



## EMPLOYMENT TRIBUNALS

**Claimant 1:** Alfonso Navarro  
**Claimant 2:** Marianella Fuentes  
**Claimant 3:** Nieves Navarro Fuentes

**Respondent:** Affinity18 Limited

**Heard at:** London South      **On:** 22/02/2023

**Before:** Employment Judge Krepski

**Representation:**

**Claimants:** Alfonso Navarro

**Respondent:** Martin Finnerty – Director

## RESERVED JUDGMENT

1. Claimant 1 (“C1”)’s complaint of unfair dismissal is well-founded. This means the Respondent unfairly dismissed C1.
2. The Respondent is ordered to pay £1,129.86 in respect of the claim of unfair dismissal.
3. Claimant 2 (“C2”) and Claimant 3 (“C3”)’s complaints of unfair dismissal are not well-founded and are dismissed.

4. The Respondent was in breach of contract by dismissing C1 without notice.
5. The Respondent is ordered to pay to C1 the sum of £753.24, being damages for the breach of contract.
6. C2 and C3's claims in respect of breach of contract are not well-founded and are dismissed.
7. The Claimants' claims in respect of pension contributions are not well-founded and are dismissed.
8. The Respondent made unauthorised deductions from wages in respect of holiday pay in respect of all three claimants.
9. The Respondent is ordered to pay C1 in the amount of £3,564.22, C2 £1,064.40, and C3 £1,450.27 in respect of holiday pay.
10. The Respondent also made unauthorised deductions from wages in respect of the payslip discrepancies of C1 and C2.
11. The Respondent is ordered to pay C1 £907.50 and C2 £390.61 in respect of payslip discrepancies.
12. The Respondent failed to provide C1 with written particulars of employment, contrary to s38 of the Employment Act 2002 and is awarded 4 weeks' pay in the amount of £1,506.48 which the respondent is ordered to pay.

**Summary:**

- C1:
  - Unfair dismissal (basic award only): £1,129.86
  - Wrongful dismissal (notice pay/breach of contract): £753.24
  - Holiday pay: £3,564.22
  - Payslip discrepancy: £907.50
  - S38 Employment Act 2002: £1,506.48
  - **TOTAL: £7,861.30**
- C2:
  - Holiday pay: £1,064.40
  - Payslip discrepancy: £390.61
  - **TOTAL: £1,455.01**
- C3:
  - Holiday pay: £1,450.27
  - **TOTAL: £1,450.27**

## REASONS

### Preamble

1. In the course of this hearing, I heard evidence from Mr Navarro, Mrs Fuentes, and Mr Finnerty. I also considered two bundles; a bundle provided by the Respondent consisting of 117 pages and a bundle provided by C1, on behalf of the claimants, consisting of 14 pages, some of which were double sided.
2. What follows are findings of fact I have reached on the balance of probabilities. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. It has not been necessary, nor would it be proportionate, to determine each and every fact in dispute.
3. I have not referred to every document I read and/or was directed or taken to in the findings below, but that does not mean it was not considered, if it was referenced to in a witness statement, in evidence or in submissions.

### Findings of fact – Background

4. The director of the Respondent, Martin Finnerty (MF), owns and has interests in a number of companies.
5. C1 was introduced to MF one evening in a restaurant in which MF had an interest. C1 was a chef and MF said in oral evidence, “*we thought we’d give him a chance*”.
6. C1 received a letter dated 11<sup>th</sup> March 2017 on Total Personnel Services Ltd letterhead. The letter states in part:

*“The Director of Chromos, Martin Finnerty, has confirmed that he would like you to take the role of Head Chef.*

*“Your terms of engagement will be as follows:*

- *Start date will be ????? [sic], 2017*
- *Starting pay rate will be £9.50ph.*
- *[...]*
- *Working hours will be rostered weekly.*
- *Your pay rate will be reviewed after completion of 3 months from date of commencement*
- *[...]*

*“Please confirm if you wish to proceed. A contract will be drawn up for your review if you wish to go ahead.”*

