# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Iqbal

**Respondent 1:** Farhi Limited

**Respondent 2:** Click4Pharmacy Limited

**Heard at:** **Midlands West Employment Tribunal via video hearing**

**On:** **11 December 2023**

**Before:** **Employment Judge Fitzgerald**

**Representation**
Claimant: Ms Javed
Respondent:1 Ms Wakil
Respondent 2: Mr Rafiq

# JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was a worker of the First Respondent. The Claimant's claims are therefore correctly brought against the First Respondent.

2. The Claimant's claim of holiday pay succeeds and the First Respondent is ordered to pay him the sum of £264.33 gross.

3. The Claimant's claim of unlawful deduction of wages succeeds and the First Respondent is ordered to pay him the sum of £1,106.54 gross.

4. When these proceedings commenced the First Respondent was in breach of its duty to give the Claimant a written statement of particulars and an award of 4 weeks' pay is made. The First Respondent must pay the Claimant the sum of £532.80 gross.

5. The claims against the Second Respondent are dismissed.

6. The Tribunal has awarded gross amounts given that the Claimant is no longer working for the First Respondent and so the Claimant should

account to HMRC as appropriate via Self-Assessment for any tax due on the sums awarded to him.

# REASONS

## Claims and Issues

1. At the outset of the hearing we established the issues that the Tribunal needed to determine. These are as follows:

    a. Employment status
        i. Was the Claimant an employee or worker of Respondent 1 or Respondent 2 within the meaning of section 230 of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998?

    b. Holiday Pay (Working Time Regulations 1998)
        i. What was the Claimant's leave year?
        ii. How much of the leave year had passed when the Claimant's engagement ended?
        iii. How much leave had accrued for the year by that date?
        iv. How much paid leave had the Claimant taken in the year?
        v. How many days remain unpaid?
        vi. What is the relevant daily rate of pay?

    c. Unauthorised deductions
        i. Were the wages paid to the Claimant by Respondent 1 or Respondent 2 less than the wages he should have been paid?
        ii. Was any deduction required or authorised by statute?
        iii. Was any deduction required or authorised by a written term of the contract?
        iv. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
        v. Did the Claimant agree in writing to the deduction before it was made?
        vi. How much is the Claimant owed?

    d. Schedule 5 Employment Act 2002 cases:
        i. When these proceedings were begun, was Respondent 1 or Respondent 2 in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?
        ii. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
        iii. Would it be just and equitable to award four weeks' pay?

## Preliminary Issues

2. At the start of the hearing the Claimant made an application for the Respondents' defences to be struck out on the basis that the Respondents' conduct had been abusive and vexatious and the defence was weak. There were also issues with late documents and witness statements. After hearing from the parties and considering the issues raised, as well as the overriding objective of the Employment Tribunal, the application was refused. All parties were here and ready to proceed and the case is prepared. Any matters that parties disagree with can be put to the witnesses in cross examination and the Tribunal can make a determination on the disputed documents/ evidence (see next para) to enable the case to proceed.

3. As regards documents the Tribunal determined that all documents provided in June 2023 will go into evidence – there is a responsibility upon parties to read documents sent to them in good time before the hearing. The photographs (of the Claimant's car) dated 29 October 2023 will be forwarded by the clerk and the Tribunal will review them and parties can be cross-examined on them. The Tribunal refused further late evidence. Parties have had sufficient chance to call evidence and there is a large amount of evidence before the Tribunal already which will have to be case managed for a one-day case. We do not have more time to hear additional witnesses.

## Procedure, documents and evidence heard

4. I had before me a bundle of documents running to 134 pages. I also had a witness statement bundle running to 27 pages and a skeleton argument from the Claimant.

5. As regards the audio recordings I confirmed that only the second recording can be heard, so I have listened to that only and otherwise read the scripts of the calls.

6. The Claimant presented oral evidence and witness statements from himself, Ms Javed and Mr Razak.

7. The Respondents presented oral evidence and witness statements from Mr Kamran, Ms Wakil, Mr Rafiq and Mrs Fazal.

## Facts

**(**R1 refers to Farhi Limited and R2 refers to Click4Pharmacy Limited)

8. The Claimant began working for one of the Respondents on 9 February 2023 as a delivery driver and this continued until 6 June 2023.

