EMPLOYMENT TRIBUNALS

Claimant: Mr M Hall

Respondent: Mr G Ridley & Mrs K Anthony-Ridley t/a Sloppy Joes Street Food

Heard at: Cardiff Employment Tribunal, by video On: 13 March 2024

Before: Employment Judge E Macdonald

Representation
Claimant: Mr M Hall (litigant in person)
Respondent: Did not attend and was not represented

CORRECTED JUDGMENT UNDER RULE 69

Under the provisions of Rule 69 the Judgment sent to the parties on 14 March 2024 is corrected on 13 May 2024 as follows:

i. The date is amended from 13 March 2023 to 13 March 2024
ii. The case number is amended from 1601270/2023 to 1602170/2023
iii. The word "years'" is substituted for the word "year's" in Paragraph 2 below.

JUDGMENT

1. The name of the Respondent is amended to "Mr G Ridley & Mrs K Anthony-Ridley t/a Sloppy Joes Street Food".
2. The complaint of unfair dismissal is dismissed as the Claimant did not have two years' qualifying service with the Respondent.
3. The complaint for statutory paternity pay is dismissed as the Claimant did not have the requisite period of 26 weeks' qualifying service prior to the "qualifying week", being the 15th week before the birth.
4. The Claimant was at all material times an employee of the Respondent.
5. The complaint of unlawful deductions from wages in relation to unpaid invoices is well-founded, and the Respondent is ordered to pay to the Claimant the sum of **£252.96** (gross), subject to deductions for taxation and national insurance.
6. The complaint of unlawful deductions from wages in relation to accrued but untaken holiday pay is well-founded, and the Respondent is ordered

to pay to the Claimant the sum of **£1,044.32** (gross), subject to deductions for taxation and national insurance.

7. The total sum payable by the Respondent to the Claimant is **£1,297.28** (gross), subject to deductions for taxation and national insurance.

REASONS

Procedure

1. By a Form ET1 received on 15 September 2023 the Claimant brought claims of unfair dismissal, unlawful deductions from wages, and for holiday pay. The Respondent resisted the complaints; in essence, the Respondent's position was that the Claimant was at all material times a self-employed contractor and therefore not entitled to bring any of those claims.

2. Standard directions were subsequently issued, which required the parties to provide witness statements. The Respondent submitted some evidence by way of response.

3. On 4 March 2024 Mr Ridley sent an email to the Tribunal saying insofar as is material "I will not be joining this meeting. There is no case. Mr Hall was self-employed."

4. On 4 March 2024 Mr Hall provided a bundle of relevant evidence and a witness statement.

5. On the same date Mr Ridley provided an email asserting that the Claimant submitted invoices for work done, was responsible for his own tax and National Insurance was never on the payroll, asked to be employed "on a self-employed basis", worked mainly on the Respondent's premises and used their tools and materials. That email also asserted that a contract of employment had been issued but that the Claimant had refused to sign it; the contract was then amended but the Respondent never received a response to their email, or acceptance of the contract (whether verbal or in writing).

6. On 6 March 2024 Mrs Anthony-Ridley sent an email to the Tribunal saying insofar as is material "do I need to tell someone that I won't be able to attend the above tribunal?"

7. On 11 March 2024 Employment Judge Brace wrote to the parties noting the effect of Rule 47 of the Tribunal Rules – in essence, that if a party did not attend then the hearing could go ahead in their absence – and noting that Mr G Ridley and Mrs K Anthony-Ridley had indicated that they did not intend to attend the final hearing.

8. Before today's hearing started the Tribunal's clerk emailed the Respondents asking them to confirm whether they intended to attend the hearing. The response stated that they were not available to attend the hearing. I therefore directed that the reason for the non-attendance be sought. The response from Mrs Anthony-Ridley stated that "we have our business to run. We can't close our restaurant as we have bookings & 15 members of staff that rely on us." That response arrived at 10.19 a.m.