7. The claimants never received any contract or other documentation concerning the terms of their relationship with MF or his companies.
8. C1 started working as a chef in Chromos and, a few weeks later, was joined by his wife and daughter (C2 and C3).
9. Both MF and C1 agree that C1 never worked for Total Personnel Services Ltd. Instead, C1 and C2 started receiving money via bank transfer from White Bear Media Ltd, another company owned by MF.
10. During this time, C1 started having more responsibility within the company and ended up as the manager of Chromos. Chromos shut, however, and the Claimants continued working with MF in one of his other businesses, namely a bowling alley/amusement centre, after the summer of 2018.
11. This accords with the bank statements of C1 and C2 which shows that they stopped receiving payments from White Bear Media Ltd on 12<sup>th</sup> October 2018, and started receiving payments from the Respondent, Affinity18 Ltd, on 1<sup>st</sup> October 2018.
12. MF describes Affinity18 Ltd as an “*employment agency*” and that “*the Claimant were Zero-Hour workers with Affinity 18 Ltd*” (page 117 of the Respondent’s bundle).
13. C1 stated that the bowling alley/amusement centre he and his family worked at was called Play Islands, and that he could not be sure exactly what it was that Affinity18 Ltd did. However C1 did note that the “Nature of business” on Companies House is described as “*Other amusement and recreation activities not elsewhere classified*”.
14. MF wrote in his witness statement, “*[The Claimants] were not issued with contracts as prior to April 2020, Zero-Hour Worker contracts were not a legal requirement at that time*”.

### **Findings of fact – Work arrangement**

15. C1 stated in oral evidence that, since he never had a contract (despite asking for one on multiple occasions), he did not know who he was working for. The only way he knew he was being paid by a different company was through there being a different name on his bank statements. He did not know that he had been working for the Respondent at first. He says this was the same for his wife and daughter.

16. He also stated that whilst he started at Chromos and ended up at the bowling alley, the three claimants did whatever was needed in MF's portfolio of businesses. From when he first started working for MF in March 2017, C1 never worked for any other company, because he worked for MF on a full-time basis.
17. C1 described how, when he first started working at Chromos, he worked as a head chef. MF asked C1, within around 6 months of starting, whether he would manage not only the kitchen but also the business. Gradually, he and his family had more and more responsibility, and C1 was eventually managing most of MF's businesses, with the exception of MF's nursery.
18. At no point during his working with MF was C1 told that he wasn't needed in a particular week, for example. On one occasion, when C1 had a heart attack, he went to hospital for 3 days and, upon his release, was working for MF the next day. C1 described how MF would always tell C1 what he wanted done week to week, which C1 would do subject to any other work that MF had asked him to do.
19. C1 stated that whilst the claimants were able to take holidays, they were never paid for them. He did not know how many holidays they were allowed to take, which is why he asked for contracts repeatedly. They submitted timesheets every month, and C1 also produced spreadsheets with the timesheet information for MF.
20. I found C1 to be a credible and reliable witness, and I accept C1's evidence in respect of the above.

### **Findings of fact – Pension**

21. With regards to his pension, C1 stated that he never received any information from MF about his pension, despite asking for information on his entitlement to a pension.
22. MF stated that the C1 did not wish to put into the pension scheme, because it required a contribution on his part and that he needed the money instead.
23. MF also pointed to a pension "Opt Out Notice" (page 116 of the Respondent's bundle), however C1 pointed out that the notice has his name spelt incorrectly, that it has his incorrect date of birth, and that the signature is not his. I do not find this to be a document signed by C1.

24. Additionally, MF stated in oral evidence that this was signed during the period of furlough. However the "Opt Out Notice" is dated 1<sup>st</sup> January 2019; long before any furlough scheme was in existence.
25. No "Opt Out Notice" was provided by the R for the other two claimants. C2 stated she had not signed any documents relating to her pension.
26. MF stated he thought he had an opt out for C2, but could not find it. He said he didn't believe C3 was entitled to a pension. I do not believe either signed an opt-out of any kind.

### **Findings of fact – End of working relationship**

27. The parties agreed that there was a conversation about coming off furlough in January 2021. C1 stated that this would be whenever the R decided to open.
28. C1 stated, however, that the Respondent suddenly stopped communicating with him.
29. C1 stated he found out that he was no longer working with MF because he received a bank transfer for £57 instead of what he was expecting to be paid, which was around £1300. He did not manage to make contact with MF. C2 also confirmed she had not been told her job had finished.
30. C1 further confirmed that the last contact he had from the Respondent was a WhatsApp message saying "*Please drop the keys*" at the end of March 2021.
31. I find this to be the case.

