VCD

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr C Crooks	**AND**	Mr M Rahman

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON 11 December 2018**

EMPLOYMENT JUDGE VC Dean (sitting alone)

Representation
For the Claimant: in person
For the Respondent: in person

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a worker engaged by the respondent from 23 June 2017 until 19 November 2017.
2. The respondent failed to pay National Minimum wage for the claimant hours worked by the claimant during the period of his engagement by the respondent.
3. The respondent made payment of wages to the claimant that were in a deficit sum of £913.62. The respondent is ordered to pay to the claimant the gross sum of £913.62.
4. The respondent failed to pay to the claimant money in lieu of his accrued entitlement to 39 hours of Working Time Regulation annual leave. The respondent is ordered to pay to the claimant the sum of £292.50.

REASONS

Background

1. The claimant worked as a delivery driver at an Indian restaurant/takeaway known as Panka Walla from the 23 June 2017 until 19 November 2017. Claimant claims to be an employee or worker and that the respondent failed to pay the claimant national minimum wage for the hours that he worked and failed to pay him any entitlement that he accrued to working time regulation holiday pay. Following a period of early conciliation through ACAS the claimant presented a complaint that he is entitled to payment of national minimum wage for the hours that he worked for the respondent and to be paid holiday pay.

Issues

2. At a case management discussion on 28 September 2018 before Employment Judge Gaskell the parties agreed that the issues to be determined by me are:
    a. Whether the claimant is an employee of the respondent
    b. Whether the claimant is a worker for the respondent
    c. Whether the claimant is a self employed contractor?
    d. If the claimant is found to be a worker or employee what are the terms of the claimant's remuneration
    e. How many hours did the claimant work for the respondent?
    f. The total remuneration to which the claimant was entitled
    g. How much remuneration was paid – including whether any payments should be left out of the account
    h. Calculate the shortfall of payments due whether contractually and/or in breach of the NMW.
    i. Is the claimant entitled to payment of Working Time Regulation holiday pay? And if so, how much?

Law

3. I remind myself that the first issue to be determined by me at this hearing is whether or not the claimant enjoyed the status as an employee of the respondent or whether he was a worker or alternatively a self employed independent contractor. If not an employee or a worker the claim will go no further in this Tribunal hearing. If an employee or worker I will go on to consider what payment is due to an employee.
4. Under the provisions of Section 230 of the Employment Rights Act 1996 an employee is defined as an individual who has entered into or works under "a contract of employment". The Act provides a definition of a worker s230(3)(b) who is described as an individual who has entered int0 or works under :

    "any contract, whether express or implied and(if it is express) or in writing, whereby the individual undertakes to do or perform personally web services or never parted the contract the status is

> *not by virtue of the contract that the client or customer profession or business undertaking carried on by the individual; and any reference to workers contract shall be construed accordingly."*

5. I am reminded of the law in Autocleanse Ltd -v- Belcher & Others [2010] IRLR 70 CA. which describes in detail the analysis of the issues where there is a contract or written evidence of contractual terms. This however is a case before me in which there is a paucity of contemporary documentation and no written evidence of a contract reached between the parties.
6. I am reminded that personal service is a necessary but not sufficient factor for a contract of employment to exist, Stevenson LJ in Netheremere (St Neats) Ltd -v- Gardener [1984] IRLR 245:

> "*A degree of control and consistency of other provisions in the contract are the key factors in determining whether employment relationship subsists*".

7. As per McKenna J in Ready Mix Concrete (South East) Ltd -v- Minister of Pensions and National Insurance [1968] 1ER 433 at 439/440 and in Quashie -v- Stringfellows Restaurants Ltd [2012] IRLR 536. It was confirmed that the degree of control exercised over the individual may be determinative in some circumstances. Leigh -v- Chung & Shun Shing Construction and Engineering Co Ltd [1990] IRLR 236 confirms;

> "*the fundamental test to be applied is this: is the person who has engaged himself to perform these services performing them is a person in business on his own account?".*

8. The case identifies factors which may be of importance in determining whether or not someone is self-employed which includes:

> *"Whether the man performing these services provides his own equipment, whether he has his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."*

9. Whilst in Massey -v- Crown Life Insurance Co [1978] 2 ER576 confirmed that the fact that a person who has been obtaining tax advantages by claiming to be self-employed may itself be a factor against allowing him to change that label later. The Court of Appeal in Young & Woods Ltd -v- West [1980] IRLR 201, at 208 confirmed that

an employee should not be stopped from contending that he is an employee merely because he has been content to accept self-employed status for some years (Autocleanse at paragraph 69). However, I am reminded of the citation to Hitchcock -v- Post Office [1980] ICR 100 in Commissioners of Inland Revenue -v- Post Office Ltd [2003] IRLR 199 at paragraph 14; that an individual who carries on a business with employees of his own tends to indicates "*very strongly*" that he is not employed under a contract of service.

