**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: 4101122/2022; 4101127/2022; 4101126/2022; 4101126/2022; 4101125/2022; 4101128/2022 and 4101123/2022**

**Held via CVP (Cloud Video Platform) from Glasgow on 10 October 2022**

**Employment Judge J Hendry**

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| **Mr S Bell** | **First Claimant In Person** |
| **Mr D Strain** | **Second Claimant Represented by: Mr S Bell - Lead Claimant** |
| **Mr A Brannan** | **Third Claimant - as above** |
| **Mr R Ramsay** | **Fourth Claimant - as above** |
| **Mr C Shaw** | **Sixth Claimant - as above** |
| **Mr C Rafferty** | **Seventh Claimant - as above** |
| **Core Plant Hire Ltd** | **Respondent Represented by: Mr F McNally -** |

**Scotland** **Office Manager**
**MI1 5HS**

## JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimants were employees of the respondent company.

2. The respondent company failed to pay the claimants holiday pay throughout the course of their employment.

3. It was not reasonably practicable for the claimants to make claims for unpaid holiday pay at an earlier point as they were unaware that they were entitled to employee status.

4. The respondent company will pay the claimants the following:

   a) Mr. S. Bell the sum of £7000 representing two years accrued but unpaid holiday pay.

   b) Mr. D. Strain the sum of £7840 representing two years accrued but unpaid holiday pay.

   c) Mr. A Brannan the sum of £7000 representing two years accrued but unpaid holiday pay.

   d) Mr. R. Ramsay the sum of £4760 representing one years accrued but unpaid holiday pay.

   e) Mr. C. Shaw the sum of £7000 representing two years accrued but unpaid holiday pay.

   f) Mr. C Rafferty the sum of £7000 representing two years accrued but unpaid holiday pay.

## REASONS

### Background

1. Mr Bell and other employees of the respondent company raised Employment Tribunal proceedings on 18 February 2022. The claim was initially rejected

but, following a reconsideration on 22 March 2022, allowed to proceed as at the date of the presentation.

2. The respondents failed to lodge an ET3 in response to the claims and their application to have the ET3 received late was refused.

3. The case proceeded to a hearing on 8 August 2022 by CVP with Mr Bell representing the other claimants who were not in attendance. A note was issued following that hearing which recorded that in the course of the evidence it was clear that there were documents available to both sides that might assist the Tribunal in determining both the status of the various claimants and the relationship with the respondent, Core Plant Hire Ltd. Principally these related to the initial contractual documents the claimants all signed when starting work for Core Plant Hire Ltd. The respondents in their ET3 that had been rejected had accepted there was a contractual relationship between them and the claimants.

4. The case called again on 10 October 2022. In the interim period, Mr McNally explained that he had not lodged any documents on behalf of the respondents. He conceded that there was no documentation other than the document the claimants had produced referring either to holiday pay or their status as he sought self-employed contractors. Mr Bell indicated that he had checked with the other claimants and Mr Stevenson's case had been withdrawn. They had all received the same standard document from the company. Mr McNally confirmed that this was the case.

5. The issue between the parties was the status of the claimants. The claimants accepted that they were all *"in the same boat"*. Mr McNally's position, as he put it in the cross-examination of Mr Bell, was that they were self-employed sub-contractors. In essence, other than a different interpretation of the claimants' status, there was no dispute as to the *"day to day position"*.

**Findings in fact**

6. The claimants were ground workers who were engaged by the respondent company. They worked through the CIS scheme. The claimants all worked

for the company for in excess of two years before raising these proceedings apart from Mr Ramsay who had worked for a year prior to raising these proceedings.

7. Before joining the company, the claimants were given a document to sign headed *"sub-contractor agreement"*. In the terms of the agreement the respondents were described as the contractors. They hired the services of the various claimants who were described as sub-contractors under the CIS scheme. It was understood that they would get regular work. An hourly rate was agreed at £12.50 per hour except in the case of Mr Ramsay who had an agreed rate of £17 per hour and Mr David Strain at £14 per hour. They worked 50 hours per week during the duration of their engagement.

8. The claimants were not given any contractual right to substitute others to carry out the work on their behalf. They worked exclusively for the respondent. They did not have any clients/customers, nor did they employ others.

9. The claimants were directed to sites run by another company, Ross-shire Engineering Services. They generally worked under the direction of that company on work mostly projects for Scottish Water. On site they were indistinguishable from employees of that company. The number of hours the claimants actually worked was then communicated to the respondents. The respondents issued the claimants with monthly statements setting out the amount to be paid which was then processed and paid through the respondent company.

