



EMPLOYMENT TRIBUNALS

Claimant

Mr David Pountney

v

Respondent

Mr Paul Lawson
t/a Countrywide Signs (Cambridge)

Heard at: Bury St Edmunds
On: 9, 10 and 11 January 2024
Before: Employment Judge Tynan

Appearances:

For the Claimant: Ms May, Solicitor
Intermediary: Mrs Cox, for the Claimant
For the Respondent: Mr Hoyle, Consultant

JUDGMENT having been sent to the parties on 31 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a Claim Form presented to the Employment Tribunals on 15 March 2022, Mr Pountney has brought claims against Mr Lawson that he was unfairly dismissed, that he is owed a statutory redundancy payment and for his notice pay, holiday pay and arrears of pay. The claims followed ACAS Early Conciliation between 13 January 2022 and 23 February 2022.
2. The claims are all denied by Mr Lawson who asserts, amongst other things, that Mr Pountney was self-employed rather than his employee and accordingly that Mr Pountney cannot bring a claim for unfair dismissal or redundancy pay.
3. Mr Pountney asserts that he was dismissed by Mr Lawson on 23 December 2021 when he was asked by Mr Lawson to go to his house, where he was allegedly instructed that he was to return his work van and tools and told in future that he would only be paid for those days that Mr Lawson needed him. Mr Pountney says he never worked for Mr Lawson

again. This is denied by Mr Lawson who says that agreed informal, or flexible, working arrangements were in place from November 2021 and that Mr Pountney continued to work for him until in or around February 2022 when Mr Pountney stopped taking his calls with offers of work.

4. In his evidence at Tribunal, Mr Lawson said that he put in place alternative arrangements by March 2022, seemingly having spoken with Ms May at some point to encourage Mr Pountney to continue working for him.
5. Before I heard Ms May and Mr Hoyle's closing submissions, I invited them to address me on the issue of when and how the working relationship had come to an end, including in the event I determined that Mr Pountney had not been dismissed on 23 December 2021 as he claims. Ms May told me on Mr Pountney's instructions that she had no further submissions to make in that regard.
6. It is not, of course, for the Tribunal to step into the legal arena, or to determine a case that has not been put by the parties, least of all by professionally represented parties. Whilst I have been mindful throughout of Mr Pountney's clearly documented and all too apparent vulnerabilities, including his communication difficulties, nevertheless the case that I am required to decide, as set out in the Claim Form, the Case Management Summary from 29 June 2023 and in Mr Pountney's Witness Statement, is whether he was dismissed on 23 December 2021 rather than whether he was dismissed or constructively dismissed in February, or even March 2022.
7. Mr Pountney has the burden of establishing that he was dismissed and it seems to me that he would need to amend his claim in order for the Tribunal to consider any claim in the alternative that he was dismissed, or constructively dismissed, on some later date to the date he claims to have been dismissed. Not only are these alternative possibilities not set out in the Claim Form, they have not been addressed in evidence or submissions; in the case of any alternative claim of unfair constructive dismissal, for example, by identifying any repudiatory breaches of contract sought to be relied upon and why, if it is the case, these might be said to have been the operative cause of any resignation, as well as the words or conduct which indicated that any repudiation was accepted by the Claimant rather than waived by him.
8. Mr Pountney and Mr Lawson each gave evidence at Tribunal. Mr Pountney was supported by an Intermediary Mrs Cox. I am particularly grateful to her for her invaluable contribution.
9. There was a single agreed Hearing Bundle extending to 304 numbered pages, supplemented by a further 11 pages of documents from the Companies House website.
10. I have already alluded to Mr Pountney's vulnerabilities. They were summarised by Employment Judge Graham as part of a Ground Rules Hearing on 29 June 2023. As I made clear during the Hearing, I do not go behind the Record of that Hearing, or Employment Judge Graham's assessment of Pountney, noting again, as I did during today's hearing, that Pountney's vulnerabilities and the documented Ground Rules were

