# EMPLOYMENT TRIBUNALS

**CLAIMANT:** Mr Henryk Rezler

**RESPONDENT:** TSP Contracting Limited

**HELD AT:** London South (by CVP) **ON:** 6 October 2022 and 12 December 2022

**BEFORE:** Employment Judge Hart

**REPRESENTATION:**

**Claimant:** Ms Diana Janusz, employment consultant
**Respondent:** Mr Piotrowski, in person
**Interpreter:** Ms Ania Heasley, polish interpreter

# JUDGMENT

The judgment of the tribunal is that:

1 The claimant was at all material times an employee of the respondent.

2 The claim for unlawful deduction of wages and / or breach of contract in relation to the non-payment of wages between 19 and 23 July 2021 succeeds. The respondent is ordered to pay the claimant **£700 net.**

3 The claim for accrued holiday pay on termination of the contact succeeds. The respondent is ordered to pay the claimant 24 days' pay, amounting to **£3360 net.**

4 The claim for holiday pay for the previous two holiday years succeeds The respondent is ordered to pay the claimant 40 days' pay, amounting to **£5600 net.**

5 The respondent failed to provide the claimant with a written statement. The respondent is ordered to pay the claimant two weeks' pay, amounting to **£1750 gross**.

# REASONS

## INTRODUCTION

1. Mr Rezler, the claimant, was a tiler, working for TSP Contracting Limited, a building company owned by Mr Piotrowski. He brings claims for unlawful deduction of wages and / or breach of contract (non- payment of wages between 19 and 23 July 2021), holiday pay and failure to provide a written statement of particulars. The claimant's entitlement is dependent on his employment status: whether he was an employee, worker or independent contractor.

## THE HEARING

2. The parties and their witnesses attended by CVP. The hearing was conducted using a polish interpreter. They are all thanked for their assistance and representation during the hearing.

3. Due to technical difficulties on the first day of the hearing which delayed the start, the hearing took place over two half days.

4. It was confirmed at the outset of the hearing that no reasonable adjustments were required by either party.

5. The tribunal was provided with a joint agreed hearing bundle of 76 pages, the references to page numbers in this judgment are to the pages in this bundle.

6. The claimant provided a witness statement and gave evidence on his own behalf, the judge provided the respondent, who was not represented, with assistance in cross-examination. The claimant also adduced a statement from Mr Kamil Niemira, who was not called to give evidence. It was not relied on during the hearing, and the tribunal has not taken it into account in its deliberations.

7. Mr Piotrowski gave evidence on behalf of the respondent and was cross-examined. The respondent had provided an amended response form. Mr Piotrowski confirmed that this contained his statement and was not an application to amend.

8. On completion of the evidence both parties made oral submissions. Judgment was reserved.

## CLAIMS / ISSUES

9. The parties agreed that the claims and issues to be determined by the tribunal were as follows:

    9.1 It was accepted that if the claimant was an independent contractor then his claims would fail.
    9.2 Was the claimant a worker entitling him to claim unlawful deduction of wages and unpaid holiday pay?

9.3 Was the claimant an employee entitling him to claim, in addition, breach of contract and failure to provide a written statement?

Unlawful Deduction of Wages

9.4 It was accepted that the respondent had not paid the claimant his last week of wages, and the amount of £700 net was agreed.

9.5 Was the deduction authorised by a statutory provision, written contract or agreed in writing in advance?

9.6 Was the deduction an exempt deduction?

Breach of Contract

9.7 It was accepted that the claim was for non-payment of the claimant's last week of wages, and that the amount of £700 net was agreed.

9.8 Was the deduction in breach of a term of the claimant's contract?

Holiday Pay

9.9 It was accepted that the claimant had not been paid for any holiday during his engagement with the respondent [the reason was because the respondent considered him to be an independent contractor and therefore not entitled to holiday pay].

