



# EMPLOYMENT TRIBUNALS

**Claimant:** T Mikalajunas

**Respondent:** Kumar Freight Line Limited

**Heard at:** Midlands West Employment Tribunal (by CVP)

**On:** 13 May 2024

**Before:** Employment Judge Chivers

## Representation

Claimant: Ziedune Mikalajunaite (sister)

Respondent: Jagraj Singh (Admin Team) (in part)

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

## REASONS

1. The claimant worked as a HGV driver with the respondent. He pursues 3 complaints. These are (i) unlawful deduction of wages; (ii) breach of contract (for failure to pay notice) and (iii) failure to pay holiday pay.
2. The tribunal issued directions on 11 January 2024 for a schedule of loss from the claimant (by 8 February) and for the parties to provide copies of their witness statements and documents to each other by 7 March 2024. The parties were told the case was listed for a hearing on 13 May 2024 on 11 January 2024.
3. The case was due to start at 10:00am. At 07:57, the respondent contacted the Tribunal stating  
*“We’ve had an issue at our office space that we rent and are unable to use it for the hearing and have no last minute space available to me for the remote hearing.”*
4. The respondent went on to request a postponement,

5. I requested that Tribunal staff contact the respondent and inform them that the case had been on-going for some time, and I was not minded to postpone on the basis of the information received and to stress that they only require a private and quiet space to attend the hearing and that many parties attend remotely from home.
6. The respondent did not initially attend the hearing at 10:00. I adjourned the hearing and requested that Tribunal staff contact the respondent to ascertain whether they intended to attend.
7. Upon re-convening the hearing at 10:08, Mr Singh attended on behalf of the respondent. Mr Singh indicated that he did *"not know anything about the case."* He referred to the earlier email request from the respondent. He said the respondent's director was unavailable to attend and requested the hearing be rearranged to next week. No further details in respect of the director's non-attendance were provided. I repeated the points made earlier in terms of the respondent only requiring a quiet and private space to participate in the hearing.
8. I considered the respondent's postponement but having regard to the overriding objective, refused it. The claim had been issued in January 2023 and so had been on-going for over 12 months. The details of the hearing had been communicated to the parties some months before. The only details provided for the postponement request were that there was an issue with the respondent's premises which meant that the respondent was not able to participate in the hearing from these premises. There seemed no reason however why the respondent could not participate using alternative space.
9. By this stage, it was clear that I did not have the documents submitted by the claimant to the tribunal.
10. I explained to Mr Singh that I was going to pause the hearing to retrieve these documents. I explained that I saw no grounds not to proceed today. I adjourned the hearing at this point – 10:40 am – to re-convene and start at 11 am. This would give Mr Singh sufficient time to communicate the decision to others within the respondent and decide how they wished to proceed. I was clear that the hearing would continue in their absence if the respondent did not attend.
11. When the case did re-convene at 11, Mr Singh was not in attendance. Further attempts were made by the Tribunal to contact the respondent but without success. The hearing therefore proceeded in the respondent's absence commencing at 11:08.
12. I reviewed a bundle of documents provided by the claimant which included a witness statement from the claimant and 4 exhibits (including a schedule of loss). No bundle was received from the respondent and no witness statements were received from the respondent. I had regard to the content of various emails which had been sent by the respondent during the case including those dated 12 February 2024 12:04, 7 May 2024 12:37 and 10 May 2024 13:07.

13. Evidence was given by the claimant only. As referred to above, there was no attendance from the respondent, or any witness statement presented by them. In respect of the emails referred to above, I had regard to them but found I could afford little evidential weight to the content of such emails as the respondent had not provided a witness statement, nor attended to be cross examined about their defence or these emails.

### **Findings of fact**

14. I make the following findings of fact. These reasons do not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider to decide if the claim succeeds or fails. If I have not mentioned a particular point it does not mean that I have overlooked it. It is simply because it is not relevant to the issues.
15. The claimant was issued with an Employment Contract with the respondent on 18<sup>th</sup> January 2021 (“the Contract”). The Contract refers to “*the Employer*” - as Kumar Freight Line Ltd. It refers to the claimant working as a HGV Driver and him “*commencing permanent full-time employment with the Employer on the 17<sup>th</sup> day of January 2021*”.
16. The Contract provides –

#### ***“Holidays***

*The Holiday year will commence on 18<sup>th</sup> day of January and run for one year (“the Holiday Year”)*