agreed on Mr Lawson's behalf. During cross examination of Mr Pountney and in his closing submissions, Mr Hoyle sought to row back from what had been agreed by his colleague on 29 June 2023; in particular, he focused upon certain statements made by Mr Pountney in an application for Universal Credit (a copy of which is at pages 113 to 128 of the Hearing Bundle). Mr Hoyle submits that Mr Pountney has exaggerated the effects of his health issues and his learning disability, and asserts that he is a calculating and dishonest individual. The submission is not well made, indeed it is misconceived. Conflicts in evidence are a common feature of many, if not most, cases that come before the Tribunal. Such conflicts rarely indicate that a party or a witness is lying. This is certainly not one of those relatively rare cases where a party has lied on oath or sought to mislead. Mr Hoyle's submission overlooks that it was documented by Employment Judge Graham, and accepted by Mr Hoyle's colleague on behalf of Mr Lawson that Mr Pountney's difficulties include a risk of memory distortion, difficulty constructing a coherent narrative, and difficulties recalling past events. It is hardly surprising therefore that there may be variances or gaps in Mr Pountney's evidence and in statements made to others. I am satisfied that Mr Pountney has always endeavoured to tell the truth and to provide his best recollection, as well as his perception, of what happened.

11. Even putting aside that it would be an error of Law on my part to go behind the Record of the Ground Rules Hearing, from my own observations of Mr Pountney at Tribunal he demonstrated all six of the difficulties identified in paragraphs 19.1 to 19.6 of the Record of the Ground Rules Hearing, above all when Mr Hoyle strayed from the agreed approach to cross examination and asked leading questions, tag questions, statements as questions and certain lengthy questions. I do not intend that as a criticism of Mr Hoyle, as I caught myself asking Mr Pountney tag questions at one point. But such questions served to highlight what was apparent in any event, namely that Mr Pountney has significant communication difficulties.
12. Mr Hoyle cited Mr Pountney's reference in his Universal Credit application to being "unable" to read and write as an example of his exaggeration and dishonesty. Putting aside that Mr Pountney refers elsewhere in the application to difficulties with reading and writing, rather than an absolute inability to read and write, Mr Pountney's difficulties in that regard became all too apparent when he was invited by Mr Hoyle to read out just three lines of text. He hesitated and stumbled over the words he was asked to read out. In any event, he has clearly documented difficulties with expressive vocabulary, so it is unsurprising that he might describe his literacy difficulties in fairly simple or black and white terms, rather than provide a nuanced description of the precise extent of his limitations. The fact remains that he has significantly impaired literacy skills which contribute to his overall communication difficulties.
13. Mr Hoyle asserted, in closing, that Mr Pountney had admitted in the course of his evidence that he had been dishonest in his application for Universal Credit. I took him to task on the point since the submission did not reflect Mr Pountney's evidence at Tribunal, as became all too apparent when Mr Hoyle could not refer me to any note of evidence kept by him to support his contention. Instead, Mr Pountney's evidence, which I noted,

was that he had completed the application for Universal Credit with a view, he said, “to securing the best result from the dole office”. I regard that as unexceptional. It does not suggest dishonesty, or exaggeration. Mr Pountney went on to emphasise that everything stated in the application was true. I accept without reservation that whatever his communication difficulties Mr Pountney has never set out to mislead. It is entirely understandable that someone who is applying for state benefits will put their best foot forward, as for example would a job applicant in their CV. In any event, it is no part of my function to determine any claim to benefits, or the merits of any claim that was made by Mr Pountney. My focus has remained on ensuring that today’s hearing was conducted with due regard to the six agreed difficulties noted in the Record of Ground Rules Hearing.