10. This definition worker is regulation 2(1) of the Working Time Regulations 1998 and in s.54(3) of the National Minimum Wage Act 1998.

11. In Addison Lee Ltd v Gascoigne EAT 0289/17 the EAT held tribunal's finding that a cycle courier was a worker under regulation 2 WTR, accidentally self-employed contractor is entitled to statutory holiday pay. The key element in that case was the mutuality of obligation.

12. Similarly, in Pimlico Plumbers Ltd v Smith [2018]ICR 1511 the Supreme Court held that the dominant feature of contract was the obligation of personal performance albeit in the case one with a very limited right of substitution which was not inconsistent with worker status.

Evidence

13. In hearing this case neither party has been represented. I have heard evidence from claimant who represents himself. For the respondents I have heard from Mr Mohammad Asadur Rahman, the restaurant manager for the respondent who submitted a witness statement, and from Mr Mohammed Mahbubur Rahman his brother who was the business operator at the time. Mr Mahbubur Rahman did not present a witness statement as he had not considered himself to be a witness in the case against him as owner of the business. In addition, I have been asked to read a statement from Mr Samuel Wellings who has not attended to give evidence, I give his evidence very little weight as it has not been available to be questioned by the claimant or myself.

14. I have been referred to a small number of documents in this case. The claimant has produced a bundle which is not paginated it includes a general summary of the dates and hours worked by the claimant for the respondent. I have been referred to a separate bundle for the respondent, similarly not paginated, which included a detailed schedule of the hours worked by the claimant or the respondent.

Findings of Fact

15. The respondent, a small family run Indian restaurant and takeaway, is based in Walsall. The restaurant provides customers with the dine in service as well as a home delivery service. The takeaway service

provides free delivery on orders over £12 within a three-mile radius. Over 3 miles deliveries incur a charge. The opening hours business Sunday to Thursday 5.00p.m. to 1.00p.m. and on Friday and Saturday 5.00p.m. to 12.00a.m.

16. Mr Mahbubur Rahman met the claimant when the claimant was working at another restaurant. Subsequently Mr Mahbubur Rahman met the claimant again and offered to give the claimant a job as driver delivering takeaway meals. The wage agreed between the two men was that on the nights that the claimant worked he would be paid £20 per shift and £1 for each delivery within a three-mile radius and £2 delivery beyond that radius. Since 13 October 2017 the payment of the shift amount was increased to £25.00 per shift in addition to the delivery Top up.

17. At no time while the claimant worked for the respondent was it agreed by the parties that the claimant would be paid a mileage allowance or fuel expenses incurred. The claimant suggests that the Delivery Top-up payment should be excluded from any calculation of wages paid to him in calculation of wages counting toward the national minimum wage if that sum is due to him. I find that the bargain that Mr Rahman struck with he claimant was one in which no agreement was made to pay fuel expenses and indeed the claimant did not seek at any time to claim them.

18. Claimant worked for the respondent from 23rd June 2017 until 19 November 2017. The claimant describes himself as a chef working for Keir Homes and sometimes for Wolverhampton University. Previously he had worked as an agency chef from 2003 and he also worked as a chef for Essington Manor, a care home. Previously the claimant had worked for a Chinese restaurant. The claimant asserts that in all his previous jobs he had been employed as an employee or a worker.

19. When working for the respondent the claimant did not wear a uniform worn by the respondent's employees who worked in the restaurant. Sometimes when he arrived to work for the respondent, directly after finishing one of his other jobs, the claimant wore chef's whites however it is agreed that the claimant never worked as a cook for the respondent in their kitchen. The respondent's employees wore a uniform for their employer in contrast to the claimant.

