EMPLOYMENT TRIBUNALS

Claimant: **Mr P Nicholson**

Respondent: **Sort Limited**

Heard at: **Nottingham**

On: **Monday 14 and 15 November 2016**

Before: **Employment Judge Dyal (sitting alone)**

Representation

Claimant: **Mr Budworth, of Counsel**
Respondent: **Mr Neville, of Counsel**

JUDGMENT having been sent to the parties on 29 November 2016 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

The Issues

1. At the outset of the hearing the issues were identified and agreed with the assistance of the parties.

    1.1 Unfair dismissal:

    Qualification to claim unfair dismissal:

    1.1.1 What was the Claimant's employment status? In particular, was he an employee and did he have a period of at least 2 years continuous service at the date of the dismissal?

    Substantive issues:

    1.1.2 If the Claimant has standing to complain of unfair dismissal:

1.1.3 what was the reason for the dismissal and if it was a potentially fair reason, was the dismissal fair in all the circumstances?

N.b. In the course of the hearing Mr Neville conceded that if the tribunal found that the Claimant had standing to bring an unfair dismissal claim, the Respondent admitted that the dismissal was unfair. However, he would rely on *Polkey* on contribution.

1.1.4 If the dismissal was unfair:

1.1.4.1 Should a *Polkey* reduction be made?

1.1.4.2 Should any basic and/or compensatory award be reduced on account of the Claimant's conduct?

1.2 Written reasons for dismissal pursuant to Section 92 Employment Rights Act 1996 ('ERA'):

1.2.1 Did the Claimant have the necessary employment status and continuity of employment to bring such a complaint?

1.2.2 Did he make a request for reasons in accordance with Section 92?

1.2.3 If so, were reasons provided?

1.3 Holiday pay.

1.3.1 Mr Budworth clarified the nature of the claim at the outset:

1.3.1.1 the claim was for and only for leave that <u>had</u> been taken but that had not been paid.

1.3.1.2 the claim was for leave taken pursuant to regulation 13 of the Working Time Regulations 1998 only. No claim was made in relation to leave entitlement arising under regulation 13A.

1.3.1.3 the claim for holiday pay was brought pursuant to the Working Time Regulations 1998 ('WTR') alone. There was no complaint of unlawful deduction from wages under the ERA. (Mr Budworth therefore accepted he was not relying upon the series of deductions provisions in the ERA.)

1.3.2 The issues for adjudication therefore were:

1.3.2.1 was the Claimant a worker within the meaning of the WTR?

1.3.2.2 if so what leave did he take?

1.3.2.3 when did the payment for that leave fall due?

1.3.2.4 was payment made? (N.b. Mr Neville accepted that no payment had been made for holiday pay.)

1.3.3 Once the dates of leave were identified in the course of the hearing, together with the dates on which payment fell due, a limitation issue emerged:

1.3.3.1 was the holiday pay claim presented in time?
1.3.3.2 If not should time be extended?

The Hearing

2. The Tribunal was presented with an agreed bundle of documents to which it had regard. It heard evidence from Mr Tunnicliffe, Managing Director of the Respondent and Mr Halhead, Digital Director of the Respondent, and from the Claimant.

3. The Tribunal heard submissions from both Counsel. Mr Budworth made oral submissions. Mr Neville produced very helpful written submissions to which he spoke.

Holiday Pay

4. At the outset of the proceedings and again shortly before the Claimant's evidence concluded the Tribunal raised the issue that it would need to know the details of the Claimant's holiday pay claim – the number of days leave, the dates of leave and the dates on which it was said there had been a failure to make payment. Nonetheless, the Claimant gave no evidence about when he had taken holiday or when he should have been paid for it. At the close of day one the advocates agreed that the information would simply be provided to the Tribunal as agreed facts during closing submissions. The tribunal was content to accept that approach since it was agreed between the parties.

5. In closing submissions Mr Budworth told the Tribunal that the Claimant's dates of holidays so far as relevant were 17 April 2015 to 6 May 2015, 1 September 2015 to 4 September 2015 and 28 January to 11 February 2016.