9. Rule 47 of the Tribunal Rules provides:

> **47.** If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that

party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

10. That power is to be exercised in accordance with the overriding objective, which includes dealing with cases in ways which are proportionate; avoiding delay; and saving expense.

11. All practicable enquiries had been made as to the reason for non-attendance. The Respondents had notice of the hearing but had decided, intentionally, as of 4 March 2023 that they would not attend. There was no application to postpone made either before or indeed at the hearing. I was not satisfied that would have been impossible for one or other of the Respondents to have attended today. The Respondent's obligations towards their staff would not change were the hearing to be postponed. It would be disproportionate to postpone and would increase delay in the proceedings.

12. I therefore decided to proceed in the absence of the Respondents.

Amendment: name of Respondent

13. The Tribunal had previously raised in correspondence that the name "Sloppy Joes Street Food" did not appear to refer to a legal entity. Correspondence from the Respondents' accountant indicated clearly that the correct name of the Respondent(s) was "Mr G Ridley & Mrs K Anthony-Ridley t/a/ Sloppy Joes Street Food."

14. I accordingly (and with the consent of the Claimant) directed that the name of the Respondent be so amended.

Amendment: statutory paternity pay

15. The Claimant in his witness statement provided on 4 March 2024 indicated that he was seeking to claim for statutory paternity pay. That claim does not appear in the Form ET1. The Claimant applied to amend to include this claim.

16. I considered the application in accordance with the test in **Vaughan v Modality Partnership UKEAT/0147/20/BA** which requires me to consider the balance of prejudice. I also considered the Presidential Guidance. I decided to grant the application.

17. However, I went on to note that the Claimant lacked the requisite period of qualifying employment. The claim was therefore dismissed.

Evidence

18. I considered the Claimant's witness statement and supporting bundle of evidence I also had regard to the documentation submitted by the Respondents. The Claimant applied to submit further evidence (namely copies of bank statements showing his remuneration in the relevant period); I granted that application on the basis that the evidence was clearly probative, went directly to the issues, would cause the Respondent no prejudice, and would be necessary to decide the claim for holiday pay in any event.

19. I made the following findings on the balance of probabilities. I gave more weight to the Claimant's evidence as it was contained within a witness statement and formally affirmed in Tribunal. The Claimant also answered questions directly. The Respondent's evidence was not contained in a witness statement and was not confirmed on oath (or by affirmation); nor was it possible to test that evidence under

cross-examination, or to ask questions of the Respondents' witnesses. I gave little weight to the Respondent's evidence.

Findings

20. The Claimant was engaged by the Respondent to work at the Respondent's premises as a chef from 15 December 2022 and he continued to work at the Respondent's premises through to 2 July 2023.

21. In due course, the Claimant was provided with a draft contract of employment. That first draft contract was dated 1 February 2023 and it appeared in the Claimant's bundle.
22. He discussed the draft contract with the Respondent, specifically with Kris (i.e. Kristin Ridely]; he remembered the discussion taking place in the Respondent's upstairs office. In response, Ms Ridley agreed to change some parts of the contract. He was then sent a second contract, which he agreed verbally. He was told not to worry about signing it as the contract would be signed by them on his behalf.

23. The "final" contract was dated 24 April 2023. It also appeared in the Claimant's bundle and I have carefully considered it. Significantly it contains a number of changes, e.g. whereas the initial draft of 1 February 2023 states that "[a]s you are employed on a self employed basis, no holiday will be accrued", the "final" version contains provision for holiday pay.

24. That contract provided at Paragraph 1.2 that:

> "1.2 You are employed on a self employed basis & are not on the monthly payroll."

25. However, the remaining provisions of the contract are inconsistent with this clause. In particular, I have regard to the following provisions:

26. The Claimant's normal place of work and normal working hours were dictated by the Respondent, with a provision that the Respondent could "request" that he work additional hours from time to time "if we consider this is necessary for the proper performance of your duties": Clauses 1.4 and 1.5

27. The Claimant's basic hourly rate was set at £12/hour: Clause 1.6

28. The Claimant was required to report "on a day-to-day basis" to Kristin or Gary Anthony-Ridley: Clause 2.1

29. The Claimant was required to comply with the Company's "rules, policies and procedures": Clause 2.3. That Clause provided that the Respondent required "all its staff to take the safety of our working conditions very seriously . . ."

