deductions from wages therefore succeeds to that extent.

CORRECTED REASONS

Introduction and Issues

1. The claimant complained of unauthorised deductions from wages (by nonpayment of holiday pay) and dismissal in breach of contract (wrongful dismissal).

2. The respondent's position was that the claimant was an independent contractor and that, as he was neither a worker nor an employee, he was not entitled to pursue his complaints at an Employment Tribunal. The case therefore largely turned on the claimant's employment status.

3. At the outset of the hearing, it was agreed that the issues were as follows:

    a. Was the claimant an employee as defined by section 230 Employment Rights Act 1996 ("ERA")?

    b. If not, was the claimant a worker as defined by Regulation 2 of the Working Time Regulations 1998 ("WTR") and s230(3)(b) ERA?

    c. If the answer to either of the above is 'yes', during what period(s) was he a worker or an employee?

    d. What was the claimant's entitlement to annual leave?

    e. Did the claimant take any holidays and, if so, when?

    f. Was he properly paid during any of those holidays?

    g. Is any part of the claimant's claim out of time?

    h. If the claimant was an employee, did the respondent terminate his employment in breach of contract?

Evidence and Bundle

4. I heard evidence from the claimant and Mike Auld (the respondent's Group Operations Director)

5. I was referred to a 147-page bundle. The pagination in the electronic bundle did not match the pagination on the physical copy because of the insertion of pages 74.1 and 74.2. References to page numbers in this judgment are references to page numbers in the physical copy of the bundle.

Law

6. Regulations 13 and 13A of the WTR together provide that a worker is entitled to 5.6 weeks' paid annual leave in each leave year.

7. Regulation 2 of the WTR defines a worker as:

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."

8. This is broadly the same definition contained in section 230 of the ERA which also defines an employee and a contract of employment:

(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.

9. The key tests for the existence of a contract of employment are those set out in ***Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497***, namely that:

    a. an agreement exists to provide the servant's own work or skill in the performance of service for the master ("personal service") in return for a wage or remuneration ("mutuality of obligation").

    b. in the performance of that service, the master has a sufficient degree of control over the servant ("control").

    c. the other provisions are consistent with a contract of service ("other factors").

10. Subsequent decisions (notably ***Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612*** and ***Carmichael v National Power [1999] 1 WLR 2042***) have confirmed that personal service, mutuality of obligation and control are necessary but not sufficient conditions for the existence of a contract of employment. If all three are present, the question of whether there is a contract of employment must be assessed by considering all other relevant factors and weighing up whether they are consistent with a contract of employment.

11. For an individual (A) to be a worker for another (B) pursuant to the WTR:

    a. A must have entered into or work under a contract with B; and

    b. A must have agreed to personally perform some work or services for B.

12. However, A is excluded from being a worker if:

a. A carries on a profession or business undertaking; and

b. B is a client or customer of A's by virtue of the contract.

13. On this latter point, the EAT in ***Cotswold Developments Construction Ltd v Mr S J Williams UKEAT/0457/05*** held that there is a distinction between someone who actively markets his or her services to the world at large, on the one hand, and someone who is recruited by a principal to work for that principal as an integral part of its business, on the other hand.

14. The current state of the law on worker status has been recently (and very helpfully) summarised by the Employment Appeal Tribunal in ***Mrs N Sejpal v Rodericks Dental Limited [2022] EAT 91***.

15. A worker may seek recovery of unpaid holiday pay by way of a complaint that he has suffered an unauthorised deduction from wages contrary to section 13 ERA (holiday pay being included within the definition of wages contained in section 17 ERA). Such a complaint must be presented to an Employment Tribunal within three months* of the alleged deduction or, if there has been a series of alleged deductions, within three months* of the most recent alleged deduction (section 23 ERA) (*as extended pursuant to section 207B ERA to take account of any period of Acas early conciliation).

16. An Employment Tribunal has jurisdiction to hear a claim by a former employee (but not a worker) for the recovery of damages for breach of contract by virtue of paragraph 3 of the Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Findings of Fact

17. The respondent is a hospitality business which operates a number of venues in the north west of England. Until he left the respondent in around February 2020, the claimant had previously been employed as its Operations Manager.

18. On 22 October 2020, the respondent's Commercial Director, Warren Bennett, contacted the claimant to enquire whether he would be willing to return to the respondent as its Head of Marketing. At that time, the respondent, in common with other businesses in the hospitality industry, had been heavily impacted by COVID 'lockdown' restrictions and its immediate future was still uncertain.

