



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Diaconu

**Respondent:** Synergy Personnel Limited

**Heard at:** London Central (via CVP)

**On:** 7 September 2023

**Before:** Employment Judge S Connolly

## Representation

For the claimant: In Person

For the respondent: Mr Crook (Director)

# JUDGMENT

The Claimant's claims against the Respondent for holiday pay and in relation to the deduction of a £40 fee from his wages are not well founded and are dismissed.

# REASONS

## Claim and Issues

1. The Claimant worked for two weeks as a painter on a project at the National History Museum. This job was advertised by the Respondent. The Claimant submits that he was not self-employed in this situation and makes claims for his P45 and holiday pay amounting to £201.81. The Respondent's position is that the Claimant was self-employed so there was no entitlement to a P45 or to holiday pay or any other payment. The Respondent also suggested that the Respondent was not the correct party for the Claimant to submit claims against. At the hearing, the Claimant also mentioned a claim for £40 in relation to a fee deducted from his wages (£20 per week). He accepted that this claim was not in his claim form and when asked, said that he either didn't realise or that he forgot to include it.

## Procedure, documents and evidence heard

2. The hearing was conducted via video. There were no technical issues during the hearing which impacted the effective running of proceedings. The Claimant submitted a small number of documents including contractual documents and correspondence in relation to his engagement, time sheets, payslips and a recording of a call with Mr Deacon from the Respondent. The Claimant and Mr Crook (on behalf of the Respondent) gave evidence in person.

## Fact Findings

### *Engagement*

3. The Claimant was engaged as a painter for a job at the Natural History Museum. He worked there for two weeks as part of a team of six painters in total. He obtained this work by replying to an advert submitted by the Respondent. He had a conversation with Mr Deacon of the Respondent before starting the job.

### *Contract*

4. There was no dispute about the contractual documentation provided. The Claimant signed contractual documentation with Payroll 360. This clearly stated the Claimant was self-employed that he agreed he was not entitled to holiday pay. It also included clauses in relation to the right for him to provide a substitute. These clauses included the following wording:

*“Being self-employed means that you can supply a substitute to perform the services (subject to the terms of your agreement with us) for any reason, for example if you are unwilling or unable to do the work yourself (for example if you are on another job or you are unwell).”*

*Please confirm that the following statements apply;*

- 1. you understand that you will be able to use somebody else, provided they have the necessary skills/qualifications to do the work.*
  - 2. you understand that you will be responsible for payment to the substitute if you use one and responsible for the work that the substitute does.”*
5. The Claimant accepted that he signed the contract but did state that the contract was not provided by the first day of the engagement. Therefore, he felt he had no choice but to sign it if he wanted to continue on the job.
  6. The Claimant stated that it is correct that he was self-employed. However he said that the nature of the arrangement that transpired on this occasion was not a self-employed arrangement. He mentioned specifically that he had to complete timesheets whereas a self-employed person would usually do a job and submit an invoice directly for that work afterwards.

7. Mr Crook behalf of the respondent said that he couldn't speak for Payroll 360. However, he did say that it was clear the Claimant was self-employed. He referenced that the Claimant had a "UTR number". This was included in the documents provided by the claimant to the Tribunal. He said that Payroll 360's would charge individuals a fee for their services and costs, which includes various insurances. He said that the Respondent did not deduct these monies.
8. It was Mr Crook's evidence that the Claimant's situation was common for skilled tradespeople as they don't need to work under supervision of the site manager as the site manager is not qualified in their particular trade.
9. Mr Crook added that there would be other arrangements where people would be paid via PAYE and contract of employment issued by Payroll 360. This would be if they were under supervision of the client. However, this was not one of those situations. The Tribunal accepted Mr Crook's summary of the different options that might apply when engaging individuals for work.

#### *Control*

10. The Claimant stated that he had an induction with DBR Limited (a company based at the site) on his first day and the site manager told him his working hours, when his breaks would be and that if he left early he would be sacked. The Respondent could not give any evidence on whether these conversations took place
11. The Claimant did explain that regardless of what a person's status was i.e. whether they were self-employed or not, a site induction would always be required.
12. DPR Limited checked on the Claimant's standard of work a little bit more in the first few days but when they realised that the team and the Claimant were good workers and fast workers they checked on them a little bit less. The Tribunal has no reason to doubt the Claimant's estimate of perhaps every two days.

#### *Personal Service and Right of Substitution*

13. In his evidence the Claimant stated that he would not be able just to send a substitute in his place. He said that the only way he could do this would be if he sent a substitute to the Respondent and then the Respondent sent the substitute to the client. This was not challenged by the Respondent.

#### **The Law**

##### **Holiday Pay**

14. Regulation 13 and 13A of the Working Time Regulations 1998 set out the entitlement to 5.6 weeks' annual leave per annum.
15. Regulation 14 of the Working Time Regulations 1998 gives the right to make a claim for accrued but untaken annual leave.

16. Regulation 2 defines worker:

*“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;*

17. To fall within “limb (b)” the individual must show: (1) the existence of a contract, (2) that he or she undertakes to personally perform work or services for another party, and (3) that the other party is not a client or customer of a profession or business undertaking carried on by the individual.