6. It was plain at this point that there was a limitation issue. The primary time limit is set by reg.30(2)(a) which must be read together with reg. 30B WTR. The limitation period can be extended pursuant to reg.30(2)(b).

7. It was the parties' agreed position that *if* the Claimant was entitled to holiday pay under the Working Time Regulations 1998 then payment should have been made for it no later than the tenth day of the month following the month in which the leave was taken (e.g. if leave were taken in January it had to be paid no later than 10th February). The parties further agreed that the date on which payment should have been made was the date on which limitation began to run for the purposes of Regulation 30(2)(a) WTR. The Tribunal accepted this agreed position.

8. On this basis, the claims in relation to the first two periods of leave were clearly out of time. The claims in relation to the final period of leave were also out of time. On the agreed facts, and assuming that the Claimant was a worker, the Claimant should have been paid for the third and final period of leave by 10 March 2016. That was the date on which it was agreed by the parties that limitation began to run for the purposes of Regulation 13 WTR. Day A, for the purposes of reg. 30B(1)(a), was 10 June 2016. It was the

parties' agreed position that the claim was therefore out of time even having regard to Regulation 30B WTR.

9. Mr Budworth made an application to extend time in his closing submissions. He made it without any vigour. Essentially, Mr Budworth's submission was that the delay was short so there was no real prejudice to the Respondent in extending time. However, he acknowledged, and rightly, that the evidence did not support a cogent submission that it had not been reasonably practicable to present the claim within the primary limitation period. This was a realistic concession. There was, quite simply, no apparent reason why it might not have been reasonably practicable or feasible to present the claim in time. No such reason was suggested, nor was there any evidence that it had not been reasonably practicable, nor was there any request to reopen the evidence.

10. In short, the claim for holiday pay must be dismissed. Based upon the agreed facts, it was presented outside of the limitation period set by reg. 30(2)(a) WTR, even having regard to reg. 30B WTR. There was no basis for extending time pursuant to reg. 30(2)(b) WTR.

Written Reasons for Dismissal

11. By Section 92(2) Employment Rights Act the right to written reasons for dismissal arises only if the employee requests them (save in special cases).

12. It is an agreed fact between the parties that the Claimant did not request written reasons for his dismissal. The special circumstances in which an employee might be entitled to those reasons without a request (e.g. dismissal during pregnancy) simply do not apply here (nor are they even said to). Accordingly this claim must fail.

13. The claim must fail additionally in light of the tribunal's findings below given s.92(3) ERA and the need for two years of continuous employment.

Unfair Dismissal

Findings of Fact

14. The Respondent trades as Sort Refer. Sort Refer is a business for mortgage brokers, financial advisers and similar professionals. Essentially it is an on-line portal through which the broker or other professional can book the services of a range of solicitors, conveyancers, surveyors and the like for their lay clients.

15. The Respondent started in 2009 as a small start-up business. Over time it has grown and has developed a more mature business structure with a more professional organisational culture. However for the purposes of Section 98 ERA, it remains a fairly small undertaking with modest administrative resources.

16. The Claimant is and was a highly experienced salesman in the financial services sector dealing, for a long part of his career, with insurance and mortgage products. He first started working with the Respondent on a part time basis in mid to late 2010. He began working on a full-time basis with the

Respondent from around January 2011. At this time he entered a written agreement which characterised the relationship between himself and the Respondent as a contractor relationship. The written agreement, according to its terms, states that the agreement is *not* a contract of employment.

17. The Tribunal finds that the characteristics of the relationship during this early period were as follows:

    17.1 The Claimant was paid commission only. Given the nature of the business and the significant operational costs, he was personally taking a genuine risk as to profit and loss. Indeed, in the first couple of years of his engagement with the Respondent, according to his own evidence, he was essentially making a loss.

    17.2 On the other hand, the Respondent was taking no financial risk in relation to the Claimant in the sense that the Claimant had no salary at all. If the Claimant made no sales the Respondent did not have to pay him anything.

    17.3 The Claimant was paid gross on the understanding that he was self employed for tax purposes and he accounted for his own tax in the appropriate way.