9.10 What was the claimant's leave year?

9.11 What holiday pay has the claimant accrued in the final leave year?

9.12 Was the claimant entitled to carry over leave from the previous holiday year/s?

Written Statement

9.13 It was accepted that the claimant had not received a written statement of particulars [the reason was because the respondent considered him to be an independent contractor and therefore not entitled to a written statement].

9.14 Would it be "just and equitable" to award the claimant 4 weeks' pay instead of 2 weeks' pay?

## FACTUAL FINDINGS

10. The tribunal has only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute the tribunal has made findings on the balance of probabilities.

11. The respondent was a small building company who was contracted to work for individual London Boroughs on residential properties. Mr Piotrowski was the Business Director of the company, and acted as project manager. The respondent employed 4-5 sub-contractors to work on its various sites. It also used an independent planner, electrician and joiner.

12. The claimant worked for the respondent between 18 September 2018 and 23 July 2021. He was initially engaged as a tiler, but spent 85-90% of his time on other tasks as and when directed to do so by Mr Piotrowski. Except for a short period at the end of 2018 / beginning of 2019 when there was no work, the claimant worked continuously and solely for the respondent.

13. The respondent accepted that the claimant was not provided with a written contract at the commencement of, or during, his employment. None of the sub-contractors were provided with written contacts, with the exception of Mr Niemira

who had asked for one (**pg 74-76**). Mr Niemira's contract stated that it was a "self employed contact for services" and that he was not an employee. Further it stated that there was no obligation on the respondent to provide work or on Mr Niemira to accept it, although rather contradictorily it also required Mr Niemira to work fixed hours Monday to Friday between 8am and 6pm.

14. The claimant was paid, at his request, £140 net per day; tax was deducted by the respondent at the self-employed rate. The claimant received a "Construction Industry Scheme: Payment and deduction statement" which set out his monthly pay and deductions for tax (**pg 33-61**).

15. Mr Piotrowski stated in evidence that the claimant had asked to be self-employed. The claimant disputed this stating that employment status was not discussed. The tribunal considers that both parties are wrong in their recollections. The tribunal notes that the contract provided to Mr Niemira, referred to him as being a self-employed sub-contractor, and considers it likely that Mr Piotrowski employed all his sub-contractors on this basis. The tribunal considers that it was therefore likely that Mr Piotrowski would have made it clear to the claimant that he was to be self-employed and that the claimant agreed. There is no evidence to suggest that the claimant considered himself to be employed during his engagement with the respondent, for example he does not raise this issue nor does he request employee benefits such as paid leave.

16. From the outset the claimant was engaged to work 8 hours a day Mondays to Fridays. Mr Piotrowski stated that the working hours on his sites was 8am to 4:30pm with two 30 minutes breaks. The claimant was not obliged to work outside these times or at the weekend, and if he did it was by agreement and he was paid overtime.

17. The only periods when the claimant did not work was when he was on holiday or attending appointments such as a doctor's appointment. There was no formal arrangement in relation to taking time off, the claimant would request it and Mr Piotrowski would agree. Mr Piotrowski accepted that he had the ultimate say as to whether or not he allowed the claimant to take time off. The claimant would not be paid for days that he was not at work, and sometimes pay was deducted when he worked less than a full day. This would only occur where the period of time taken off was considered by Mr Piotrowski to be significant. Pay was not deducted if the claimant "arrived a little bit late or left a little bit early".

18. Mr Piotrowski would direct where the claimant would work (since there were different sites), what work the claimant did and how the work was to be done. Mr Piotrowski stated that the claimant and the other sub-contractors were mainly responsible for how they carried out the work, but he accepted that as project manager he had overall responsibility for the quality of the work and that if there was a disagreement as to how the work was to be done the decision was his. Mr Piotrowski accepted that he had dismissed one of the sub-contractors, Mr Kaminski, because he was not satisfied with his quality of his work.