10. The claimants worked for the respondent company. They were unaware that they might have employment status. They did not work for other clients. They worked 50 hours per week for the respondent company who in turn seconded them to Ross-shire Engineering.

11. As employees or workers, the claimants would be entitled to 28 days paid holiday per year.

12. Holiday pay was never discussed between the claimants and the respondents or with Ross-shire Engineering. There was no documentation setting out their holiday entitlement. If they took time off, then they were not paid.

13. Equipment including t-shirts and PPE were supplied by Ross-shire Engineering Ltd. The claimants' last day of work with the respondent was 17 January 2022.

14. Mr Ramsay worked for the respondents for a year. His hourly rate was £17 per hour. Mr Strains hourly rate was £14 per hour. The other claimants worked for the respondents for more than two years.

15. The claimants in late 2021 approached the respondent and queried why they were not getting paid holidays nor was their rate of pay enhanced to take account of holiday entitlement. Mr Bell was their spokesperson. He contacted ACAS and became aware that he and his colleagues might be regarded as employees or workers entitled to holiday pay. Negotiations took place between the claimants, the respondents and Ross-shire Engineering but no agreement was reached in relation to payment of arrears of holiday pay and the current proceedings were raised.

**Witnesses**

16. The Tribunal heard evidence from the lead claimant Mr Bell. He gave his evidence in a clear and straightforward manner. He was a credible and reliable witness. The factual basis of his evidence was not in any event challenged only his belief and that of his colleagues that they were employees or workers.

**Discussion and decision**

17. The first question is what the correct status of the claimants is and whether they are employees or workers or self- employed. For the purposes of being entitled to paid holiday pay it would not matter whether or not the claimants were employees or properly workers under the Employment Rights Act 1996.

*230 Employees, workers etc.*

*(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.*

*(3) In this Act "*worker*" (except in the phrases "*shop worker*" and "*betting 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.*

18. The case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 Vol 2 QB 497 is often taken as a starting point. At pages 512 to 513 of the report the Judge, Mr Justice MacKenna wrote:

*''It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights or duties the parties wished to provide for, a declaration*

*of this kind might help in resolving the doubt and in fixing them in the sense required to give effect to that intention.''*

19. Later at pg. 515, he sets out a description of a contract of employment (contract of service):

*"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."*

20. Over the years the courts have considered a number of factors and elements in the relationship which might point one way or another. The right of the ''employee'' to substitute another person to carry out their work is often seen as a bar to the existence of the employee/employer relationship. In this case there seems to have been no right of substitution provided for nor was substitution a feature of how the relationship worked in practice. If the person concerned did not turn up for work they were not paid. The equipment to allow them to carry out their work was provided for the claimants. In reality they were not carrying out business on their own behalf. The engagement contract was common to them all and was on a ''take it or leave it basis''. There are of course other factors including an irreducible minimum or obligation to provide work.

21. I considered the Judgment in the case of **Young and Woods Ltd v West** (1980) IRLR 201 to provide helpful guidance. In that case, Mr West was given the option of working as a sheet metal worker on a contract of employment or as a self-employed person. He chose the latter. After the work was terminated he raised a claim of unfair dismissal. The Court of Appeal held that the obligation of a Tribunal is to determine whether the label of self-employment was a true description or a false description by looking beneath the description to the reality of the facts. Lord Justice Ackner pointed out that

it was well settled that the label which the parties choose to use to describe their relationship cannot alter or decide their true relationship; but, in deciding what that relationship is, the expression by them of the true intention is relevant but not conclusive.

22. In the Supreme Court case of **Autoclenz v Belcher & Ors** (2011) UKSC the court held that the contract the claimants had entered into classing them as self-employed was, in that respect, a "sham" It has become authority for the proposition that the Tribunal should look at the reality of the situation which might override the written contractual ''window dressing''

23. In the present case the complicating factor is Ross-shire Engineering in that the claimants could well be regarded as being employees of that company. They worked under the direction of the company's mangers, wore their PPE, drove their vans and used their equipment. However, their contractual relationship was with the respondents and I was not asked to make an award against Ross-shire Engineering nor were they parties to the claims. I did not regard that as fatal as an employee can be seconded to work for another parry and does not lose their status by doing so. In the event I am wrong it seems to be clear that the respondent engaged the claimants as individuals to perform work for Ross-shire Engineering which would bring them under the definition of workers in Section 230 (3)(b) of the Act.