19. The claimant was due to start a new full-time, permanent position with another business on 26 October 2020 on a salary of £75,000 which was a considerably higher salary than that which the respondent was willing to offer. The claimant told Mr Bennett that he need to earn at least £5,000 per month and would be unwilling to accept anything less than that from the respondent. This was still more than the respondent was prepared to offer as a salary, considering all the additional costs and benefits associated with employment.

20. The respondent was, however, prepared to engage the claimant on a selfemployed basis. The claimant was attracted to this as an option because

Mr Bennett told him that he would have flexibility over where and when he worked and that he would be able to supplement his income from the respondent by working for other clients. Mr Bennett offered that the respondent would provide the claimant with accounting assistance.

21. The parties agreed that the claimant would be engaged on a self-employed basis. Unfortunately, neither party created any written record of the terms which they had agreed and it seems that, because of their previous relationship, the arrangements were left largely to trust. This would turn out to be a source of regret, particularly to the claimant who accepted that he was naïve not to insist on a written contract.

22. The only express terms that were agreed orally at the time were that:

    a. the claimant would work “hours to suit”;

    b. just before the end of each month, the claimant would send the respondent an invoice for £5,000 which would then be paid by the end of the same month.

23. Consistent with an agreement to work as a self-employed contractor, the claimant registered as self-employed with HMRC and engaged an accountant to assist with accounting and tax (the offer of accounting assistance from the respondent having not materialised).

24. The respondent provided the claimant with a laptop and an email address and announced his re-joining the team in an email to all staff dated 24 October 2020 (page 74.1). The contents of the email implied that the claimant would be an integral member of the team.

25. By common consent, the claimant worked hard and always had plenty to do, so much so that he was unable to find the time to market his services to other clients. As a result, the claimant did not work for anyone other than the respondent and, during the period in question, the respondent was the sole source of his income.

26. The claimant’s case is that he was required by the respondent to work 9 to 5 Mondays to Fridays (and the occasional weekend). The respondent’s case, however, is that there was no such obligation and that the claimant was conscientious and hard-working and reliant on his income from the respondent because of the uncertain state of the hospitality industry. It was the respondent’s case that the claimant made the role into a full-time one of his own volition.

27. When pressed on the point, the claimant accepted that there was no explicit instruction from the respondent to work full-time hours. Rather, he couched his evidence in terms of an “assumption” and an “expectation” that he would be required to work as if he was in full-time employment. He accepted in cross-examination that the respondent “did not have a gun to my head” and that he could have declined work from the respondent but that he had nowhere else to work because the hospitality industry was “in peril”.

28. The claimant also accepted that he did not need to obtain the respondent's permission to take time off for holidays or other reasons and there is some evidence of this in the bundle. For example, on 31 August 2021, the claimant sent Mr Auld a text to say that "I've not been able to work today because summer school has finished" and he did not have childcare (page 99). In the same text, the claimant said that he had worked 8pm to 12 midnight the previous evening to ensure that he was on top of things.

29. Similarly, on 25 November 2021, the claimant sent Mr Auld a text to say "I'm just having to shoot across to Mcr [Manchester] this morning for a personal apt [appointment]" (page 105).

30. The respondent's case was that the claimant was entitled to send a substitute to perform his work but I do not accept this, except in limited circumstances (discussed below). The respondent approached the claimant

    to undertake this role and he undertook it personally. It is implausible that the respondent would have made this personal approach if it had not wanted the claimant to carry out the work himself. This is also consistent with the email announcement of 24 October 2020 at page 74.1 and the fact that, when the claimant offered to send his partner (a marketing manager) to cover for absences, the respondent refused.

31. The claimant also had a degree of responsibility for managing members of the respondent's marketing team and was involved in recruitment, both of which are consistent with providing personal service.

32. The limited circumstances in which the claimant could have sent someone else was in connection with some of the respondent's events he attended at weekends to generate publicity and social media material for the respondent. The claimant accepted that he could have sent someone in his place, such as a photographer. However, these activities were not core to the role. He was required to undertake the core activities himself.

33. Working relations between the parties appeared to have gone smoothly until Spring 2021, at which point a dispute had arisen between them as to whether the claimant was entitled to paid holidays. The claimant had assumed that he was but the respondent's position was that, as a selfemployed person, he was not.