19. The claimant was expected to work as a member of a team with the other sub-contractors employed by Mr Piotrowski. Mr Piotrowski confirmed that he would move the sub-contractors around, and would on occasion ask other members of

the team to complete a task that the claimant had been working on. Mr Piotrowski explained that this occurred when the claimant was taking too long or not properly performing the task.

20. The claimant was expected to perform his work personally, and did not have authority to delegate his work to another person. Mr Piotrowski stated that he wanted to work with people that he could trust and rely on and "would not accept" someone else in place of the claimant.

21. The claimant was responsible for his own training. However if there was a task that the claimant had been asked to do that he had not performed before then either Mr Piotrowski would show him how to do it or ask another member of the team to do so.

22. The claimant had his own professional tiling and carpentry tools that he brought to work in 4 bags. The respondent provided and paid for more expensive and larger tools such as a table saw, mitre saw, heavy duty breakers, drills and lifting equipment. Mr Piotrowski bought and paid for the materials that the claimant would use at work.

23. On one occasion Mr Piotrowski asked the claimant and other members of his team to wear a company T-shirt containing the name of the respondent. They were not obliged to wear the T-shirt, but the claimant did for a period of 3 months.

24. Mr Piotrowski had a business card to provide to clients. The claimant did not have his own business card. The claimant recalls on one occasion providing the respondent's business card to a client who had asked for it. This was confirmed by Mr Piotrowski who explained it was because the client wanted to complain about the dust.

25. The claimant's last day of work was 23 July 2021. The claimant resigned because Mr Piotrowski refused to give him a pay rise. It was not disputed that Mr Piotrowski did not pay the claimant for his last week of work. Mr Piotrowski stated that this was because of the poor quality of the claimant's work.

26. The claimant entered into ACAS Early Conciliation on 3 September 2021 and was provided with the Early Conciliation certificate on 15 October 2021. The claim form was presented to the tribunal on the 15 November 2021. Taking into account the extension provided by the ACAS early conciliation process the claim was submitted in time.

## THE LAW

### Employment Status

27. Section 230 of the Employment Rights Act 1996 (ERA 1996) provides that:
    (1) an employee *is "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".*

    …

(3) a worker is *"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 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"*.

Therefore an employee is a worker but not all workers are employees.

28. "Workers" are employed to personally perform work for another party and are to be distinguished from "independent contractors" who are in business on their own account. One of the considerations in determining whether a claimant is a worker or an independent contractor is whether or not the contract contains a "substitution clause", which would be inconsistent with an agreement to provide personal work or service. The other main factor is whether the person for whom work is done is the client or customer of the claimant.

29. When considering whether a claimant is an employee (as opposed to worker or independent contractor), tribunals should adopt a multi-factoral approach, suggested by **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 1 All ER 433 (QBD). This in essence involves three questions:
1. Mutuality of obligations: Was there an obligation on the respondent to provide work and pay a wage and an obligation on the employee to accept and perform the work offered?
2. Control: Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
3. Were the other provision of the contact consistent with it being a contract of service (employee)?

30. The parties stated intention as to the status of their working relationship is a relevant factor, but tribunals should always consider the true nature of the relationship and not just the intentions of the parties or the wording of any written contract: **AutoClenz Ltd. v Belcher** [2011] UKSC 41; **Uber BV & Others v Aslam & Others** [2021] ICR 657, SC. This is in recognition of the differential bargaining power of the parties, and seeks to consider the reality of the relationship not merely the labels given by the parties.

31. It is not unusual on building sites for the main contractor to contract out the labouring work to others, often on a self-employed basis. Nevertheless depending on the facts, the sub-contractor could well fall within the definition of employee or worker. There are a number of cases where a self-employed labourer or tradesperson was nevertheless held to be an employee: see for example **Ferguson v John Dawson and Ptns (Contractors) Limited** [1976] 3 All ER 817, CA; **Lee Ting Sang v Chung Chi-Keung** [1990] ICR 409 (PC) and **Lane v Shire Roofing Co (Oxford) Ltd** [1995] IRLR 493, CA. In these cases,

factors that the courts referred to as suggesting employee status included: the claimant being told what work to do and where to do it, not providing their own equipment, not being permitted to hire helpers, carrying no financial risk, not setting their own charges but being paid either piece work rate or daily rate. Ultimately each case turns on its own facts, and the tribunal is required to consider all the relevant factors when coming to its decision.