### **Findings of fact – MF's evidence**

32. MF stated in oral evidence that Affinity18 Ltd is an agency to "*employ people to go anywhere and do anything. I give out zero hour contracts, nobody has a permanent contract. It stops disputes so people can go and do what they want*".
33. MF further stated that the bowling alley/amusement centre itself is owned by PJG Developments Ltd, which is also his company. It does not, however, have any employees, and that all employees come from the Respondent.
34. MF stated all employees at Affinity 18 Ltd, of which he estimates there are around 8, were on zero hour contracts. He accepted that it doesn't have a

website, and the way people find out about the company is through word of mouth or people who ask him, or his accountants, for a job.

- 35. MF stated that the claimants previously worked for another agency he owned, White Bear Media Ltd.
- 36. MF could not remember whether the Respondent had provided staff for businesses he didn't own, but he accepted that the majority was for businesses within his group of companies.
- 37. MF stated that the Claimants had to build up holiday pay through working for the R, and then could either take paid holiday or take the money built up in lieu.
- 38. MF could not account for the discrepancies between the amounts received by the Claimants and the amounts on the payslips.
- 39. MF accepted that the claimants started work for the Respondent in 1<sup>st</sup> October 2018. He accepted the latest they would have worked for the Respondent was on 3<sup>rd</sup> March 2021.
- 40. On the bottom of page 2 of the claimant's bundle, MF stated in an email sent on 5<sup>th</sup> February 2019, "*Yes we need to sort Pensions extra and make things easier*".

### **Discussion – Pension Contributions**

- 41. The claimants have made claims in respect of the pension contributions that they say should have been made on their behalf by the Respondent.
- 42. On the basis of the evidence before me, I find that the claimants did not opt out of any pension scheme, as I do not have any properly completed opt-out notices before me.
- 43. However, the Employment Tribunal does not have jurisdiction to hear a complaint about the failure to auto-enrol an employee into a workplace pension scheme.
- 44. Rather, such a complaint of a failure to auto-enrol a person in a pension scheme should be raised with the Pensions Regulator.
- 45. As such, the Claimants' claims in respect of employer pension contributions must fail and are dismissed.

46. C1 also claims in respect of the *employee* contributions. However this sum would have come out of his own gross pay. Based on the payslips I have before me, there do not appear to have been any deductions in respect of his pension.

47. As such, there has been no deduction from his wages in respect of pension contributions and so this claim must also fail and is dismissed.

### **Discussion – Payslip discrepancies**

48. The claimants were put on furlough in March 2020. All three signed electronic letters confirming that they would be put onto the government furlough scheme.

49. C1 and C2 stated in evidence that they expected their pay to be the same every month, but for some reason the bank transfers received from the Respondent were slightly lower than the amount stated on their payslips.

50. MF did not have any explanation for these discrepancies.

51. In view of the above, I find that C1 and C2 were subject to unauthorised deductions from their wages.

52. The following table replicates in large part the table produced by C1. The main change is the addition of further bank transfers which I found in the bank statements provided by C1 in his bundle. These were transferred by the Respondent to the joint account of C1 and C2.

53. In view of the limited information available on the bank statements, it is not possible for me to know who the additional payment was intended for.

54. Noting, however, that the C1 and C2 not only have a joint bank account but are husband and wife, I find it appropriate to divide the additional bank transfers equally between C1 and C2 when calculating the discrepancies.



