Case Number: 2301467/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE G PHILLIPS**

BETWEEN:

Ms K Minney **Claimant**

AND

Shinkyu Martial Arts **Respondent**

FULL MERITS HEARING

ON: **24 April 2019**

APPEARANCES:
For the Claimant: **In person**
For the Respondent: **Did Not Appear**

JUDGMENT

The decision of the Tribunal is that the Claimant was not an employee of the Respondent or a worker so the Tribunal has no jurisdiction to entertain her complaint of unpaid wages or her application for holiday pay.

REASONS FOR THE TRIBUNAL'S JUDGMENT

Background

1) This was a Full Merits Hearing to determine the Claimant's claim, as set out in her ET1 Claim Form dated 24 April 2018, that she was owed wages by the Respondent, amounting to £700. In order to bring this claim before the Tribunal, the Claimant needed to establish that she was an employee (or a worker) of the Respondent. The nub of the Claimant's claim is that she worked a large number of hours doing work for the Respondent, that there was an agreement that she would be paid for this work, that she did this work and that the Respondent has failed to honour that agreement.

2) If she is an employee, (or a worker), the Claimant also asked for any holiday pay that she may be due. She calculates this as amounting to a total of £688 in regard to the hours she worked canvassing [210 hours: £408]; video production [£40]; and marketing work [£240].

3) The Respondent in its ET3 asserts that the Claimant is not an employee but was rather a self-employed independent contractor. Further and in event, it says that she is not entitled to the outstanding sum of £700.

Issues

4) As I have said above, the nub of the Claimant's claim is that she has not been paid for work that she did for the Respondent. She ticked the box in her ET1 to the effect that she was owed for "other money". At paragraph 8.2 she elaborated on this to say she was "not paid for her for final month's work with Shinkyu Martial Arts".

5) The Respondent in its ET3 firstly disputes that the Claimant had been engaged on an employment basis – it said that the Claimant was a self-employed freelancer, who was engaged to complete a project. It disputes that the Claimant was it's Marketing Manager. The Respondent does not dispute that there was an agreement with the Claimant that she would be paid £2,400 to "kick start the online marketing campaign; that this would consist of a budget of £1,200 for the first month and £400 for the next 3 proceeding months. This was to cover her personal income and advertising expenses". It does dispute that this project had been delivered as had been requested and therefore has declined to pay the balance.

6) The Claimant maintains that she completed every task that had been discussed. She says that she is owed the balance of the agreed budget of £700.

7) In order for the Tribunal to have jurisdiction to hear this claim, whether it is put as a "protection of wages" claim, a breach of contract claim or an arrears of pay claim, the Claimant first needs to establish that she is an employee or a worker. A contractual liquidated damages claim can be brought before an Employment Tribunal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623**.** If the claim is brought as a contract claim in an Employment Tribunal under the 1994 Order, it requires that the claim the claim arises or is outstanding on the termination of the employee's employment. If there is no employment, then there is no basis for a breach of contract claim. The jurisdiction to hear a claim for wages or arrears depends essentially on the individual being a worker [see section 3 Employment Rights Act 1996].

8) If the Claimant fails to establish that she is an employee or a worker, but rather is an independent freelance contractor, then the employment tribunal does not have jurisdiction to deal with her complaint. However, she will still have the option of suing for a breach of contract in the County Court, where the limitation period is 6 years.

9) Any claim for holiday pay will also depend on whether the Claimant was an employee or a worker; if she was not, then she will not be entitled to paid holiday. In any event, holiday pay claims have to be brought within a three month period from the date of dismissal / termination of the contract.

10) In this case, the Claimant had not mentioned in her ET1 making a claim for holiday pay, nor that she might be a worker, so these applications are being

made very late in the proceedings.

Evidence

11) No one from the Respondent attended the hearing. The Claimant had prepared a small bundle of relevant documents and evidence on which she wished to rely. In addition, I had the ET1 and the Respondent's ET3. The Claimant had also included in the bundle some exchanges between herself and Jason Smith of the Respondent before and after their relationship ended, the latter of which [tab 2] set out very robustly and clearly the Respondent's challenges to the Claimant's claims (1) that she was an employee; and (2) that she was owed money.