**Unlawful Deduction of Wages**

32. Section 13(1) of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is "authorised". A deduction is "authorised" where it is made due to:
    (a) a statutory provision,
    (b) a "relevant provision" in the workers contract. This can be where the deduction is permitted under a written term of the worker's contract or because the respondent has provided the worker with prior written notification of the existence of an oral or implied term permitting the deduction', or
    (c) the worker has previously signified in writing his agreement or consent to the making of the deduction.

    This provision applies to those employed as "workers" not just employees.

33. Under section 14 some deductions are exempt, for example an overpayment of wages or deductions made as a consequence of disciplinary proceedings, however none of these apply in this case.

34. A worker has a right to complain to an employment tribunal of an unauthorised deduction from wages pursuant to section 23 ERA 1996.

**Breach of Contract**

35. A contract is an agreement between the parties, made in writing, orally or by conduct. The terms of a contract may be expressly agreed between the parties or implied, for example by statute, custom and practice, or because it is necessary to make the contract work.

36. A claim for breach of contract arises where one of the parties fail to comply with one or more of the terms of contract. Tribunals have jurisdiction to consider a breach of contract claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. A claim may only be brought in the employment tribunal if the claimant is an "employee", it relates to a matter that is outstanding on the termination of employment, and the sum being claimed is less than £25,000.

**Holiday Pay**

37. Regulation 13 of the Working Time Regulations 1998 (WTR 1998) entitles a worker to 4 weeks' annual leave and regulation 13A entitles a worker to a further 1.6 weeks' annual leave, amounting to a total of 5.6 weeks including bank

holidays. The entitlement under both regulations apply to those employed as "workers" not just employees. Regulation 2(1) defines "worker" in terms identical to those in section 230(3) ERA 1996.

38. Under both regulation 13 and 13A, workers are entitled to be paid in lieu of accrued but untaken holiday on termination of employment. Where there is no agreement in writing, the leave year begins on the anniversary of the start date.

39. In relation to carrying over the 4 weeks' leave under regulation 13 from previous leave years, the general rule under regulation 13(9)(a) is that a worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year. There are caselaw exceptions to this rule which include being prevented from doing so by the employer: **King v Sash Window Workshop** [2018] IRLR 142 (ECJ). In **Smith v Pimlico Plumbers Ltd** [2022] IRLR 347 (CA) it was confirmed that the effect of **Sash Window** was that a worker would only lose the right to carry over annual leave if he was provided with the opportunity to take that leave, encouraged to take that leave and informed that the right would be lost if he did not. If this was not done then the right accumulates until termination of the contract.

40. In relation to carrying over the 1.6 weeks' leave under regulation 13A from previous leave years, regulation 13A(7) only permits this to be carried over if there is a relevant agreement (i.e. contract) between the parties. This is not an EU derived right and therefore there are no caselaw exceptions.

**Failure to Provide a Written Statement**

41. Section 38 of the Employment Act 2002 requires tribunals to award compensation where a respondent has failed to provide a full and accurate written particulars of employment under section 1 of the ERA 1996. Prior to 6 April 2020 only employees were entitled to a section 1 statement. From 6 April 2020 the entitlement was extended to "workers" who commenced employment on or after this date, however this provision does not apply in the claimant's case since he was employed prior to this date. Therefore he can only claim compensation if the tribunal finds that he is an employee.

42. A tribunal may only award compensation if the claimant is successful in one or more of the listed claims, which includes unlawful deduction of wages and /or failure to pay holiday pay. Under Section 38(3) the tribunal must award two weeks' pay and may award four weeks' pay where it considers it is "just and equitable in all the circumstances".