Findings of Fact and Conclusions

14. In terms of my findings and conclusions in this case, I shall deal firstly with the question of Mr Pountney’s employment status.
15. In my judgement, the overwhelming weight of evidence is that he was employed by Mr Lawson and that he was not a self-employed worker or contractor.
16. It is not disputed by Mr Lawson that dating back to 1999 Mr Pountney had been an employee of Countrywide Signs Limited, Countrywide Signs (Newmarket) and thereafter J C Needham Limited (the latter company seemingly having traded as Countrywide Signs (Cambridge)). The parties disagree whether Mr Pountney’s employment was terminated by Mr Needham and a P45 issued as part of Mr Lawson’s agreement to acquire the franchise from Mr Needham. Mr Lawson says he saw a P45 at the time. Nothing turns on the point. Whether or not Mr Pountney’s previous employment with Mr Needham ended, the issue is whether he was employed or re-employed by Mr Lawson. In my judgement, their relationship had the essential hallmarks of an employment relationship, namely control, mutuality of obligation and personal performance; and, as per Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, the other provisions of the contract were consistent with its being a contract of service. Indeed, the only contra-indication was that Mr Lawson did not deduct income tax and National Insurance contributions from Mr Pountney’s wages at source as he was required to do for an employee, something I accept Mr Pountney was unaware of until early 2022. Mr Pountney reasonably understood in that regard that the sums he received from Mr Lawson were his net salary.
17. Mr Pountney provided his own work and skill and, for the major part of the relationship, he was paid a regular salary even if he was in the habit of asking for an advance on his wages. In my judgement it is beside the point that he was, as I accept, sometimes unreliable, insofar as he failed to turn up for work or to tell Mr Lawson that he would not be coming to work on a particular day. Mr Lawson accepts that Mr Pountney always made up the time and completed his weekly tasks without fail. He never sent a substitute. There was no suggestion he was permitted to do so or ever sought to send a substitute. There was mutuality of obligation in that Mr Pountney had to perform whatever work was available, even if work levels

fluctuated and were impacted during and following the Coronavirus pandemic. Mr Lawson had to pay Mr Pountney his agreed salary regardless of what work was available. He also paid him for sickness absence and maintained his pay during the Coronavirus lockdowns. In my judgement that was not simply an expression of goodwill on Mr Lawson's part as Mr Hoyle submits, but the unequivocal acceptance of an obligation and the assumption by Mr Lawson of the risks associated with fluctuating business levels inherent in running a business. These were not risks that were assumed by Mr Pountney since he was not in business on his own account. Mr Lawson maintained insurance, Mr Pountney did not. Mr Lawson made a van available to Mr Pountney and maintained, taxed, insured it and also paid for all fuel costs as well as providing a satnav device to Mr Pountney. He also provided him with the tools required to do the job and instructed him on a daily basis through the provision of a job sheet. Mr Lawson readily acknowledged in response to my questions, that the arrangements differed to other individuals he engaged as contractors who provided their own vehicles and certain tools, worked on a more casual basis for him and were paid a higher rate of pay.

18. In conclusion, in my judgement Mr Pountney was employed by Mr Lawson.
19. The more pertinent, and as regards the unfair dismissal, redundancy and notice pay claims ultimately the definitive, question is whether Mr Pountney was dismissed by Mr Lawson on 23 December 2021. I find that he was not. There is evidence of ongoing payments from Mr Lawson to Mr Pountney in January and February 2022 which I accept reflect the fact that Mr Pountney was continuing to undertake work for Mr Lawson, even if he was understandably unhappy at the fact that Mr Lawson had, as I find, unilaterally imposed an arrangement under which Mr Pountney was only paid for the work he was offered and performed. It seems to me that Mr Pountney found himself 'between a rock and a hard place'. He needed to apply for Universal Credit in order to secure a more reliable and regular source of income, but was under considerable pressure to accept whatever work was offered to him pending a decision on that application in order to avoid getting further into debt. At all times he was ready and willing to continue working for Mr Lawson in accordance with the established working arrangements in place between them since 2015. It ill behoves Mr Lawson to criticise Mr Pountney for trying to make the best of the situation, in circumstances that were not of his making.
20. Ms May surmised that the payments to Mr Pountney in January and February 2022 simply made good the shortfall in his December 2021 wages. However, the total amount paid to Mr Pountney over those two months was £1,280 rather than £1,200 (which was the December 2021 shortfall). In any event, Ms May's theory fails to address why Mr Pountney received various payments from Mr Lawson of differing amounts rather than a single balancing payment, nor does it explain why Mr Pountney wrote to Mr Lawson in January 2022 asking for his wages to be made good if in fact Mr Lawson had already begun to make up any shortfall. And it fails to explain the ongoing shortfall of £360 from November 2021 (or £280 if credit is given for £80 of the total payments of £1,280 in January and February 2023).