    17.4 Importantly, the Claimant also paid his own business expenses of which there were many and they were substantial. For instance, he used his own equipment in the main, his own car, his own home office, his own telephone and mobile phone

    17.5 The only exception was that the Claimant did receive paid expenses if he was required to attend a meeting at the Respondent's offices. However, this happened infrequently and could not have accounted for a significant proportion of the Claimant's overall expenses.

    17.6 The Claimant worked remotely from home although, since he worked in field sales, there was a significant amount of travel within the geographical area in which he had clients. The Claimant himself decided whether to visit clients, and if so when and which, and when to work at home.

    17.7 The Claimant had his own network of contacts. Clients were not provided to him by the Respondent. On the contrary, the central reason for engaging the Claimant was that the Claimant had his own database of clients and had relationships with a broad base of professional clients such as brokers.

    17.8 The Respondent had very limited if any control of the Claimant's work both as a matter of contract and in practice. As a matter of contract there was no real sense in which the Respondent had a right to control the Claimant, certainly not the sort of control that characterises and is typical of an employment relationship. As a matter of practice the Claimant worked in the field alone with little management input or control. Essentially he just kept in touch from time to time on a pretty informal basis.

    17.9 The Respondent did not, and in the Tribunal's judgment could not, tell the Claimant what to do. For example, it did not and could not, tell him what to focus on, which specific clients to visit, how to approach making a sale, what hours to work or any matter of that kind.

    17.10 Although in a loose sense the Claimant did have a sales target this was very informal. It was simply what the Respondent hoped he

would achieve. There was no question of performance management, or management action if the target was missed.

17.11 The Claimant had no holiday pay, no sick pay and there was no applicable grievance or disciplinary procedure.

17.12 Further, the parties genuinely understood themselves to be in a relationship in which the Claimant was providing consultancy services on a self-employed basis.

17.13 The Claimant did not need permission to take time off work. As a common courtesy it was his practice to tell the Respondent if he was taking time off.

17.14 On the other hand:

17.14.1 The Claimant was working for and solely for the Respondent from January 2011 onwards;

17.14.2 The contract at p42 - 46 makes no provision for sending a substitute and there is no apparent basis for implying such a term.

17.14.3 It was a term of his contract with the Respondent that he would not engage in competitive activity with the Respondent where there was any conflict with the Respondent's business.

17.14.4 The Claimant was selling the Respondent's product and the Tribunal infers that it might well have appeared to outsiders such as mortgage brokers, that the claimant was an employee of the Respondent's business.

17.14.5 It is also true that the Claimant received a certain amount of background support from the Respondent in the sense of having an e-mail account that was a Respondent e-mail account. The Respondent had IT staff who would help with IT issues and it also had a customer service department which might field concerns raised by the brokers the Claimant had business with.

17.14.6 Certain expenses were paid for by the Respondent (the cost of attending meetings at its premises.)

18. The above characterises the relationship between the parties during its early period, from around January 2011 onwards. It also characterises the relationship for a period of time thereafter – the question is 'for what period of time?'.

19. What makes this case difficult, is that there was an evolution over time in how the business operated which ultimately had a significant impact on the characteristics of the relationship between the Claimant and the Respondent. The most difficult thing for the Tribunal to determine is quite how and when things materially changed. To be frank the Tribunal has not had as much assistance with this as it would have liked. The evidence was at times vague.

20. In his oral evidence the Claimant suggested that things started to change significantly when Mr Halhead joined the business in around July 2013. However, the evidence about quite how (if at all) things changed was very limited and lacking in detail. In essence, the Claimant's evidence was that from this point in time he was given more direction about lines of business inquiry to follow. The tribunal finds that if the Claimant was given more direction of this sort at this time, it was in the way of a simple suggestions of

how to improve business. It was not a requirement or an instruction or anything of that nature and it remained open to the Claimant to do as he preferred – which he did.

21. From around August 2013 onward, the Respondent deployed a Mr James Boyles to operate in a Sales Manager role. However, the tribunal does not consider that Mr Boyles' appointment or role had any significant implications for the characteristics of the Claimant's relationship with the Respondent at this time. There is no cogent evidential basis to suggest that the Claimant's autonomy diminished, that he was subjected to any signficant control by Mr Boyles or that anybody thought that Mr Boyles had the power to control the Claimant, nor that the Respondent at this time acquired the contractual power to do any of those things whether through Mr Boyles or anyone else. Rather the Tribunal finds that as at around August 2013, Mr Boyles essentially became the main point of contact for the Claimant within the Respondent. He became the principal person with whom the Claimant had to raise any significant concerns with, for example, the concerns identified at page 53 relating to incorrect commission calculations.