**DISCUSSION AND CONCLUSIONS**

**Whether a worker?**

43. The tribunal finds that the claimant was not an independent contractor. He did not have his own business, but worked for the respondent. It was the respondent who entered into contracts with local authorities to do building work, and who

would in turn employ sub-contractors (including the claimant) to carry out the work on its behalf.

44. The claimant worked solely for the respondent, he did not have his own clients or customers. He did not have his own business, did not have a business identity or business card. When he was at work he represented respondent, including providing (on one occasion) the respondent's business card to a client and for a short period wearing a T-shirt with the name of respondent.

45. The claimant also did not carry any financial risk, he was paid a daily rate for the work that he did. Whilst the claimant had his own specialist tools that he brought to work, the respondent provided the more expensive / heavy duty equipment and paid for the materials that the claimant used.

46. Further, it was not disputed by the respondent that the claimant was employed to do the work personally. There was no substitution clause permitting him to hire others on his behalf. Mr Piotrowski was very clear in his evidence that he would not accept someone else in place of the claimant for the understandable reason that he would not be able to vouch for the quality of the work done.

47. The tribunal therefore has no hesitation in finding that the claimant was a "worker" under the broader definition of section 230(3)(b) of the ERA 1996. This is sufficient for the tribunal to have jurisdiction to consider his claims for unlawful deduction of wages and holiday pay. The only claims that are dependent on the claimant being an employee is that for breach of contract and failure to provide a written statement.

**Whether an employee?**

48. The tribunal further finds that the claimant was at all times an employee of the respondent. First there was mutuality of obligations. The tribunal notes that Mr Niemira's contract contained express clauses that denied any mutuality of obligations, but the respondent has not suggested that similar terms were agreed with the claimant. Further, and in any event, the reality of the relationship between the claimant and the respondent was one of mutuality. From the outset the claimant was expected to work fixed hours, 5 days a week, 8 hours a day. He could only refuse to work overtime. If he wished to take time off he was required to obtain the respondent's permission. Usually all that was required was for the claimant to tell Mr Piotrowski that he was taking time off, however Mr Piotrowski accepted that he had the ultimate say. The contract was open-ended and not dependent on particular assignments or tasks. It was clear on the evidence provided that the claimant expected the respondent to provide him with work and the respondent expected the claimant to perform the work provided to him for which he was paid.

49. The tribunal also finds that the respondent had control over the claimant's work. It determined the days and hours of work (as set out above). It also determined the claimant's rates of pay. When the claimant asked for a pay rise Mr Piotrowski had refused. Mr Piotrowski would also direct what work was to be done, where it was to be done and how it was to be done. Whilst the claimant was by profession a tiler, most of his work was non-tiling work and he was directed in

relation to this work, and on occasion provided with on the job training in relation to new or unfamiliar tasks.

50. The main factor pointing away from the claimant being an employee is that both the claimant and the respondent considered him to be self-employed, and he did not request, nor was he provided with, employee benefits such as a contract of employment, sick pay, holiday pay, pension etc.. However, whilst the label that the parties apply to a contractual relationship is relevant it is not determinative. Tribunals are required to consider the true nature of the relationship and not just the intentions of the parties. In this case the true relationship was that of employer: employee, for all the reasons identified above. The facts are similar to the other self-employed labourer sub-contractor cases referred to in paragraph 31 above, all of which found that in fact the labourer in question was an employee, and not a self-employed independent contractor.

**Unlawful Deduction of Wages**

51. The respondent accepted that he did not pay the claimant for work done in the period 19 to 23 July 2021, and that he withheld a week's pay amounting to £700 net (£875 gross). The tribunal finds that the respondent had therefore made a deduction of wages.