9. The Claimant understood that he was working for 'Click4Pharmacy' but this in fact is the trading name of both Respondents.

10. I find that it was not made clear to the Claimant which of the Respondents he was working for and it is unfortunate that there is no written contract which would have confirmed this, and also his status.

11. The parties entered into correspondence about the Claimant's disputes after 6 June 2023 when he left and an e-mail from Ms Wakil is set out on page 44. This refers to the Claimant's 'employment' on several occasions. In evidence Ms Wakil said that this e-mail was prepared by her solicitor who used the wrong language to describe the Claimant.

12. Ms Wakil's evidence is that any employee would be employed by R1 and there were also self-employed contractors and they were engaged and paid by R2. R2 does not have a payroll.

13. Ms Wakil is the sole director of both companies and they are clearly closely linked. Ms Wakil's evidence is that Click4Pharamcy Ltd covered the delivery side of the business, although a driver was in fact employed by R1 directly after the Claimant left and their employer was R1. The line it would appear to me is drawn depending on the status of the individual and whether they need to be paid via payroll – in which case they are employed, or in the case of a worker, engaged, by R1 Fahri Limited.

14. The company accounts are of no assistance on this point as the accounts in the bundle rather oddly show both companies as having no employees.

15. The Claimant's evidence is that from February to June 2023 he worked most days between Monday to Friday. His start time moved back a bit but settled on starting around 10.30am and he worked until he had completed his deliveries for that day. The Claimant says that he could have turned down a day's work if e.g. he had an appointment to go to and would have let the Respondents know that he couldn't deliver that day – but in practice this didn't really happen and he worked most days. The Claimant says that he could not send someone else, i.e. a substitute.

16. The Respondents say that the Claimant had no obligation to do the work and he could pick and choose, but have not disputed the Claimant's evidence that he did work most days Monday to Friday. The Respondents say that the Claimant could have sent a substitute.

17. I find that on the evidence the Claimant did have some flexibility in that he could turn down a shift if he wanted and the Respondents were not obliged to give him work every day, but in practice he did work regular hours. I have noted the invoice from the Claimant on page 38 which both parties have used as a basis for calculating the sums owed to the Claimant. I note that the Claimant did take a period of time off – stated to be holiday – between 7 March and 30 March 2023, but that other than that he worked regularly for 3 plus hours per day. The Claimant did not have to seek permission for this holiday, rather he informed the Respondents he was taking it and so would not be around to work. He did not work every

single day between Monday and Friday, outside the March period, but for most days.

18. The Respondent's position is that the Claimant was a self-employed contractor and was in business on his own account as a delivery driver.

19. I note that the Claimant was put onto the insurance for the company van and received some form of induction from Mr Kamran on the first day so he knew what he was doing. Mr Kamran in evidence talked of the Claimant obtaining permission from Mr Rafiq to go with him on that day. The Claimant says that he followed the Respondent's instructions as regards deliveries, whereas the Respondent says that he had autonomy and could choose what packages to take and chose the small ones with close by delivery locations. I prefer the Claimant's evidence on this point. It seems unlikely that the Respondent would run its business by allowing drivers to pick and choose which deliveries they wanted to make and which size of parcels they wanted to take – for example this would make no sense if say two deliveries in close proximity or even at the same location were large and small. It seems very unlikely that different drivers would take them. I find that the Respondent did have control over what the Claimant did and the deliveries he made during his shift once the Claimant started that shift.

20. I do not accept that on the facts here the Claimant could send a substitute – ultimately the Claimant needed to turn up himself to do the deliveries and I do not think the Respondent would have accepted a substitute. This role was delivering medication and I do not believe that the Respondent would have allowed just anyone to turn up and do the deliveries. Factually the Claimant did not send a substitute and although the Respondents said in submissions that other drivers have sent substitutes there was no evidence presented of this. I find that personal service was required.

21. As regards equipment I have heard evidence from the Claimant that he used the company van nearly all the time and the Respondents say it was twice. By my count the Claimant did almost 60 shifts and so this is quite a discrepancy. I have taken into account Ms Javed's submission that the Claimant would have been unlikely to have agreed to the hourly rates if he had to use his own vehicle. I also note the photo of his car which is relatively small for making deliveries. I understand the Respondents to be saying that after the Claimant left the keys in their van they refused to allow him to use it. This matter is finely balanced but on this point I prefer the Claimant's evidence and find that he did use the company van for at least a reasonable portion of his shifts. I simply cannot see how the business model would work if the Claimant did not have a reasonably sized vehicle for his deliveries.