55. I therefore find the following:

| <u>Pay period (month)</u> | <u>Claimant</u> | <u>Payslip</u> | <u>Bank transfer</u> | <u>Additional transfer<sup>1</sup></u> | <u>Difference</u> |
|---------------------------|-----------------|----------------|----------------------|----------------------------------------|-------------------|
| September 2020            | 1               | £1395.00       | £900.00              | £100.00                                | £395.00           |
| October 2020              | 1               | £1395.00       | £1224.00             | £89.00                                 | £82.00            |
| November 2020             | 1               | £1395.00       | £1270.80             |                                        | £124.20           |
| December 2020             | 1               | £1395.00       | £1241.85             |                                        | £153.15           |
| January 2021              | 1               | £1395.00       | £1241.85             |                                        | £153.15           |
| September 2020            | 2               | £923.83        | £600.00              | £100.00                                | £223.83           |
| October 2020              | 2               | £923.83        | £697.00              | £89.00                                 | £137.83           |
| November 2020             | 2               | £923.82        | £894.87              |                                        | £28.95            |

56. Accordingly, I find that there was an unauthorised deduction from wages in respect of C1 of £907.50. I also find that there was an unauthorised deduction from wages in respect of C2 of £390.61.

### **Discussion – Holiday**

57. Given the evidence of C1, MF, and the payslips provided by the Respondent, I find that the claimants did not receive paid annual leave.

58. Instead, the claimants occasionally received “holiday pay” in lieu of paid annual leave. When the claimants *did* take annual leave, it was unpaid.

59. I only had sight of payslips in respect of the financial years 2019-20 and 2020-21. Based on those payslips, I make the following findings:

| <u>Financial Year</u> | <u>Claimant</u> | <u>Average weekly hours</u> | <u>Holiday pay received</u> |
|-----------------------|-----------------|-----------------------------|-----------------------------|
| 2019-20               | 1               | 44.68                       | £1239.00                    |
| 2019-20               | 2               | 32.08                       | £1108.35                    |
| 2019-20               | 3               | 29.13                       | £328.40                     |
| 2020-21               | 1               | Almost wholly on furlough   | £0                          |
| 2020-21               | 2               |                             | £0                          |
| 2020-21               | 3               |                             | £0                          |

60. The Working Time Regulations 1998 give workers an entitlement to 5.6 weeks (28 days) leave each leave year. Moreover, MF accepted during questioning that, if the claimants worked a “full” 40 hour week, they would be entitled to 28 days of paid annual leave.

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<sup>1</sup> Divided by two

61. As such, even if I were to accept the Respondent's approach, that is "rolled-up" holiday pay in lieu of paid annual leave, there have been underpayments in respect of the 2019-20 holiday pay. Furthermore, no holiday pay was provided in respect of the financial year 2020-21.

62. On the basis of the above and the payslips, I find the following:

| <u>Financial Year</u> | <u>Claimant</u> | <u>% of full 40 hr week<sup>2</sup></u> | <u>Average weekly pay<sup>3</sup></u> | <u>Holiday pay due<sup>4</sup></u> | <u>Minus already received</u> | <u>Outstanding</u> |
|-----------------------|-----------------|-----------------------------------------|---------------------------------------|------------------------------------|-------------------------------|--------------------|
| 2019-20               | 1               | >100%                                   | £428.86                               | £2401.61                           | £1239.00                      | £1162.61           |
| 2019-20               | 2               | 80.2%                                   | £241.89                               | £1086.37                           | £1108.35                      | -£21.98            |
| 2019-20               | 3               | 72.8%                                   | £218.15                               | £889.33                            | £328.40                       | £560.94            |
| 2020-21               | 1               | >100%                                   | £428.86                               | £2401.61                           | £0                            | £2401.61           |
| 2020-21               | 2               | 80.2%                                   | £241.89                               | £1086.37                           | £0                            | £1086.37           |
| 2020-21               | 3               | 72.8%                                   | £218.15                               | £889.33                            | £0                            | £889.33            |

63. Accordingly, I find that there have been unlawful deductions from wages in respect of C1 in the amount of £3,564.22, in respect of C2 in the amount of £1,064.40, and in respect of C3 in the amount of £1,450.27.

64. Whilst C1's schedule of loss makes reference to 4 years for which he did not receive paid holiday, in view of the lack of payslips in relation to earlier years, I decline to make any further award in respect of those earlier years.