22. In June 2014, the Respondent began to employ Business Development Managers directly. There was undoubtedly some similarity and overlap between what these Business Development Managers were expected to do and what the Claimant was expected to do. After all, they were all expected to develop the Respondent's business through sales. The employment of other people is not something that in itself necessarily would nor in fact did change the *Claimant's* relations with the Respondent. There is no cogent evidence that *the Claimant's* role materially altered at this time or as a result of these appointments, or that the characteristics of *his* relationship with the Respondent were materially altered. Again the Tribunal is not satisfied that there is any adequate or cogent evidence that in around June 2014 the Claimant's relations with the Respondent changed in a way that materially altered the characteristics of the relationship.

23. In December 2014 there were negotiations between on the one hand, the Claimant and Mr Paul Gregory (another Business Development Managers who was characterised by himself and the Respondent as self-employed), and on the other hand, the Respondent. The negotiations were over the employment status and terms of remuneration of the Claimant and Mr Gregory. In essence, the Respondent wanted to alter what it considered to be the existing employment status by making them employees. It offered them each a contract of employment on particular terms. The Claimant and Mr Gregory rejected that offer and preferred to maintain the existing contractual relations. That was because, in their view (which the Respondent does not agree with) they would have been significant financially worse off if they had become employees on the package that the Respondent was offering.

24. It is fair to say that the Claimant and Mr Gregory understood some of the benefits of being self employed such as in relation to expenses and were drawn to them. It is also fair to acknowledge that this was not an entirely one sided bargaining exercise. Each party to the negotiations had significant leverage over the other in one way or another. The Claimant and Mr Gregory were very valuable to the Respondent and selling the Respondent's product was the Claimant's and Mr Gregory's source of income. Ultimately the bottom line of 'how much will I end up being paid', is what drove the Claimant and Mr Gregory to prefer what was characterised as 'the self-employed option'.

25. The Respondent was only prepared to continue to treat the Claimant and Mr Gregory as self employed if they each set up a limited company and contracted with the Respondent through that company rather than directly. In the event, there was some delay in putting this into effect. In April 2015, new contractual relations were entered. The Claimant started a limited company. The limited company contracted with the Respondent and invoiced the Respondent for the Claimant's services.

26. In December 2014 the Claimant and other Business Development Managers including those who were employed were paid a bonus. The Claimant's bonus was the same as the bonus paid to the employed BDMs although this does seem to the tribunal to have been a matter of courtesy and gratitude rather than obligation. It was an *ex gracia* payment.

27. In January 2015 the Tribunal considers that there was a watershed change in relations between the Claimant and the Respondent. Although it has been very difficult to pin point the timing of this watershed, January 2015 is far the most plausible candidate. At this moment that the Respondent declared that it would be exerting much more control over the Claimant and thereafter did so.

28. The best evidence of this is the e-mail at page 70 of the bundle dated 9 January 2015. It records that it had been discussed that the expectation and approach to Business Development Managers would be the same moving forwards regardless of contract and status. The email goes on to set out the various respects in which the Respondent would thereafter be more closely controlling the Claimant and Mr Gregory (e.g. formally assigning them a territory, working closely with the sales manager, monthly reporting, updating outlook with appointments, working 37.5 hours etc).

29. The Tribunal finds that the Claimant was thereafter managed and controlled to a degree that was typical of a senior employee in a field sales role:

    29.1 He had to regularly produce detailed reports to management.
    29.2 There was more intervention from managers.
    29.3 There was more accountability going in both directions.
    29.4 Minimum working hours were suggested and required.
    29.5 Regular one to one meetings with Mr Boyles were required.
    29.6 Formal targets were set and the Claimant was measured against them.

30. Thus, from early 2015 onwards the Tribunal finds that the Respondent's control over the Claimant grew. This continued until the termination of the Claimant's engagement.