34. Matters came to a head following submission of the claimant's £5,000 invoice for May 2021. During May, the claimant had been on holiday and the respondent was disgruntled about having to pay the full £5,000 when it had not, in its opinion, received a full month of services. After some to-ing and fro-ing, the respondent agreed to (and did) pay the May invoice in full but thereafter wanted to move to an hourly rate method so that it would only be required to pay for hours actually worked. In so doing, the respondent made clear to the claimant that it would not pay holiday pay, a matter which rankled with the claimant. At around this time, the respondent sent the claimant a template contract for services (page 75) but this was never progressed or finalised so I have attached no weight to its terms.

35. The respondent proposed an hourly rate of £30. The claimant disputed this as being too low and proposed an hourly rate of £33.50. The respondent challenged the claimant about his hourly rate calculations upon receipt of his June 2021 invoice. In response, the claimant provided a countercalculation which came to £34.48 per hour (which effectively would have included an element of ‘rolled-up’ holiday pay), and the claimant pointed out that the rate for June was wrong (ie he had undercharged). The claimant’s calculation was set out in a text to Mike Auld dated 25 June 2021 (page 96). The respondent paid the June 2021 invoice in full on 30 June 2021.

36. The parties settled on £32.50 per hour as the agreed rate.

37. The June 2021 invoice totalled £5,832 so, in comparison to the previous arrangement of £5,000 per month, the claimant had benefited from the switch to hourly rates. In fact, over the remaining six months of the claimant’s engagement, the claimant invoiced - and the respondent paid - a total of £31,456.83 using the hourly rate method. Had he continued to charge on the previous £5,000 per month basis, he would have billed no more than £30,000 over the same period. This was despite taking two periods of unpaid holiday between 19 and 23 July and 12 and 19 September 2021 (which form part of his complaint). So, although the claimant was unhappy about the switch to hourly rates, it did give him the opportunity to increase his earnings from the respondent, which points towards a selfemployment relationship.

38. Upon receipt of the claimant’s invoice for £4,556.53 for September 2021, the respondent challenged the number of hours charged. In response, the claimant texted Mike Auld on 29 September 2021 to say “I’m going to continue to work as normal, there’s too much work for me to reduce my hours” (page 106). Again, it is not clear how this was resolved but the claimant’s invoice for October (which included some additional hours for September) totalled £5,866.30 so it appears that the claimant did not reduce his hours and therefore retained a degree of control over how many hours he worked for the respondent.

39. On 30 November 2021, Mr Auld informed the claimant that, following a recruitment exercise, the respondent had recruited a marketing manager. Mr Auld said that there would still be some need for the claimant’s services but that the new marketing manager would dictate the work that would be sent out to him. This would inevitably have an impact on the amount of work available to the claimant.

40. The claimant was unhappy about the prospect of a drop off in his earning capacity which he could not afford and about the manner in which the respondent had gone about the recruitment exercise which he thought was underhand. Mr Auld told the claimant that, if he was going to have a bad attitude, it would be best if the relationship ended with immediate effect. By his own admission, the claimant (who was stressed and upset) told Mr Auld to ‘fuck off’. His engagement ended there and then.

41. For the purposes of calculating the claimant's entitlement to holiday (if any), I accept Mr Auld's evidence that the respondent's holiday year began on 1 April each year and that this represented a change from the claimant's previous employment by the respondent during which it began on 1 December each year. There was no dispute that the claimant, if found to be a worker, would have been entitled to 5.6 weeks' paid holiday per year.

Discussion and Conclusions

Was the claimant an employee as defined by 230 Employment Rights Act 1996 ("ERA")?

42. I am satisfied that the claimant met the first limb of the ***Ready Mixed Concrete*** test, namely that he had agreed to provide his own work or skill in return for remuneration from the respondent. I have found that the claimant was obliged to provide personal service and that there was no right to provide a substitute to perform his core activities. Insofar as there was an ability to send a substitute, this was limited to the more peripheral eventsbased activities during occasional weekends.

43. There was also mutuality of obligation, especially during the period up to the end of May 2021 during which the claimant charged a flat monthly fee of £5,000. In the hearing, both parties called this a retainer which connotes mutuality of obligation. Even after the switch to hourly rates, there is no sense that work was being withheld from the claimant or that he was refusing it.