12) The Claimant affirmed and gave oral evidence. I was able to ask her questions of my own. The Claimant made a number of submissions, based on the facts and circumstances, as to (1) why she believed she was an employee; and (2) why she was entitled to be paid £700. Her principal argument was that as a matter of practicality, Mr Smith treated her as an employee. In brief, she also submitted, amongst other things that (i) she was not running a business and that she had completed an online HMRC assessment which showed she was not an employee [tab 5e, p 4]; (ii) she undertook no financial risk [tab 1] and had not quoted for the job; (iii) materials and equipment were provided by the Respondent; (iv) she was fully integrated into the business; (v) she worked in a number of different roles; (vi) the word "employee" was used by Mr Smith [tab 5b, c]; (vii) Mr Smith controlled her work on the video and other matters [tab 5g, f, h] ; she had a script for canvassing provided by the Respondent [tab 5l].

13) The Claimant did not refer me to any case law. By way of explanation and clarification, I have included mention below of a small number of cases on which I have relied in order to underpin (1) how certain matters should properly be considered by an employment tribunal; and / or (2) where those cases establish key legal principles which appear to me to be relevant and material here.

Brief findings of relevant to the main issue for determination

14) The Respondent, of which Mr Jason Smith is the CEO, is a martial arts training and instruction club, based in and around East London / Essex. The Claimant says, in her ET1, that her employment with the Respondent began in promotion and promotional film making, after which she was offered a position as Marketing Manager. The Claimant initially worked for the Respondent doing door-to-door canvassing. She had seen an advert for this on Gumtree. She did this most days during evenings for a 2.5 hour shift, for which she was paid an hourly rate. She did this on a regular but casual basis from January 2017 until about August 2017. The Respondent also asked her to train new canvassers.

15) In late April / early May, the Claimant also did some filming for the Respondent's website. For this she was after some dispute provided with a lump sum payment of £300. Most of the filming equipment was provided by the Respondent [including a shoulder rig, the camera, a tripod, batteries and a hard drive]. Mr Smith provided some detailed comments and thoughts on the contents of the video [tab 5f, page 9].

16) The Claimant says she started the Marketing Manager post on 5 May 2017. She says although this position was initially offered on a commission basis, after discussion with Mr Smith, it was agreed that she would have a budget of £2,400, which included her salary and money to spend on online marketing: "the percentages of spending I could decide myself". This budget was to be spent "over the coming months". The Respondent does not disagree that it was agreed that the Claimant would be paid £2,400 to "kick start the online marketing campaign; that this would consist of a budget of £1,200 for the first month and £400 for the next 3 proceeding months. This was to cover her personal income and advertising expenses". It disputes, however, that the Claimant was engaged as an employee.

17) On 22 May [tab 1c] the Claimant sent Mr Smith her suggestions for the marketing campaign. This referred to the need for there to be "impeccable communication" otherwise "falling behind schedule and unsatisfactory results will be imminent". The Claimant stated that if the six points in the email were agreed, she would draw up a more in-depth plan, "which will encapsulate everything that needs to be done, allowing me also to quote what I think should be paid for this work".

18) The start of the online market campaign was postponed on a number of occasions: (1) by Mr Smith from June / July to August; (2) by the Claimant from August to October after her hard drive failed [tab 7a]; and (3) then to the end of December. The Claimant was paid £1,100 in two tranches in October and November 2017.

19) The Claimant says that there were a number of practical problems over the months – not least, on her account, that Mr Smith often did not respond to her suggestions or queries for days on end [tab 8]; that she was not given the necessary key logins for the administration of the various online accounts [tab 6]; that Mr Smith went on holiday in December, giving her one day's notice. In the end, the launch did not happen until 27 December, when Mr Smith was on holiday. Over this period, the Claimant took instructions from Debbie Harris, who she described as the manager of the Respondent. Although the Claimant had initially offered to use her own card to pay for the online marketing and advertising costs, in the end she decided not to do this and Ms Harris paid for these, which came to about £300, with her own credit card. The Claimant says that when Mr Smith returned, he indicated that the remainder of the outstanding agreed monies would "perhaps be paid, once the results of the campaign had come through". The Claimant says this was not what had been discussed and agreed – it was not a "results based" arrangement. Mr Smith disputes that the job had been done as had been requested and declines to pay the balance. The Claimant maintains that she completed every task that had been discussed. She says that she is owed the balance of the agreed budget of £700. This sum allows for an additional sum of £300 to be spent in the final weeks on paid marketing.

20) The Claimant submitted evidence that she completed the work and that delays were primarily [other than the August delay occasioned by her hard drive crashing] due to Mr Smith's failure to respond. She produced analytical evidence to show the impact of the marketing campaign and the spike in page views that

resulted from it. She said there were some additional conversions and sign ups. She says her work laid the foundation for the future.

Determination of the issues

1. The law relevant to the issue of the Claimant's status

Employment status

21) The Claimant has the burden of proving (on the balance of probabilities) that she was an employee.