20. When driving for the respondent the claimant used his own car, a Mercedes. The claimant was not paid travelling expenses or reimbursed the cost of fuel he used. In addition to the flat rate of pay agreed for each shift he worked, the claimant was paid either £1 or £2 'delivery Top-up' for each delivery, dependent upon whether the delivery was within the 3 miles radius for free customer deliveries or not.

21. The claimant's first day working for the respondent was Sunday, 25 June 2017. The summary of the days and hours worked by him provided by the claimant is one which sets out general propositions. The claimant asserts that his hours of work were Friday and Saturday starting at 5:30

and continuing until 00:30a.m. and on Sunday 5:30 to 00:00 midnight. I prefer the account given by the respondent in relation to the timing of the claimant's hours of work that reflect the opening hours of the business that are confirmed on their take-away menu and take account of the fact that deliveries would not feasibly be made at the time the business opened and did not extend beyond the closing times. I find that the hours of work usually undertaken by the claimant were Friday and Saturday 17:30 to 00:00 and on Sunday 17:30 – 23:30. The schedule of the hours worked by the claimant include the details of the occasions when the claimant arrived late or left early or did not attend.

22. The respondent has prepared a schedule which has logged the claimants start and finish times on shift and notes when the claimant failed to attend to make deliveries at all or if he arrived late. The claimant in replies to questions has confirmed that he on occasions arrived late and there were occasions when he did not attend for work at all. In explanation the claimant has stated that he sometimes did not attend work as he could not work when he was having family problems, including rows with his 'missus' because he was gambling and he explained that if he was not in work on a day he would tell Mr Rahman that he was working elsewhere or had problems with his car. The claimant confirms that whatever hours he worked on a shift he was always paid the flat rate and the top-up payment that reflected the deliveries and there was not a deduction made from his pay. It is clear that the claimant was not able to send a substitute drive to complete the deliveries on his behalf if he was not able to work.

23. I find that although on three occasions the claimant was absent from work on days when he was scheduled to work, 1 September, 5 November and 2 December those days marked as absent were not taken by the claimant as holiday and the claimant was not paid when he was absent for the whole shift. The claimant was either late or left early on eight occasions however he was still paid the full 'shift amount' in addition to the Delivery Top-up.

24. The claimant confirmed in his evidence that he was paid in cash and received a gross sum and no tax or national insurance was deducted. The claimants account is that he wanted to be paid national minimum wage and tax and N.I to be deducted as it was in his other employments.

25. I find that the claimant, while acknowledging he did not always arrive at work on time or at all, did not reflect that fact in the summary of the hours he is claiming that he worked for the respondent. In light of the inconsitency between the claimants own evidence and the records he seeks to rely upon I prefer and accept the record of the hours worked by the claimant that has been prepared by the respondent as being the accurate record of the sums paid to the claimant. Likewise the respondent has made a record of the top-up delivery payment made and distinguishes between delivery Top-up payments of £1 and £2 dependant upon the sums paid in contrast the claimant making not

detailed breakdown of when top up delivery payments were made to him. I find that the claimant bore any expense he incurred for fuel when working for the respondent.

26. The contractual arrangements agreed between the parties were not reduced to writing. The claimant when attending the respondent's premises alerted them to the fact he was available in the car outside the premises by sending a text to say that he was available to make a delivery. On returning from deliveries claimant texted his return or went into the restaurant as he chose. Whilst working for the respondent the claimant was often accompanied in his car by his partner and their child. Only the claimant went into the respondent's premises to collect the food to be delivered.

27. Although the claimant did not wear a uniform while working for the respondent, he was given a heat bag to keep the food deliveries warm.

28. Other than informing the respondent that he was at the premises when he arrived at the start of a shift or returned from a delivery the claimant was not under the direction of the respondent other than to make the delivery to the customer, the route he chose was of his choosing. It is evident that the claimant was somewhat resentful of another driver who was a direct employee of the respondent who drove Mr Rahman's own car to make deliveries. The claimant considered that the other driver was treated more favourably than him as he thought the deliveries the employee made were closer than those allocated to the claimant and he was not able to complete as many deliveries as his colleague and was therefore unable to maximise the delivery top-up sums that he received.

29. In the latter weeks of the claimant working for the respondent the claimant asked to be made a direct employee of the respondent and to be paid the National Minimum Wage. Mr Rahman maintains that the claimant was not an employee and was a self employed person and was not entitled to be paid the national minimum wage, he had agreed to work for a flat payment, latterly at the rate of £25 per shift and he was paid that amount regardless of whether he arrived late or left the shift early.