44. However, I do not find that the respondent exercised a sufficient degree of control over the claimant's performance of the services to establish an employment relationship. Control is multi-faceted and there were some key respects in which the claimant had a greater degree of control than would have been expected if he had been employed.

45. For a start, the claimant negotiated his own rate of pay at the outset of the relationship which was greater than the salary that was on offer for an employed role. Although it is fair to say that the claimant was unhappy that the respondent changed the basis of his pay from monthly to hourly, the claimant negotiated the hourly rate up from £30 to £32.50.

46. Following the change to hourly rates, the worked more hours (and earned more pay) than the respondent appeared to be comfortable with culminating in the text message on 29 September 2021 in which the claimant told the respondent that he was not prepared to reduce his hours in response to a challenge about his September 2021 invoice. That exchange is more typical of a client being unhappy with the charges levied by a contractor than an employer dictating the number of hours that one of its employees was required to work.

47. The claimant was also not subject to the same processes of seeking and obtaining approval for annual leave (or other absences) as the respondent's employees.

48. The claimant was not required to work 9 to 5 Mondays to Fridays and there is evidence of the claimant choosing when to work, such as when he worked from 8pm to midnight the evening before the day on which he did not have any childcare.

49. The respondent did have some control over what work the claimant was required to do but I also find that the claimant, using his own skill and experience, was in a position to decide what needed to be done on the respondent's behalf and how much time was required to perform that work. On this aspect, therefore, both parties had some degree of control over the claimant's work.

50. The respondent did not dictate to the claimant how his work should be carried out but that is a neutral factor in this case given the claimant's seniority and experience. In other words, one would not expect an employer to exercise much, if any control, how an experienced senior employee performed their work.

51. For these reasons, this limb of the ***Ready Mixed Concrete*** case is not satisfied. Given that personal service, mutuality of obligation and control are all necessary conditions for the existence of an employment relationship, I find that the claimant was not employed for the purposes of section 230 ERA or Regulation 2 (limb a) WTR.

52. In case I am wrong about that, I have considered whether the other factors of the relationship are consistent (or inconsistent) with a contract of employment.

53. Although the intention of the parties is not, of itself, determinative of status, it is clear that they both intended the relationship to be one of selfemployment and proceeded accordingly.

54. Consistent with that understanding, the claimant registered with HMRC as self-employed, engaged the services of an accountant and submitted monthly invoices.

55. The claimant was also free to undertake work for other clients. As it turned out, this was not something the claimant was able to take advantage of because of the amount of work to be done for the respondent and the perilous state of the hospitality industry at the time. Nevertheless, there was at least a theoretical possibility of the claimant's undertaking work for others and this is also consistent with being self-employed, rather than employed.

56. On the other hand, the claimant was integrated into the respondent's business, as evidenced by his involvement in the management of the marketing team, and was provided with a laptop and email address. These are factors which tend to point towards an employment relationship but they are not unique to employment in the way that submitting invoices is unique to self-employment. If therefore find that, on balance, the other factors are consistent with (or, at least, not inconsistent with) a self-employed relationship.

Was the claimant a worker as defined by Regulation 2 of the Working Time Regulations 1998 ("WTR") and section 230(3)(b) ERA?

57. However, that is not the end of the story. It is possible, as the respondent accepted, for an independent contractor to be a worker as defined by Regulation 2 (limb (b)).

58. I have already found that the claimant was required to provide the core services personally which is one element of the Regulation 2 (limb (b)) definition. It does not matter that some limited aspect of his work could have been undertaken by a substitute. The language of Regulation 2 (limb (b)) makes clear that the issue is whether the worker is to "perform personally **any** work or services" (my emphasis). He therefore did not have to perform personally **all** the work or services and a limited right of substitution is not inconsistent with being a worker.

59. That being the case, the claimant would only be excluded from being a worker if the respondent had been "a client or customer of any profession or business undertaking carried on by the individual".

60. At the point at which the respondent approached the claimant, he was not in business on his own account. In fact, it does not appear to have been something which the claimant had contemplated until the idea was raised with him. He was however attracted by the idea of being self-employed and working for a number of different clients and agreed to work for the respondent on a self-employed basis.

61. The claimant's engagement by the respondent came about as a result of the respondent's approach to him. It did not come about as a result of the claimant's own marketing and business development activities. The claimant's business, such as it then was, came into being only because of the respondent's approach to him.