### **Discussion – Unfair dismissal**

65. In order to bring a claim of unfair dismissal, a claimant must have been an employee as opposed to a worker or an independent contractor

66. Whilst, I have considered all the evidence before me when making this decision, I considered in particular: the close working relationship between C1 and the Respondent; the fact that he was essentially helping MF to run the Respondent business; that MF expected C1 to be working for the Respondent every week (unless C1 was on holiday); that the Respondent (via MF) had control over C1's workload and how his work should be done; that C1 was not working for any other persons at the time in question (and did not appear to have the freedom to do so); that C1 was paid on an hourly basis as opposed to per-task; that C1 was an integral part of the business, organising the rotas for other employees and acting

<sup>2</sup> If more than 100%, then it will be taken to be 100% i.e. the full entitlement of 5.6 weeks.

<sup>3</sup> Taken to be the same values for 2020-21 as for 2019-20.

<sup>4</sup> Average weekly pay multiplied by the entitlement of 5.6 weeks, multiplied by the % of a full week.

- in a managerial role; and that C1 was employed for tax purposes, paying tax as he did via PAYE.
67. As such, I find that C1 was an employee of the Respondent for the purposes of s230 of the Employment Rights Act 1996.
68. Some of the same points also apply in respect of C2 and C3: I formed the impression from the evidence given by C1 and MF, that MF also expected C2 and C3 to be working for the Respondent every week (unless they were on holiday); that the Respondent, via C1, had control over their workload; that C2 and C3 were not working for others at the time in question; that they were paid on an hourly basis as opposed to per-task; that they were key parts of the business working closely with C1; and that they were employed for tax purposes, paying tax via PAYE.
69. I do not find, however, on the basis of the overall picture painted, that the relationship was as close between C1 and the Respondent, as it was with C2 and C3. Accordingly, I find that C2 and C3 were workers, as opposed to employees.
70. Whilst I took into account the evidence of MF, and in particular his claim that the claimants were zero-hour agency workers, I did not find this a convincing argument, especially given the lack of any contracts to that effect and the fact that the “agency workers” worked largely for MF’s other companies.
71. As workers, C2 and C3 cannot bring claims of unfair dismissal and their claims in this regard fail.
72. I therefore turn to C1. MF claimed that C1 had never been dismissed, but rather he had stopped responding to MF and therefore never made himself available for work.
73. On this point, I prefer the evidence of C1, namely that MF stopped responding to him and his family. This is because of the consistency of the evidence C1 gave on this point, the evidence/explanation MF gave in relation to the pension opt-outs, and the lack of evidence presented by the Respondent in relation to it trying to contact the claimants.
74. In view of the fact that the Respondent stopped responding to and/or contacting the C1 in order to provide him with work, I find this to be a fundamental breach of the contract and that it amounted to a dismissal. I also find that there was no valid reason for doing so.
75. As such, I find that the Respondent unfairly dismissed C1.

76. I award C1 the following:

- i. Basic award – 2 years' continuous multiplied by 1.5 weeks' gross pay<sup>5</sup> – £1,129.86.

### **Discussion – s38 Employment Act 2002**

77. As I have found C1 to be an employee and further found he was not provided with written particulars of employment, I make a further award of 4 weeks' pay<sup>6</sup> in the amount of £1,506.48 which the Respondent is ordered to pay.

### **Discussion – Wrongful dismissal**

78. As I found C2 and C3 not to be employees, they cannot bring a claim in respect of a breach of contract and their claims in this respect must fail. I therefore go on to consider C1's claim.

79. An employee is entitled to be given notice of his dismissal in accordance with the terms of his contract. If there is no expressly agreed period of notice, there is an entitlement to reasonable notice of termination.

80. I find that the Respondent did not give any notice of C1's dismissal in view of the sudden cessation of communication by MF on behalf of the Respondent. The Respondent was therefore in breach of contract by dismissing C1 without notice, by failing to respond to C1's communications.

81. I find that the Claimant worked for the Respondent between 1<sup>st</sup> October 2018 until 3<sup>rd</sup> March 2021. In view of his having worked 2 full years at the Respondent, I find that it would have been appropriate to give 2 weeks' notice<sup>7</sup>.

82. I therefore award £753.24 in damages for breach of contract in respect of C1.

**29/03/2023**  
**Employment Judge Krepski**

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<sup>5</sup> £376.62 for the purposes of this aspect of the claim.

<sup>6</sup> *Ut supra*

<sup>7</sup> *Ut supra*