22. As regards the company phone I find that the Claimant was provided with a phone and indeed this was in the vehicle when it was stolen. I accept that for a period of time the Claimant was also using his own phone and

downloaded the PDM app onto it – but at least for a period a company phone was provided.

23. The Claimant was not paid any holiday pay by the Respondents as they viewed him to be a self-employed contractor.

24. The Respondents say that the Claimant was negligent during his period of work for them by leaving the van running with the keys in and it was stolen. The van was later recovered but items were stolen. The Respondent deducted £1,106.54 from the Claimant's earnings to cover their losses. The Respondents say that the Claimant orally agreed that his earnings could be deducted, although the Claimant disputes this. It is clear that here was no agreement in writing as regards any deduction.

**The Law**

25. In order for the Claimant to bring his claims for unlawful deduction of wages and holiday pay he must show that he is an employee or a worker under the Employment Rights Act 1996 (unlawful deduction of wages) and the Working Time Regulations 1998 (holiday pay).

26. The relevant definition is section 230(3) of the Employment Rights Act 1996:

    "*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".*

27. The same definition of "worker" can also be found in:
    Regulation 2 of the Working Time Regulations 1998 (WTR).

28. Since the case of *Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497* three areas have attracted the greatest degree of case law attention and are viewed as the central factors in determining whether an employment relationship exists:
    a. Personal service.
    b. Control.
    c. Mutuality of obligation.

29. These factors are now commonly referred to as "the irreducible minimum". The concept was first introduced in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612* and subsequently endorsed by the House of Lords in *Carmichael v National Power Plc [1999] ICR 1226*. Their prevalence suggests that, although all factors must be considered, some factors are more important than others. At its strongest, this "irreducible minimum" principle means that if any one of the three core areas is not established,

there can be no employment contract. However, this should not be taken as an incontrovertible rule. The third stage of the Ready Mixed Concrete multiple test requires the court or tribunal to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists.

30. The elements required to satisfy the statutory definition of a worker under section 230(3)(b) of ERA 1996 are:

    a. There must be a contract between the worker and the alleged employer, whether express or implied.
    b. The contract must require personal service.
    c. The other party to the contract is not the customer or client of any business undertaking or profession carried on by the individual.

***Holiday Pay***

31. Employees and workers have a right to a minimum of 5.6 weeks' paid annual leave under the Working Time Regulations 1998 (WTR). This amounts to 28 days for a full-time employee.

32. If a worker does not have "normal working hours", a week's pay is calculated as an average of all remuneration earned in the previous 52 weeks, or the number of complete weeks the worker has been employed (if less than 52). This includes any overtime payments, commission, bonuses and other allowances or payments, except genuine expense claims. Weeks in which no remuneration is due are ignored.

33. Where an employer has failed to pay (or has underpaid) holiday pay under regulation 16 WTR, or pay in lieu on termination under regulation 14, the tribunal must order payment of the amount due (regulation 30(5)).

***Unlawful deduction from wages***

34. It is unlawful for an employer to make a deduction from a worker's wages unless:
    a. The deduction is required or authorised by statute or a provision in the worker's contract; or
    b. The worker has given their prior written consent to the deduction.

    (Section 13, ERA 1996.)

35. Pursuant to s24(2) ERA an Employment Tribunal may order the employer to pay financial losses which are consequential to the unlawful deduction of wages.

***Employment Particulars***

36. Under s38 of the Employment Act 2002 when these proceedings were commenced, if there was a breach of the employer's duty to give the worker a written statement of employment particulars then I must make an award of 2 weeks' pay and, if just and equitable then a higher award of 4 weeks' pay -unless there are exceptional circumstances that would make it unjust or inequitable to make the minimum award.

## Conclusions

37. The first issue is in relation to employment status. Was the Claimant an employee or worker of Respondent 1 or Respondent 2 within the meaning of section 230 of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998?