30. Clause 3.1 specified holiday provision: 21 days' paid holiday in each holiday year, with the holiday year running from 1 January to 31 December 2023 inclusive. The same Clause provides for pro rata accrual of holiday entitlement over the year. Holidays were to be "requested and pre-approved by Kristin Anthony-ridley. We may require you to take holiday on specific days that we will notify you in advance."

31. Sickness absence is governed by Clause 4 of the Contract.

32. The contract was terminable by either party on one month's written notice (Clause 6), and Clause 6.1 provides that "[n]othing in this agreement will prevent us from

terminating your employment . . . if you commit a serious breach of your obligations as an employee."

33. Clause 6.2 also refers to "termination of . . . employment."

34. Clause 8.2 states "[y]ou confirm that you have agreed to become a sloppy Joe's Streetfood employee purely on the basis of the terms contained in this Agreement . . ."

35. It is clear that the substance of the contract was negotiated so as to provide for benefits which would normally accrue to workers and/or employees.

36. I also consider the factual relationship between Claimant and Respondent.

37. The Claimant agreed to provide labour (and skill) in return for payment.

38. The Claimant was not permitted to substitute another worker: he was obliged personally to perform the work.

39. The Claimant was provided with a uniform to wear by the Respondent, a t-shirt with the Respondent's logo, in keeping with other staff who worked for the Respondent.

40. The Claimant's shift patterns were set by the Respondent, with a weekly rota being issued and circulated via WhatsApp to all (to use a neutral term) of the Respondent's staff.

41. The Claimant was to use the Respondent's own equipment / utensils and kitchen at the premises.

42. The Claimant had to report to management (i.e. the named individuals who constituted the Respondent) and was treated and referred to in the same way as other members of staff.

43. The Claimant was paid a fixed hourly rate. He did not stand to profit from his own good performance.

44. The Claimant was not in fact paid when absent due to holiday or sickness.

45. The Claimant was in fact paid on the same dates as other employees.

46. The Claimant worked for the Respondent to the exclusion of other work (specifically as a self-employed individual carrying out milking on farms).

Law

47. I reminded myself of the provisions of s 230 Employment Rights Act 1996 which govern employment status (whether an individual is a worker, or an employee, or otherwise). I noted that the protection against unlawful deductions from wages extends to "workers" as well as employees.

48. When considering a contract of employment the Tribunal is entitled to look behind the written terms: **Autoclenz Ltd v Belcher and ors [2011] IRLR 820 (SC).**

49. The question is "what was the true agreement between the parties"?: **Autoclenz**

50. Having considered whether a written contract reflects the actual legal obligations of the parties and the true relationship, the Tribunal must then consider whether

an employment relationship exists. The test is a mixed test of fact and law.

51. The classic test of employment status is given in **Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1982] 2 QB 497.** The Tribunal needs to consider three essential ingredients:

    a. An agreement to provide work and skill in return for remuneration (i.e. personal service combined with a "work/wage bargain"
    b. In the performance of that service, the individual must agree, expressly or impliedly, to be subject to a sufficient degree of control
    c. The other provisions of the contract must be consistent with a contract of service

52. Other factors include those set out in **Market Investigations v Minister of Social Security [1969] 2 QB 173.** They include:
    a. Who provides and maintains tools and equipment
    b. Whether the person hires their own help
    c. The degree of financial risk adopted
    d. The degree of investment in and management of the business
    e. Whether the individual has the opportunity to profit from their own good performance
    f. Whether the person is paid a fixed wage or salary
    g. Whether the person is paid when absent due to holiday or sickness

53. I also reminded myself of the judgment in **Clyde & Co LLP and anor v Bates van Winkelhof [2014] UKSC 32**. The purpose of the statute needs to be borne in mind.