24. The claimants in the present case were not aware that their proper legal status was that of either being an employee or a worker and accordingly entitled to paid holidays. The employers did not advise them of their rights and the contractual documentation they received was silent in relation to the taking of holidays. A fiction was maintained that these claimants were all in some way independent contractors rather than ordinary working people who worked 'on the tools' day in and day out for the same people. When they took time off they were not paid.

25. On the one hand the law provides that workers are entitled to paid holidays but with the other restricts their ability to recover unpaid holidays. The first difficulty they face is that any claims have a limitation period of two years

introduced by the Government in the …Most civil claims have a limitation period at least in Scotland of 5 years.

26. The next difficulty they face relates to the process of making a claim for what is called an unlawful deduction from wages contained in Section 13 of the Employment Rights Act 1996. That Section gives employees a right to apply to the Employment Tribunal for payment of any money ‘‘unlawfully deducted’’ i.e that they were entitled to. A claim however must be brought within three months of the claim arising unless it is part of a series of deductions (Section 23(2) ). This was the basis of the reasoning given by the EAT in Scotland for the decision in the case of ***Bear Scotland Ltd v Fulton and another [2015] IRLR 15***.

27. The issue of unpaid arrears of holiday pay was reviewed by the Court of Appeal in England in the case **Gary Smith v Pimlico Plumbers: [2022] EWCA Civ 70**. The case reviewed the authorities particularly focussing on the origin of the right to paid leave which was came from the EU Working Time Directive. The basis of their decision is encapsulated in paragraph 102:

*‘‘In conclusion, in my judgment the appeal should succeed. The language of article 7(1), article 31 of the Charter, and King, establishes that the single composite right which is protected is the right to “paid annual leave”, for the reasons given above. If a worker takes unpaid leave when the employer disputes the right and refuses to pay for the leave, the worker is not exercising the right. Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the*

*untaken leave."* This decision is persuasive authority but it did not directly overturn the Judgment in **Bear Scotland** which I am bound.

28. Claims require to be made within three months of the date of the claim arising. Section 111 of the ERA is in the following terms:

***"111 Complaints to employment tribunal.***

***(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.***

***(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal— (a) before the end of the period of three months beginning with the effective date of termination, or (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 months. "***

29. This involves a two- stage test. In the present case the claim is some years out of time. It involves asking firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, to proceed to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. The Tribunal has no general power to extend time limits and the burden of proof rests on the claimant to establish that both parts of the test are satisfied.

30. The expression "reasonably practicable" does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring their claim. In **Palmer and Saunders v Southend-On-Sea Borough Council** [1984] IRLR 119 it was said that reasonably practical should be treated as meaning "reasonably feasible". The case of Schultz **v Esso**

**Petroleum Ltd** [1999] IRLR 488 is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable (or feasible), the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances.

31. One recurring issue in many cases as in this one is the issue of the claimant's lack of knowledge of employment tribunal time limits or as the law puts whether there is ''reasonable ignorance". The question of whether it is open to an employee ignorant of their rights to rely on that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 Scarman LJ posed the following question:

"*Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.*

*Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court."*

32. In the case of **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 Brandon LJ dealt with the issue of ignorance of rights in the following way:

*"The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."*

33. In these and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practical turns, not on what was known to the employee, but upon what the employee ought to have known (**Porter v Bandridge Ltd** [1978] ICR 943, **Avon County Council v Haywood-Hicks** [1978] IRLR 118.

34. However, it appears to me that in the present case the claimants, who acted as a group, only became aware of their rights through the efforts of the lead claimant when he contacted ACAS. Before then they had been told that they had no right to paid holiday leave by their employers and by Ross-shire Engineering. It was through the endeavours of Mr Bell that they collectively became aware that they might have a claim for paid holiday leave. In those circumstances I am driven to the conclusion that their ignorance of their rights was understandable and that it was therefore not reasonably practicable for them to raise proceedings at an earlier date. The test for raising proceedings late or out of time is a high one. It is whether it was not reasonably practicable for them to do so earlier. It seems trite to say that is someone does not know they have a right, in this case to paid holidays, how can they raise any claim earlier than when they became aware of that right.

35. The wage rates for the claimants and the mechanics of the calculations of holiday entitlement were not in dispute. These are reflected in the Judgment.

Employment Judge: J Hendry
Date of Judgement: 7 December 2022
Entered in register: 7 December 2022
and copied to parties

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| 4101122/2022 | | active | |
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