52. The reason for the deduction provided by the respondent was the poor quality of the claimant's work for that week. Even if that was the case, and that had not been pleaded and has therefore not been determined, the deduction would not have been an "authorised deduction". This is because there was no "relevant provision" permitting such a deduction. There was no written contract, nor had the respondent notified the claimant in writing of any oral express or implied term permitting such a deduction, nor had the claimant provided written consent for such a deduction. Further none of the exemptions in section 14 apply. Therefore the deduction was unlawful and the claimant is entitled to **£700 net**.

**Breach of Contract**

53. The breach of contract claim relates to the same sum as the claim for unlawful deduction of wages. It is therefore not necessary to determine this. However for the avoidance of doubt, it was not disputed that there was an express oral term that the claimant would be paid £140 net per day. It was also not disputed that the claimant worked between 19 and 23 July 2021, for which he was not paid. The respondent has not made a counterclaim for the alleged poor quality of the work done, nor has the tribunal been referred to any contractual term permitting wages to be withheld on this basis. Therefore the tribunal finds that the failure to pay the claimant for this period was a breach of contract. However, since the sum is the same as that for unlawful deduction of wages, no additional award is made.

**Holiday Pay**

54. It was agreed that the respondent had not provided the claimant with paid annual leave and that when the claimant took time off for holiday he was not paid.

55. As a worker the claimant was entitled to 5.6 weeks' (28 days') accrued annual leave for the final leave year on termination of his employment. Since there was no contract between the parties the leave year runs from the anniversary of the claimant's start date i.e. 18 September to 17 September. The final leave year therefore commenced on 18 September 2020. The claimant's employment was terminated on the 23 July 2021, representing 85% of the leave year (309 days/ 365 days x 100). Therefore his accrued leave on termination was 24 days (28 x 0.85). He was paid £140 net per day and therefore is entitled to a total of **£3360 net (**24 x £140**).**

56. In relation to the claim for unpaid holiday between the commencement of employment on the 18 September 2018 and 17 September 2020, the claimant is only entitled to claim for 4 weeks (20 days) per year under regulation 13 of the WTR. He cannot claim the additional 1.6 weeks (8 days) under regulation 13A, because there was no contractual agreement permitting him to carry over leave.

57. In relation to the regulation 13 claim, there was no evidence put before the tribunal that the claimant was informed of his right to take paid leave or provided with the opportunity to do so. This was because the respondent considered that as a self-employed sub-contractor the claimant was an independent contractor and therefore not entitled to paid annual leave. In such circumstances the tribunal concludes that the **Sash Window** exception applies and the claimant is entitled to carry over the 4 weeks (20 days) annual leave. Since his claim is for a 2 year period he is entitled to 40 days at £140 net per day amounting to a total of **£5600 net.**

**Failure to Provide a Written Statement**

58. The respondent accepted that the claimant was not provided with a written statement at the commencement of his employment or at all. The tribunal has found that the claimant was an employee, and the claimant has been successful in his claims for unlawful deduction of wages and failure to pay holiday pay, therefore the tribunal must award two weeks' pay.

59. The tribunal has considered whether it would be "just and equitable in all the circumstances" to award 4 weeks' pay as submitted by the claimant's representative. The tribunal considers that whilst there was a wholesale failure by the respondent to provide a written statement since he did not routinely provide his sub-contractors with contracts, the failure was not deliberate but was caused by a mistaken belief that the claimant was not an employee. When Mr Niemira had requested a written contract the respondent had provided one. The tribunal takes into account that the respondent was a very small employer and would have had limited access to employment advice and support. Further the issue of employment status is a complex area of law and it is not unusual for the parties to apply the wrong labels to the relationship. In this case both parties had entered into a contract in the mistaken belief that the claimant was self- employed and not an employee or worker. For this reason it would not be "just and equitable" to award the higher sum.

60. The claimant is therefore entitled to 2 weeks' pay, calculated as gross, amounting to **£1750 gross** (2 x £875).

Employment Judge Hart

Date: 20 January 2023