62. The claimant was recruited by the respondent to work for it as an integral part of its business in the ***Cotswold Developments Construction Ltd v Mr S J Williams*** sense. Whilst the claimant was then free to market his services to the world at large, that is not how the relationship with the respondent came about. I therefore find that the respondent was not a client or customer of any business carried on by the claimant.

63. I therefore find that the claimant was a worker within the definition of Regulation 2 (limb (b)) of the WTR and section 230(3)(b).

If the answer to either of the above is 'yes', during what period(s) was he a worker or an employee?

64. He was a worker for the duration of his engagement by the respondent.

What was the claimant's entitlement to annual leave?

65. Having found that the claimant was a worker, it follows that he was entitled to 5.6 weeks' paid annual leave pursuant to Regulations 13 and 13A of the WTR. As the holiday year began on 1 April 2021, he had accrued 8/12ths of

that entitlement by the time his engagement ended on 30 November 2021. That equates to 3.73 weeks.

Did the claimant take any holidays and, if so, when?

66. During the holiday year which commenced on 1 April 2021, it was common ground that the claimant had taken three weeks' leave: one week in May (which brought the issue to a head) and the weeks commencing 19 July and 12 September 2021. This therefore left him with 0.73 weeks' holiday accrued but untaken at the termination of his engagement.

Was he properly paid during any of those holidays?

67. It is common ground that the claimant was not paid for his holidays during the weeks commencing 19 July and 12 September 2021. He did not submit a claim for payment for these two weeks, as it had been made clear to him that he would not be paid during annual leave, but that does not affect his ability to make a claim in respect of those weeks.

68. The claimant was, however, paid for the holiday in May 2021. He submitted an invoice for his full monthly fee of £5,000 and, although the respondent disputed his entitlement to bill for a full month during which he had been away, it nevertheless paid that invoice. As a result, there can be no claim in respect of May's holiday or, indeed, any other annual leave he may have taken up to 31 May 2021 because the claimant received his full £5,000 for each month up to and including May 2021.

Is any part of the claimant's claim out of time?

69. The claimant's invoices for July and September 2021 were paid on 31 July and 30 September 2021 respectively. The claimant presented his claim on 16 December 2021.

70. The respondent accepts that the claim in respect of the 30 September 2021 pay date is in time but argues that the 31 July pay date is out of time as it was presented more than three months after 31 July 2021, even allowing for the extension of time provided for by engaging in Acas early conciliation.

71. The difficulty for the respondent is that non-payment of holiday pay in July and September 2021 represent a series of deductions. There was a clear factual link between the two, each deduction being connected by the nonpayment of holiday pay. There was only a two-month gap between the two pay dates and the respondent therefore cannot avail itself of any argument that a gap of more than three months had elapsed between them so as to render the earlier deduction out of time.

72. I therefore find that the claimant's claim is in time in respect of both the July and September 2021 holidays. He is also clearly in time in respect of the accrued but untaken balance of 0.73 weeks, for which he is entitled to be compensated under Regulation 14 WTR.

73. For these reasons, I find that the claimant suffered unauthorised deductions from wages amounting to **2.73 WEEKS'** pay **(EQUATING TO HIS 3.73**

WEEKS' HOLIDAY ENTITLEMENT LESS THE ONE WEEK IN MAY FOR WHICH HE WAS PAID). I did not hear submissions as to the calculation of a week's pay and so that will be a matter for a remedy hearing, if the parties are unable to agree the appropriate amount between themselves (see further below).

If the claimant was an employee, did the respondent terminate his employment in breach of contract?

74. As I have found that the claimant was not an employee, the Tribunal does not have jurisdiction to hear his breach of contract complaint which is therefore dismissed.

Next steps

75. The parties are encouraged to agree the appropriate amount necessary to compensate the claimant for his unpaid **2.73 WEEKS'** holiday.

76. The parties must write to the Tribunal **within 28 days** of the date on which this judgment is sent to them to notify the Tribunal whether or not a remedy hearing will be required and, if it is, to provide the Tribunal with dates to avoid for the period 1st September 2022 to 31st January 2023 for ½ day remedy hearing.

Employment Judge Rhodes
Date: 10 August 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 August 2022

FOR THE TRIBUNAL OFFICE

Employment Judge **Rhodes**
Date 6th October 2022

CORRECTED JUDGMENT & REASONS SENT TO THE PARTIES ON
7 October 2022

FOR THE TRIBUNAL OFFICE