18. The Tribunal has considered the relevant case law in this area in relation to the definitions of a “worker” (particularly in relation to personal service). This has included *Town and Country Glasgow Ltd v Munro EATS 0035/18*, *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC* and *Community Dental Centres Ltd v Sultan-Darmon 2010 IRLR 1024, EAT*. The outcome of these cases turn on the facts. However, they highlight the need to analyse any right of substitution included in the contractual documentation but also the need to look behind the contract at the reality of the working relationship.

## **Submissions and Conclusions**

19. The matter before the Tribunal was to establish whether the Claimant was a worker or genuinely self-employed. The contractual documents were relevant to this analysis but of course, these were not the only factor.

20. The Claimant accepted that he had signed the contract with Payroll 360. He stated that it was accurate to say he was self-employed but that the nature of the arrangement for this particular job was not one of self-employment.

21. He specifically pointed to the fact that he was not required to issue invoices and was required to complete timesheets. He also relied on the conversations which took place with the DPR Limited manager in relation to working time, breaks and leaving early.

22. The Claimant also relied on guidance provided by the Citizens Advice Bureau and this was included in his ET1. It is as follows:

*“You're entitled to paid holidays if you're an employee or a worker - including an agency worker. You might be an employee or worker even if your contract says you're self-employed. You aren't entitled to paid holidays if you run a business and you work for a client.”*

23. The guidance is accurate but is only a summary of the rules and law in relation to this matter. For example, the reference to no entitlement to paid holidays if you run a business and work for a client is one of the most clear cut examples in relation to when holiday will not be payable. The Tribunal has considered this guidance as part of the Claimant's submissions.
24. The Respondent pointed to the fact that the contractual documentation was between the Claimant and Payroll 360, rather than the Respondent. However, the Tribunal considers the fact that the Claimant responded to an advert from the Respondent and spoke to one of its employees before the engagement to be a relevant factor in the true contractual relationship.

*Control*

25. The tribunal has no reason to doubt the Claimant's recounting of the conversations he had with the site manager from DPR Limited in relation to working time, breaks and other matters. However, the Claimant also notes that there was minimum day-to-day supervision and control of the Claimant's work beyond the initial few days. Further, given that the Claimant accepted that a site induction would take place with regardless of the employment status of any person coming to work on a site, the Tribunal does not consider that the nature of the conversations with DBR Limited indicate that there was a worker relationship between the Claimant and the Respondent.

*Personal service and Right of substitution*

26. The Tribunal has considered the right for the Claimant to provide a substitute in the contractual documents and whether this is a genuine right of substitution. The Claimant was engaged in skilled job as a painter in a team of six. The Claimant suggested that if he wanted to send the substitute he would have to send them to the Respondent who would then be sent to DBR Limited. In the Tribunal's view, this still does amount to an ability of the Claimant to send a substitute in his place. The reference to sending the substitute via the Respondent is a reference to the process for providing a substitute rather than a restriction. There is nothing to suggest that this substitute clause was a sham. It states that a substitute can be supplied "for any reason" and gave examples of when this might apply. It is the view of the Tribunal that the focus of the contractual documents is to ensure a suitably qualified substitute rather than the identity of that substitute.

*Holiday Pay – conclusion*

27. Given that the Claimant was relying on conversations he had with DBR Limited and also that he had a contract with Payroll 360 Limited, it was suggested by the Respondent that it was not the correct party to for the Claimant to submit claims against. The Claimant explained that he was engaged by the Respondent and only had conversations with the Respondent. He said that Payroll 360 only dealt with his payroll matters.
28. However, based on the evidence provided, it is the view of the Tribunal

that the Claimant did have a contractual relationship with the Respondent given that he responded to their advert and discussed the job with one of the Respondent's employees before starting. The Claimant has also established that that the Respondent is not a client or customer of a profession or business undertaking carried on by the individual. Therefore, two out of the three elements of the "limb (b)" definition of worker under Regulation 2 of the Working Time Regulations 1998 are satisfied.

29. However, it is the conclusion of the Tribunal that the Claimant does not satisfy the third element of the definition given that he was not providing a personal service. The Claimant was engaged in skilled job as a painter. There was a contractual right for him to provide a substitute and he accepted that this would be allowed if approved by the Respondent. The need for a substitute to have the necessary skills/qualifications is not inconsistent with a genuine right of substitution.
30. Based on the considerations above, it is the conclusion of the Tribunal that the Claimant was not a worker for the Respondent and is therefore not entitled to holiday pay from it.

*£40 fee - conclusion*

31. Based on the evidence provided, the £40 fee was deducted by Payroll 360 not by the Respondent so the claim for that sum against the Respondent fails. In any event, the Tribunal notes that this claim was not included in the Claimant's claim form. It has not been necessary to address this in detail but by the Claimant raising this for the first time at the hearing, this claim may be out of time in any event.

Employment Judge S Connolly

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Date 21 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES  
ON

21/10/2023

FOR THE TRIBUNAL OFFICE