*During each Holiday Year, the Employee is entitled to one week of paid annual leave, such entitlement accruing on a pro rata basis, with Bank and Public Holidays to be included in the calculation of the Employee’s one week of paid annual leave.”*

#### ***Termination of Employment***

*The Employee and the Employer agree that reasonable and sufficient notice of termination of employment by the Employer is the greater of one (1) week or any minimum notice required by law.”*

17. It also provides in a Schedule to the Contract

*“Notice of termination details: the employee is entitled to one (1) week’s notice. The Employee will give the Employer four (4) weeks’ notice before quitting.”*

18. It sets out that the “*employment is permanent full time*” and normal hours of work are 40 hours with the pay period being “*once per month*”.

19. The Contract also provides

*“Any notices.... will be deemed to be completed when hand-delivered, delivered by agent, or seven (7) days after being placed in the post, postage prepaid, to the parties...”*

*“This Agreement constitutes the entire agreement between the parties and there are no further items or provisions, either oral or written. The parties to this Agreement stipulate that neither of them has made any representations with respect to the subject matter of this Agreement except such representations as are specifically set forth in this Agreement.”*

20. The Contract is signed by the claimant and by or on behalf of Karandeep Chahal of the respondent.
21. The respondent decided not to attend the hearing. From their Response and email correspondence, their position was that the claimant requested to move to self-employed status at some point after the Contract was signed and it was on this basis that the relationship continued. They asserted that there were parts of the previous 18 months when the claimant had not worked for the respondent and this was indicative of the self-employed nature of the relationship. They submitted documents headed “V6 - Vehicle Logistics” and “V5 Vehicle Mileage Report” which purported to show the claimant had not worked for certain periods during 2022. .
22. The date range of the V6 Vehicle Logistics documents was limited to 4 weeks in January 2022 (one week of which the claimant is referred to as having worked), 2 weeks in April 2022 and 2 weeks in June 2022. The claimant regards these documents as selective. The V5 Vehicle Mileage Reports relate to vehicles not drivers and so provide limited assistance. No witness statement had been provided from the respondent and no one attended the hearing from the respondent to give evidence on these documents and so, as referred to above, I was only able to afford them limited evidential weight.
23. The claimant was required to provide services for the respondent personally; he could not send a replacement to do the work. The respondent would determine what routes the claimant was to undertake. The claimant would work regular hours for the respondent. Ordinarily this would be 5 or 6 days a week and then a day or 2 days break. The respondent would then inform the claimant about 3pm the day before what the next delivery round was that he was required to do.
24. The claimant used the respondent’s lorry to carry out his duties. He was paid an average of £900 a week based on working 5 days a week. The respondent paid the claimant net of tax.
25. The clamant did not undertake work for other companies.
26. The leave year is from 18 January. The claimant did take holiday during the period of his employment but was not at any point paid for this holiday.
27. I find that the claimant was an employee of the respondent and remained an employee throughout the period he worked for them.

28. I find that at no stage did the claimant request to move to become self-employed or agree to any request from the respondent that he become self-employed. The Contract continued and was not terminated until 21 November 2022.
29. In or around November 2022 the claimant was no longer contacted by the respondent in terms of work that they required him to undertake. This followed on from a dispute involving an accident on 9 November 2022. The claimant worked for week commencing 14 November 2022 but by the end of this week, having not been paid £200 owed for work undertaken in week commencing 17 October, for 5 days he had worked for week commencing 7 November and for 6 days that he worked in week commencing 14 November, the claimant treated his employment as having ended on Sunday 21 November 2022 in the light of these non-payments.
30. The claimant received no notice of the termination of his employment.

## Law

### Employment status

31. An 'employee' is defined by section 230(1) Employment Rights Act 1996 (ERA) as being '*an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.*' 'Contract of employment' is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other factors will also need to be considered.
32. A 'worker' is defined by section 230(3) ERA as being:
- 'an individual who has entered into or works under (or where the employment is 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.'*

### Unauthorised deduction of wages

33. Under section 13 and 15 ERA, an employer may not make a deduction from the wages which are properly payable to any workers employed by the employer, or receive a payment from such a worker, unless it is

required or authorised to be made by virtue of any statutory provision or any relevant provision of the worker's contract, or the worker has previously signified in writing their agreement or consent to the making of it. Wages are defined in section 27 ERA and include holiday pay (section 27(1)(a) ERA.