54. I reminded myself of the provisions of Regulations 13 & 13A Working Time Regulations 1998 (which govern annual leave entitlement) and Regulation 16 (which is relevant to the calculation of the appropriate level of remuneration in respect of annual leave).

Decision: employment status

55. I find that the Claimant was employed by the Respondent at the material time. I make that finding based on the facts above and having regard in particular to the finding that the Claimant accepted, verbally, the contract of employment which had clearly been negotiated and amended. I also have regard to the lack of right of substitution; the degree of control which was exercised by the Respondents (to whom the claimant reported); and to the fact that the majority of the other provisions of the contract were consistent with a contract of service.

56. If I were wrong about the verbal acceptance of the contract, I would have found that the contract (dated 24 April 2023) was accepted by conduct, insofar as the Claimant in fact performed the contract.

57. I would have found in any event that the Claimant was (irrespective of the written contract) an employee of the Respondents at the material time, based on the facts set out above, and applying the tests in **Ready Mixed Concrete** and **Market Investigations**. The Respondent provided equipment and uniform; the financial risk rested solely with the Respondent; the Claimant was integrated into the Respondent's business; he was treated as the other staff were, wore the Respondent's uniform, was paid on the same payroll date as the other employees, and worked for the Respondent to the exclusion of other work. He did not have the ability to profit from good performance, but was fixed an hourly rate.

58. For those same reasons, had I not found that the Claimant was an employee, I would have found that he was a "limb b" worker (within the language of **Bates**) on the basis that he was working under a contract (even if an implied contract)

whereby the Claimant undertook to perform work personally for the Respondents, whose status was not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual (s 230(3) ERA 1996).

Decision: remedy

59. I had sight of an invoice dated 5 July 2023 in the sum of £252.96, referable to work undertaken on 1 and 2 July 2023. I accept that this work was performed and that the Claimant was not paid for this work. I accordingly find that the Claimant is entitled to payment of £252.96 (gross), which is subject to taxation and national insurance to be deducted at source (i.e. by the Respondents who were the Claimant's employer).

60. The calculation of holiday pay is more complex. The calculation date is 2 July 2023: Regulation 16(3)(c) Working Time Regulations 1998 read in conjunction with Regulation 14(3)(b), which states that pay due on termination is the amount that "would be due . . . in respect of a period of leave" determined according to a formula used to calculate how much leave is remaining at the termination date.

61. The Claimant was paid a fixed rate of £12/hour but worked variable hours, sometimes finishing late; the Claimant's bank statements clearly showed that the total amount of work done in any given month (and therefore in any given week) was variable.

62. Regulation 16 Working Time Regulations (as amended) requires that the calculation of "a week's pay" (for these purposes) requires the Tribunal to have regard to a "reference period" of 52 weeks ending in the calculation date. For employees who have less than 52 weeks' service (as in this case) the reference period is the entirety of the claimant's employment.

63. By the calculation date the Claimant had worked 28.43 weeks (15 December 2022 through to 2 July 2023).

64. The total remuneration over that period amounted to £9,734.

65. "A week's pay" for present purposes is therefore (£9.734 / 28.43) = £342.02

66. The Claimant's annual entitlement to annual leave was 5.6 weeks.

67. At the point at which the Claimant's employment ended, 199/365 of the annual leave year had elapsed. The calculation for accrued but untaken annual leave is therefore (199/365) x 5.6 = 3.05

68. It follows that the amount payable in respect of accrued but untaken annual leave is (3.05 x £342.02) = **£1,044.32** (gross), which is again subject to taxation and national insurance to be deducted at source (i.e. by the Respondents).

69. The total award is therefore **£1,297.28 (gross**) (subject to taxation and national insurance to be deducted at source).

Decision: other matters

70. I note for completeness that the Claimant lacked the requisite periods of qualifying service to bring claims of i) unfair dismissal and ii) statutory paternity pay. Those complaints are accordingly not well-founded and are dismissed.

Case No: 1602170/2023

Employment Judge **E Macdonald**

Date **15 March 2024**

Corrected on 13 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON 15 May 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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