30. I find that although there is evidence of the claimant providing his own tools, in so far as he drove his own car when making deliveries and wearing his own clothes rather than a uniform at work, I do not find that the claimant was in business on his own account. When working for the respondent to make deliveries he did not work for anyone else who directed him to make the deliveries and he was not in business on his own account and he was not able to send another driver in his stead when he was not able to work.

31. The claimant was directed when and where the deliveries of food were to be made to customers. The claimant was not in business on his own account. If the claimant arrived late for the shift or did not attend at all Mr

Rahman confirmed in his evidence that he reprimanded the claimant and warned him that if he did not attend for his shift, he would be terminated. In particular as a result of the claimant's late arrival and absences Mr Rahman told the claimant that if there were further unauthorised and unplanned absences he would be dismissed if he did not commit to the obligation to work the shift allocated to him. Amongst other things the direct nature of Mr Rahman's direction of the claimant leads me to conclude that although not integrated not the respondents business to the full extent of an employee the claimant was undoubtedly a worker for the respondent.

32. In the event after the claimant was absent on Saturday 2 December as he informed Mr Rahman that he would be working elsewhere on that day, Mr Rahman decided to terminate the claimant's employment as a delivery driver for the business. The working relationship between the claimant and the respondent had clearly soured and the claimant has pursued his claim for payment of the difference between payments he received and the national minimum wage and for accrued and untaken holiday pay under the Working Time Regulations.

Conclusions

33. In light of the findings of fact I have made, in particular that for most of the shifts that he worked the claimant was accompanied by his partner and child, I find that though not integrated into the respondent's business as an employee, the claimant was not in business on his own account.

34. I have had regard to the authorities and the guidance provided by them and the statutory provisions relating to the status of employees and workers. The claimant was not in business on his own account. The claimant provided his own car to make deliveries for the respondent however he took no financial risk in working for the respondent. The only way to increase the shift amount was to make more deliveries and that was in the control of the respondent. Moreover, as long as the claimant attended for the substantial part of the shift, the shift amount was paid to the claimant with no deductions being paid for late arrival or early departure.

35. The claimant made no investment in or management of the business and performing the task that he was engaged to do was as directed by Mr Rahman. At all times the work that the claimant was required to do was at the direction of Mr Rahman and was undertaken on behalf of the respondent company, the claimant was not independently contracting with the customers of PankaWalla.

36. In conclusion I find that the claimant was at all material times, for the period 25 June 2017 to 3 December 2017 a "worker" as described by s203(3)(b) of the Employment Rights Act 1996.

37. Having considered and adopted the Schedule provided by the respondent detailing the claimant's hours and pay I find that even though

the shift amount was increased from £20 to £25 from 13 October 2017 the claimant was paid less than the national minimum wage for the hours that he worked.

38. The relevant rate of the national minimum wage in the relevant period was £7.50. Having analysed the respondent's schedule and having identified the Total gross pay made to the claimant for each shift worked I find that on only two occasions was the total remuneration paid to the claimant for a shift in excess of the minimum wage. The claimant worked a total of 418.75 hours for the respondent over the relevant period. Based upon pay at the correct national minimum wage of £7.50 the correct payment for hour ought to have been £3140.62. The total remuneration paid to the claimant which was calculated by reference to a flat rate for the shift and the Delivery Top-up the claimant was actually paid £ £2227.00. I find that the wage paid for the shift worked was the total sum paid, the Shift amount and the top-up all of which are wages and not expenses as defined by s27 Employment Rights Act 1996. The shortfall of the payment below the national minimum wage across the relevant period I find was a shortfall in payments due in the total gross sum of £913.62.

39. I turn to the claimants claim that he is entitled to be paid in lieu of accrued and untaken working time regulation holiday pay. I have identified that the claimant worked an average of 17 hours per week and in the twelve weeks immediately preceding the termination of the working arrangement, the claimant worked 204 hours which, if paid as they ought to have been at the minimum wage, would have been a payment of an average of £127.50 a week.

40. Applying the entitlement to Working Time Regulation leave the claimant had an accrued entitlement to 39 hours leave to be paid at the rate of £7.50. The respondent has an indebtedness to the claimant in lieu of entitlement in the sum of £292.50.

Employment Judge Dean
Signed: 27 July 2019