21. In coming to a decision in the matter, I have also had regard to Mr Lawson's detailed and credible account of certain mechanical difficulties which rendered the van used by Mr Pountney unroadworthy, including the alternative transport arrangements he put in place for those days in January and February 2022 that he offered work to Mr Pountney. And, above all, I have regard to Mr Pountney's own letter of 14 January 2022 to Mr Lawson which was drafted with the assistance of Mr Pountney's siblings (page 107 of the Hearing Bundle). Mr Pountney does not assert in that letter, sent some three weeks after he now says he was dismissed, that his employment had terminated on 23 December 2021. Instead, he explicitly refers in the letter to an ongoing employment relationship, albeit with the potential for redundancy if Mr Lawson would not reinstate Mr Pountney's full pay for November, December and January, and going forward. Written as it was with significant input from Mr Pountney's siblings, the letter provides weighty evidence on the issue, namely that Mr Pountney had not then been dismissed and did not consider that he had been dismissed.
22. As I have observed already, it is not my function as a Judge to step into the arena, or to determine a claim that has not been made or addressed in evidence and submissions. Mr Pountney's claims of unfair dismissal, to a statutory redundancy payment and for payment in lieu of notice are all pursued by reference to Mr Pountney's alleged summary dismissal on 23 December 2021. On the basis, but only on the basis that Mr Pountney was not dismissed on 23 December 2021, his claim that he was unfairly dismissed and his claims to a statutory redundancy payment and for notice pay cannot succeed.
23. As to the complaint that Mr Pountney was not paid his holiday pay, the complaint is well-founded. It is an employer's responsibility to keep adequate records of its employee's working hours, including any holiday. Mr Pountney's evidence in this regard was not challenged during cross examination, namely that he had taken the 2021 bank holidays prior to 23 December 2021 and was paid for them, but otherwise that he took no other holiday and was not paid in lieu of holiday.
24. Mr Lawson's evidence is that he had effectively replaced Mr Pountney by March 2022. Doing the best I can, given his imprecision as to the date the working relationship ended, it seems to me that Mr Pountney is entitled to payment in lieu of holiday accrued up to 14 February 2022, that being the last possible date he would have worked for Mr Lawson if his last payment of wages was on 15 February 2022. Whether Mr Pountney resigned or was dismissed on that date or the relationship can be said to have ended by mutual agreement, Mr Lawson does not claim that Mr Pountney did any further work for him after 15 February 2022. On that basis, Mr Pountney accrued 2.5 days' leave, as well as being entitled to be paid for the New Year's Day bank holiday. Accordingly, he is owed 3.5 days' leave for 2022.
25. In my judgement, Mr Pountney is additionally entitled to be paid in lieu of 20 days' leave which he accrued, but did not take, in 2021. Mr Lawson does not suggest that Mr Pountney took other than the bank holidays as leave during 2021. He has failed to adduce any evidence that Mr

Pountney had an effective opportunity to take the additional 20 days to which he was entitled. Decisions of the European Court of Justice, prior to Britain's departure from the European Union but which remain good law, confirm that it is for an employer to establish that it encouraged a worker to take their annual leave while informing the employee accurately and in good time of the risk of losing the leave at the end of the applicable reference period. In any event, in Smith v Pimlico Plumbers Ltd 2022 IRLR 347, CA, the Court of Appeal confirmed that a worker can carry over a right to payment for annual leave from one leave year to the next if the worker has been prevented from taking annual leave at all or has only been permitted to take unpaid annual leave. Whilst the Court of Appeal accepted that domestic legislation can provide for the loss of the EU-derived right to paid annual leave at the end of each leave year, this is only if the worker has actually had the opportunity to exercise the right. This means that the employer must have given the worker the opportunity to take paid annual leave, encouraged him 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 has not done so, 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. The principles set out in Pimlico Plumbers clearly apply to individuals, such as Mr Pountney who have been wrongly characterised as self-employed. Although Mr Lawson belatedly accepts that Mr Pountney was a worker and therefore entitled to statutory holiday rights, it was apparent from his evidence at Tribunal that he had given no thought to the matter when Mr Pountney worked for him. He plainly did not encourage Mr Pountney to take his annual leave in 2021. In the circumstances that leave carried over into 2022 and Mr Pountney was entitled to be paid in lieu of it on the termination of his employment.

26. Finally, I record here that in light of the Tribunal's findings and conclusions above it was conceded on Mr Lawson's behalf that Mr Pountney is entitled to be paid his full normal salary up to and including 14 February 2022, and that the Tribunal has jurisdiction to determine the matter as his claim includes a claim for arrears of pay.

Employment Judge Tynan

Date: 23 January 2024

Judgment sent to the parties on
31 January 2024

For the Tribunal office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>