22) Not all persons who perform work for others are employees i.e. employed under a contract of service. Some are workers and some are truly independent contractors who work under a contract for services. It is often difficult to distinguish between these various contracts. It can be difficult to distinguish between a worker and an employee and between a worker and those who are to be regarded as carrying on a business.

23) Section 230(1) of the Employment Rights Act 1996 defines an employee as "an individual who…works under…a contract of employment". Section 230(2) defines contract of employment as "a contract of service…whether express or implied and (if it is express) whether oral or in writing".

24) Over the years, courts and tribunals have formulated a variety of tests to identify the existence of a contract of service. These tests have included what is known as the "control" test; the "integration" test and the "economic reality" test. The integration or organisational test included looking at the degree of integration of a worker into the employer's organisation. In *Hall (Inspector of Taxes) v Lorimer [1994] ICR 218* the Court of Appeal emphasised that the object was to paint a picture from the accumulation of detail and to then stand back and make an informed considered qualitative appreciation of the whole. No single factor is of itself decisive. However, there is an irreducible minimum without which there cannot be a contract of employment and that minimum includes control, mutuality of obligation and personal performance.

25) The recognised modern test is now a multiple or mixed one under which a Tribunal must weigh up all the relevant factors and decide on balance whether an individual is employed under a contract of service or engaged under a contract for services. There is no one single factor that can be paramount in determining this. Recent cases have emphasised in particular, the importance of the existence of mutuality of obligation between the parties, whereby it has been said that in a contact of service an employee is under a continuing obligation not just to do the work given to him but to take work when offered and correspondingly the employer was bound not just to pay for work that was done but also to continue to make work available.

26) McKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 1All ER 433* stated that a contract of service existed if three conditions were fulfilled: (a) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and

skill in the performance of some service for his master (mutuality of obligation i.e. to provide work and personally do the work); (b) the servant agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make the other master (control); (c) the other provisions of the contract are consistent with it being a contract of service.

27) Once it is accepted that a contract exists, it is necessary to look at the *nature* of the mutual obligations. For a contract *of employment* to exist there needs to be an obligation on the organisation to provide work and a corresponding obligation on the individual to perform the work: mutual obligations on the employee to work personally for another, and on the employer to pay for the work.

28) Looking at control, McKenna J described control as including "the power of deciding the thing to be done, the way, the means, the time, and the place". The Court of Appeal in *Montgomery v Johnson Underwood [2001] IRLR 269* confirmed that for a contract of service to exist there had to be control, that control is a separate factor and no less important than mutuality of obligation when considering whether there is a contract of service. Control requires an ultimate direct authority over an employee in the performance of his work. Control in itself however is not conclusive: an independent contractor can agree to submit himself to the same control as an employee without actually becoming an employee.

29) Other matters which an employment tribunal must consider when looking at the overall picture include how is the individual paid? Who pays tax and national insurance? Who provides any tools and equipment? How integral to the business is the individual's role? Is the individual paid for sickness and holiday? Is the individual subject to disciplinary and grievance procedures? Is the individual a member of a company pension scheme and where does the economic risk in the relationship lie?

<u>Worker status</u>

30) A worker is defined under section 230(3) of the Employment Rights Act 1996 to mean: an individual who has entered into or works under (or where employment has ceased worked under) (a) a contract of employment; or (b) any other contract, whether express or implied and if it is express (whether oral or in writing) whereby the individual undertakes to do or perform personally any work or service for another party to the contract who status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by that individual.

31) There are four requirements that need to be satisfied in limb (b): (a) the worker has to be an individual who has entered into or works under a contract; (b) with another party for works for services; (c) the individual undertakes to do or perform personally the work or services for the other party; (d) the other party must not by virtue of the contract have the status of a client or customer of any business or profession or undertaking carried on by the individual who is to perform the work or services.

32) The EAT in *Byrne Brothers (Formwork) Limited v Bard [2012] IRLR 96* said: "Thus the essence of the intended distinction must be on the one hand workers whose degree of dependence is essentially the same as that of employees and on the other contractors who have a sufficient arms length and independent position to be treated as being able to look after themselves in the relevant respects…drawing [the] distinction [between workers and independent contractors] will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effective limb (b) is…to lower the pass mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might do so as workers".

33) Elias J in *James v Redcats (Brands) Limited* said that there are three elements to the definition of worker first there must be a contract to perform work or services, second there must be an obligation to perform that work personally, third the individual will not be a worker if the provision of services performed in the course of running a profession or business undertaking and the other party is a client or customer.