Matters leading to termination

31. The Claimant's engagement with the Respondent was summarily terminated on 4 May 2016. This followed an unfortunate series of events in which the Respondent formed the view that the Claimant had been dishonest about the extent of his contact with an employee who was on garden leave.

32. The Tribunal is bound to observe that the underlying issue here was one that could fairly be described as a "storm in a teacup". Mr Halhead agreed with that characterisation of it.

33. Views may differ on the extent if any of the Claimant's dishonesty and the cogency of the mitigation surrounding it. There is no need to go into these matters given the findings of fact as made above, the analysis of the law and conclusions that now follow.

Law

Employment Status

34. The right to claim unfair dismissal pursuant to ss.94 and 98 ERA is subject to s.108 ERA, which provides so far as relevant that the employee must have 2 years' continuous employment at the date of the dismissal.

35. Section 230 ERA defines an 'employee' for the purpose of the act as an individual who enters into or works under a contract of employment.

36. There is no single accepted test for determining employment status. The modern approach is to apply a multi-factorial test. The parties agreed that this was the approach the tribunal should take.

37. The starting point is ***Ready Mix Concrete v Minister of Pensions and National Insurance*** [1968] 2 QB 497 and the dicta of Mr Justice Mckenna. Contracts of service exists if these 3 conditions are fulfilled:

    (1) The servant agrees that in consideration of a wage or other remuneration he will provide his work or skill in the performance of some service of his master.

    (2) He agrees expressly or impliedly that in the performance of that service he will be subject to the other's control and has sufficiently agreed to make the other that master.

    (3) The provisions of the contract are consistent with it being a contract of service.

38. On the issue of control, "the question is not by whom day to day control was exercised but with whom and to what extent the ultimate right of control resided" (per HHJ Richardson, ***White v Troutbeck*** [2013] IRLR 286, upheld by the CA [2013] IRLR 949**)**

39. The modern approach is to regard no factor as necessarily determinative of employment status but to analyse all of the relevant factors before stepping back, looking at the big picture and adjudicating on status.

40. In *Harvey and Industrial Relations, Division AI, Section B. Employees, para 45* there is a helpful list of factors that may be of assistance in analysing the characteristics of a relationship with a view to establishing status. The tribunal referred the advocates to this list and they agreed that it was a helpful one. It includes matters such as:

    40.1 the remuneration and how it was paid,
    40.2 how far the worker invests in his own future,
    40.3 who provided the capital and who risked the loss,
    40.4 who provided the tools and equipment,
    40.5 was the worker tied to one employer,
    40.6 was he free to work for others,
    40.7 how strong or otherwise was the obligation of the worker for work for that particular employer if and when called on to do so,
    40.8 was there a traditional structure of employment in the trade,
    40.9 how did the parties themselves see the relationship,
    40.10 what were the arrangements for payment of Income Tax and National Insurance,
    40.11 how was the arrangement terminable, a power of dismissal smacks of employment.
    40.12 the presence or absence of sick pay, holiday pay and/or pension.

41. Some factors, of course, are more important than others and the weight of each factor may vary by case. Ultimately, it is a question of looking at the overall picture and trying to judge on which side of the line the Claimant falls.

42. Complicated issues can arise in cases in which there is a tripartite contractual arrangement. On the one hand it is clear that where a tripartite agreement is super-imposed over a pre-existing bilateral agreement the imposition of a tripartite agreement is not an absolute bar to an employment relationship, see e.g. ***Catamaran Cruses v Williams*** [1994] IRLR 386. On the other hand see the reflections in ***James v Greenwich*** [2007] ICR 590, especially paragraph 58 about the circumstances in which it is appropriate to imply a contract of employment.

43. Finally the Tribunal notes the important case of ***Autoclenz v Belcher*** [2011] IRLR 820. As the headnote of the law report accurately puts it: *The question in every case is what is the true agreement between the parties… Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other. Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations*

Discussion and Conclusions

44. It is convenient to take January 2011 as the starting point for analysis. It was in January 2011 that the Claimant began working full-time with the Respondent and it was the time at which the contractual relations were agreed in writing.