### **Notice Pay**

34. An employee is entitled to minimum period of notice as set out in s86 ERA. These periods are a week per complete year of service up to a maximum of 12 weeks.

### **Holiday Pay**

35. The Working Time Regulations 1998 ("WTR") provide that workers are entitled to 5.6 weeks' annual leave in each leave year. This entitlement is not limited to employees. These 5.6 weeks are made up of

- (a) 4 weeks annual leave under regulation 13(1) of the WTR; and
- (b) An additional 1.6 weeks annual leave under regulation 13A WTR.

36. Regulation 13(9) of the WTR provides that in respect of the regulation 13(1) WTR leave

*"Leave to which a worker is entitled under this regulation may be taken in instalments but –*

- (a) It may only be taken in the leave year in respect of which it is due, and*
- (b) It may not be replaced by a payment in lieu except where the worker's employment is terminated."*

37. Regulation 16 of the WTR provides:

*"a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave."*

38. In relation to carrying over the 4 weeks leave under Regulation 13 from previous leave years, the general rule under rule 13(9)(a) is that a worker is entitled to be paid in lieu of holiday accrued but untaken in the final leave year. There are case law exemptions to this rule which include being prevented from doing so by the employer. In the case of **King v Sash Window C-214/16**, the CJEU held that the right under Article 7 of the Working Time Directive is a "single right" to paid leave, although the WTR defines it as two separate rights: the right to leave and the right to pay. If an employer refuses to grant paid leave, the court held that it must bear the consequences for this decision. It also held that a worker/employee is entitled to be paid on termination for any periods of annual leave that have accrued during employment if they have been discouraged from taking that leave because it would be unpaid. It was not an effective remedy for the worker to have to have the leave and then take legal action to recover holiday pay.

39. In *Smith v Pimlico Plumbers Ltd (2022 EWCA 70)*, the Court of Appeal held that the principle in *King* was not restricted to cases of untaken leave but also applied where the worker had taken unpaid leave.

40. A claim can be pursued under s23 ERA or Regulation 30 WTR.

### Analysis and Conclusion

41. The claimant can only succeed in his unpaid wages and holiday pay if he is an employee or a worker; the claimant can succeed in his claim for breach of contract if he is an employee. All employees are workers but not all workers are employees.

42. My conclusion is that the claimant was an employee of the respondent. He was issued with a contract of employment. He had to do the work himself and could not send a replacement. He took instructions from the respondent. There was an obligation on the respondent to provide work and an obligation on the claimant to perform the work. I find that he was an employee from 17 January 2021 until his employment ended.

43. Dealing with the 3 claims in turn

44. I am satisfied that the claimant is owed the **unpaid wages** from the Respondent in respect of the period claimed. From 17 – 21 October (in the sum of £200), week commencing 7 November 2022 (in the sum of £900) and week commencing 14 November 2022 (in the sum of £1100). The respondent is ordered to pay the claimant the gross sum of £2200.

45. In respect of the **breach of contract** claim about the failure to pay notice. I am satisfied that this is well founded. The respondent is ordered to pay the claimant the sum of £900 as damages for breach of contract. This is based on 1 weeks' pay.

46. In terms of **holiday pay**, I have considered this as an unauthorised deduction claim. The claimant was entitled to 5.6 weeks' annual leave under the WTR. This overrides whatever is in the contract. The claimant was not paid holiday pay at any point of his employment in respect of holiday that he did take and the fact of the non-payment served as a discouragement from taking leave.

47. The leave year starts on 18 January as set out in the Contract.

48. For the year of termination, 18 January 2022 – 21 November 2022 the claimant did not work a full year but a part year and his entitlement is 23.7 days. Based on £900 a week for 5 days, there is a daily rate of £180 x 23.7 = £4266. I order the respondent to pay the claimant this sum.

49. I am satisfied that this is a case where the claimant has been prevented from taking holiday pay due to the denial of that right by his employer. I find that the claimant is also entitled to outstanding holiday pay that has accrued but remains untaken for the duration of his employment. As this case relates to rights of the claimant under the Working Time Directive and not additional rights to paid annual leave under the WTR, this only applies in respect of the 4 weeks leave and not the 5.6 weeks to which he

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would otherwise be entitled under the WTR. From January 2021 to January 2022, the entitlement is based on 20 days. The sum is 20 days x £180 leaving a sum of £3600. I order the respondent to pay the claimant this sum.

Employment Judge Chivers

15 July 2024