Discussion and conclusions

34) I have looked at all the factors surrounding the relationship between the Claimant and the Respondent in this case, in order to determine whether she was working under a contract of service or a contract for services. In reaching my decision, I considered, but not exclusively, elements relating to control, mutuality of obligation and personal performance, as well as other factors, as identified below, that I regarded as relevant.

The nature of the contract

35) In this case, while there was no formal written contract, there is evidence in an email of 10 May 2017 (#1A) setting out the nature of the contractual arrangement that was in place here. In this case, while there was some movement away from the original time line that was envisaged in that email, the bulk of the matters set out were carried out. I saw no reason to go behind what was reflected in the 10 May 2017 email.

36) That email refers to a budget and a project. It does not reference employment per se or salary or contain any language that one might expect in a contract of employment. There is no reference to hours or rates of pay or duration; there is no specified start or end date, no reference to notice. There is no suggestion that the Claimant was to be subject to any disciplinary rules. The agreement relates to a specific project or task, in regard to an online marketing strategy, in regard to which it appears that the Respondent is relying on the Claimant's expertise. This does not appear, in my assessment, to be on its face a contract of employment or for a worker. It is much more the language of an single independent business arrangement.

Mutuality

37) In a contract of service an employee is under a continuing obligation not just to do the work given to him but to take the work when offered and correspondingly the employer is bound not just to pay for work that is done but also to continue to make work available. In *Carmichael and Leese v National Power Plc [2000] IRLR 43,* the House of Lords described the requisite minimum of mutuality capable of forming a contract of service as being an obligation on behalf of the potential employer to provide work to the individual with remuneration and an obligation upon the individual to undertake it. The real issue is whether the employed person is required to accept work if offered or whether the employer is obliged to offer work if available. It was clear on the facts here that while the Claimant was under an obligation to carry out the marketing task, there was no obligation imposed as to how she would do that work. It also seemed to me that she felt she had some ability to delegate tasks as she considered asking her cousin to do proof work. In terms of mutuality of obligation I was not satisfied that there was an obligation on the Respondent to provide work and a corresponding obligation on the Claimant to accept and perform the work offered. This was a one-off task. That is not to say that such single purpose, short term tasks may not be undertaken by utilising an employee / employer arrangement, just that I do not find that to be the case on the facts here.

Control

38) The control test rests on the premise that an employer has a great deal of day to day control over the work of an employee, whereas an independent contractor will have a large discretion over how and when to do the work. A worker will sit somewhere between these two “norms”. Considerations here include a duty to obey orders, control over hours of work, control over hours of holiday, supervision as to the mode of working, provision of own equipment.

39) Here, it seemed to me that the Respondent could not require the Claimant to do any number of hours on any given day or week. She was free to spend as much or as little time as she wanted. She had a budget and it was up to her how that was spent. For example, she suggested that there could be a soundtrack, and that she would pay for this out of the budget. She suggested that her cousin might be paid to do some proof reading, and was willing to pay him out of the budget. In practice, I find that the Claimant had considerable day-to-day control of her own work. While there was a dialogue between her and Mr Smith, about certain aspects of the marketing campaign, the Claimant was essentially left to her own devices as to what she did and how she did it.

Other considerations

40) This was a case where the Respondent did not have an office base, so the Claimant would not have been able to work in what might be described as a typical way, in terms of coming into an office. That does not of itself preclude there being an employer / employee relationship: many people work from home under an employment relationship.

41) The Claimant pointed out that, amongst a number of matters that she relied on, that

i) she had had for some time a regular pattern of work wile doing the canvassing
ii) she had been given a uniform
iii) some elements of her equipment were provided by the Respondent (for example a microphone, a tripod, a camera)
iv) she was allowed free access to classes and provided with the relevant garments
v) Mr Smith exercised a considerable degree of control – see for example his comments on the film
vi) there are references made to 'employment" in correspondence between her and Mr Smith;

42) I have taken note of this points and weighed them in the balance. I also take account of the fact that the Claimant had not just done this work for the Respondent in isolation – she had worked on a regular, albeit casual, basis, canvassing, for which she was paid a regular hourly rate. She also was a team leader of a group of canvassers. It was clear to me, however, that it was in this latter capacity that she had a uniform, and it was in this capacity that she was allowed free access to the classes. She was not obliged to wear the uniform while she was doing the marketing project.