45. Taking a step back and looking at the big picture painted by the findings of fact, the Tribunal considers on balance that the Claimant was not an employee. The factors identified above at paragraph 17.1 – 17.13 of the findings of fact tend to point away from the conclusion that the Claimant was an employee. The factors identified at paragraph 17.14 tend to point towards that conclusion.

46. On balance the tribunal considers that the factors that point away from employment status are more weighty than the factors that point towards it and indeed the factors that point away from it seems to the Tribunal to be very weighty indeed. The tribunal has had regard to all of the factors and no one factor has been regarded as decisive. Some are, however, particularly weighty.

47. The fact that the Claimant was paid commission only in circumstances in which he was taking the risk of profit and loss in a very real sense seems to the tribunal to be a weighty factor. Indeed, it was the Claimant's evidence that that it was costing him some money to do the job for the first couple of years. He did it because he backed himself to make a success of it in the long term.

48. The Claimant was also paying his own expenses save for a very limited expense of attending some meetings on the Respondent's premises and he was entitled to and claimed no holiday pay, no sick pay and no pension contributions. He was also free to take time off work as he required; he did not need permission.

49. There was also an absence of control, as a matter of day to day fact and as a matter of contract, of a sort that was sufficient to be consistent with an employment relationship. On the evidence it is clear that the Respondent did not control the Claimant to any significant extent (until January 2015) and the Tribunal does not consider that there was contractual power for it to do so beyond requiring him not to be engaged in competitive or conflicting activities.

50. There was a meaningful sense in which the Claimant was running his own business, albeit that it was business within a business, namely the Respondent's business.

51. Having said all of that it's only right to recognise again that the factors do not point all one way and that is why this is a difficult case. Ultimately however the Tribunal concludes that the factors pointing away from employee status are far more weighty than the factors pointing towards it.

52. The next matter for the tribunal to consider is whether, and if so when, there was any material change to the relationship between the parties of a sort that might alter the conclusion that the Claimant was not an employee.

53. In his oral evidence, the Claimant suggested that when Mr Halhead joined the business in July 2013 there was a change in his relationship with the Respondent. However, the evidence about quite how (if at all) things changed was vague. The tribunal could certainly not be satisfied that there was any change in or around July 2013 that substantially altered the characteristics of the relationship set out in detail above. At the highest the Claimant was given advice about lines of business inquiry but this was advice he remained free to accept or ignore. He was still not an employee.

54. In June 2014, the Respondent recruited a number of Business Development Managers whom it employed under contracts of service. Mr Budworth, at one stage, submitted that the Claimant became an employee when the Respondent decided to recruit employed BDMs, which he inferred would have been at least a month prior to actually doing so.

55. The tribunal considers that while there was some similarity between the work which the employed BDMs carried out and the work which the Claimant carried out, that does not of itself point to the conclusion that the Claimant was or became an employee in or around May / June 2014. There was no cogent evidence that the characteristics of the Claimant's relationship with the Respondent – as set out and analysed above - changed when the Respondent decided to and/or when it did recruit BDMs on an employed basis. The Claimant was still not an employee.

56. In around August 2014, a sales manager, Mr Boyles, was appointed. This did not materially affect the relationship between the Claimant and the Respondent. Mr Boyle did not, and did not at this time have the contractual power to, control the Claimant. The Claimant's work-related autonomy was undiminished.

57. There was no substantial change in the relationship between the Claimant and the Respondent until January 2015 when the Respondent declared that it would (p70), and thereafter in fact did, manage the Claimant closely in the same was as it managed its other Business Development Managers who were on any view employees.

58. The Tribunal does incline to the view that from January 2015 onwards the Claimant may have been an employee but it is unnecessary to decide that because even if he was the claim for unfair dismissal must fail.

59. Since the Claimant was not an employee in the period between 2011 and December 2014, his complaint of unfair dismissal must fail regardless of whether he was an employee thereafter. He was dismissed in May 2016 so does not have the requisite qualifying service.

Conclusion

60. The complaint of unfair dismissal must also be dismissed.

Employment Judge Dyal

REASONS SENT TO THE PARTIES ON

13 February 2017

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FOR THE TRIBUNAL OFFICE