38. Taking into account the legal principles outlined above and my findings of fact I find that the Claimant was not an employee of R1 or R2. The Claimant's ability to choose when to work, and lack of obligation to provide work on either of the Respondents' parts means that in my judgement the Claimant was not an employee. For example the Claimant was able to turn down a shift when he wished and he was able to choose to take off his 'holiday' in March 2023 without needing to seek permission from the Respondents. Therefore I have to go on to consider whether he was a worker or a self-employed contractor of the Respondents.

39. Based on my findings of fact I have found that the Claimant was required to provide personal service to the Respondents (as to which Respondent see below). Despite there not being a written contract in place, there was clearly an implied contract to carry out work during the Claimant's shifts. I have found that there was control over the Claimant's deliveries and also that the Claimant was provided with equipment such as a phone and work van for at least some of the time.

40. I have considered whether it can be said that the Claimant is in business on his own account. It is clear that the Claimant does not have a driving/ delivery business and he took on this role as it came up and he was looking for options after his retirement. The Claimant's car is not suitable for deliveries and he was not working for anyone else doing deliveries. Ms Wakil says that it was made clear to the Claimant that he was a self-employed contractor but the evidence is not consistent with this and on page 44 Ms Wakil was writing to the Claimant as if he was an employee and stating him to be such. I find that there was probably a lack of clarity on everyone's part – which again is why the law requires contracts to be given – but I think it is unlikely that it was made clear to the Claimant that his status was self-employed contractor.

41. Taking into account all these factors it is clear to me that the Claimant was a worker. A contract was in place. He was required to provide personal service, was under the direct supervision of the Respondent, used the company equipment to some extent and cannot in any way be said to be in business on his own account.

42. Given my findings above as regards the relationship between R1 and R2 (i.e. that it was very close) and the fact that Ms Wakil's evidence was that any employee or worker would be engaged by R1 as they had a payroll – my finding is that the Claimant was a worker of R1 during the relevant period.

43. Given my finding that the Claimant was a worker I now have to consider whether he is entitled to holiday pay and whether there has been an unlawful deduction of his wages.

44. Under the WTR workers are entitled to holiday pay. The sum put before me has been that the Claimant is entitled to £290 on a pro rata basis, that has not been disputed. I have however carried out my own calculations.

45. All parties agree that the Claimant was not paid any holiday pay by R1.

46. A worker is entitled to be paid holiday pay on a pro rata basis for the weeks that they work. The Claimant worked 14 weeks.

47. There has been no evidence of what the appropriate holiday year is so I have determined it to have started on the commencement of the Claimant's engagement with R1. Rounded up, 14 weeks is 0.3 of the holiday year.

48. Under WTR workers are entitled to 28 days holiday and that means 8.4 days holiday for the Claimant.

49. 8.4 days x 3hours 10 mins working time = 27 hours.

50. The Claimant was paid £9.10 for a portion of his working time and £10 for a portion – 0.3 of the time £9.10 and 0.7 of the time £10.

51. 0.3 of 27 hours is 8.1. So 8.1 hours at £9.30 = £75.33.

52. 0.7 of 27 hours is 18.9. So 18.9 hours at £10 = £189.

53. Therefore I find that he is entitled to £264.33 gross holiday pay.

54. As regards wages I find that R1 deducted the Claimant's wages by £1,106.54. I accept that there was an incident where the Claimant's actions caused R1 loss but for a worker a deduction can only be made from their wages if it is authorised by statute, set out in their written contract or a separate agreement in writing. There is no dispute here that there no written agreement authorising the deduction of wages. There was also no statutory basis for the deduction. Therefore the deduction was unlawful and must be paid to the Claimant in the sum of £1,106.54 gross.

55. Finally, as I made clear the Claimant was not provided with a contract or statement of particulars throughout his period of engagement with the R1. This is a breach of the ERA 1996. This case in my mind does demonstrate why a written statement is needed and had thought been given to the Claimant's status at the outset and the statement been given then we may have found that none of these issues would have arisen. I therefore consider it appropriate to award 4 weeks' pay here.

56. The Claimant worked for R1 for 14 weeks. Total payment was £1,864.75 which equates to an average of £133.20 per week. 4 weeks is £532.80.

Employment Judge Fitzgerald

Date: 2 February 2024