43) Further, she had made and been paid for making, a film for the Respondent, which was used to form the basis of a number of promotional videos which are still being used by the Respondent. It was, however, principally for this task that she had been given material and equipment by the Respondent. Indeed, for the marketing task, when her computer broke down and her hard disk failed, she took it upon herself to get these repaired at her own cost. In my judgment the way the budget and payments were structured, in particular the fact that it was up to the Claimant as to how the budget was spent, so that she was willing to consider paying her cousin to do the proof reading work on the website, and was thinking of paying for a soundtrack, was more suggestive that the economic risk of this task lay with the Claimant. Likewise, that she paid for the hard disk repair.

44) Other matters that I found to be significant in terms of determining whether the Claimant was an employee or a worker, were:

(i) while the Claimant in her ET1 does refer to being in employment, she also refers to the fact that the agreed budget would include both her salary and the marketing spend, "the percentages of spending I could decide myself";
(ii) this was a project based task of limited duration;
(iii) there was no written contract of employment, there were no notice provisions and there was no suggestion or discussion that the Claimant would be paid for sickness and holiday, or would be or was subject to any disciplinary and grievance; policy;
(iv) there was no suggestion that this was a PAYE arrangement;

(v) the Claimant provided her own computer for the marketing project;
(vi) the Respondent's business was in martial arts instruction; the marketing project was ancillary to this: it was not in any way integral to the business;

Conclusion

45) Having considered all the matters set out above and weighed and balanced them as seemed to me to be appropriate, I then stood back from the detail and considered their overall effect. Having done so, I came to the conclusion that the manner in which the Claimant performed her work for the Respondent, and the arrangements that had been put in place militated very strongly against any relationship of employer and employee or worker existing between the parties but that the Claimant was rather an independent freelance contractor, where the Respondent was in effect a client or customer.

46) I have borne in mind what the court said in *Byrne Brothers*, namely that drawing [the] distinction [between workers and independent contractors] will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) of the test "is…to lower the pass mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might do so as workers". I was satisfied none the less that on the facts here, the Claimant was not a worker, but was rather an independent contractor for the purposes of the marketing project.

2. The late applications to make (1) a holiday pay claim; and (2) to make a claim of being a worker

The law around late applications

47) The Tribunal has power to grant leave to amend a claim under its general case management power in Rule 29 of the Employment Tribunal Rules of Procedure 2013. Some general principles as to how an employment tribunal should approach an application to amend and guidelines for exercising that power are set out in the decision of the EAT in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661. In essence, the EAT said it was impossible and undesirable to attempt to list the relevant circumstances exhaustively but that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]", before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it". This approach was approved by the Court of Appeal in *Ali v Office of National Statistics*, [2005] IRLR 201. One important matter for the purposes of this case, is that the EAT in *Selkent* pointed out that applications to amend are of many different kinds, ranging, on the one hand,

from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. A tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new course of action. Where a new complaint and cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. An application should not be refused solely because there has been a delay in making it. Delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made.

48) A distinction can be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence. In *TGWU v Safeway* (UKEAT/0092/07) it was stated, "… amendments that involve mere re-labelling of the facts already pleaded will in most circumstances be very readily permitted." In deciding which category a proposed amendment falls, regard must be had to the whole ET1 (*Ali v Office of National Statistics).*

49) There are certain basic rules for calculating the period of time allowed for presenting claims to an Employment Tribunal. Generally claims must be made within three months of the date of termination of employment. Claims for holiday pay are made pursuant to Regulation 30 (2) (a) of the Working Time Regulations and must be made within three months of the "effective date of termination. If a claimant seeks to bring a complaint after the normal three month time limit has expired, a Tribunal has a discretion to extend the time for the bringing of a claim within such further period "as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practical for the complaint to be presented before the end of the period of three months". These time limits can be extended by the early conciliation regime.

50) The onus of proving that presentation in time was not reasonably practicable rests on the Claimant (*Porter v Bandridge Limited [1978] ICR*). Where the discretion on whether to extend an out of time claim is based on the "reasonably practicable" test, in *Palmer v Southend-on-Sea Borough Council {1984} IRLR 119,* the Court of Appeal concluded that "reasonably practicable" does not mean reasonable, which would be too favourable to employees and does not mean physically possible, which would be too favourable to employers, but means something like "reasonably feasible".

51) A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. In *Porter v Bandridge*, the majority of the Court of Appeal ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. Tribunals are rarely sympathetic to the notion that claimants were wholly ignorant of their rights [see for example *Avon CC v Haywood-Hicks* [1978 ICR 646]. Likewise ignorance

of time limits when a claimant is generally aware of his or her rights will also rarely be acceptable as a reason for delay.

Discussion and conclusions

52) In her ET1, the Claimant says her "employment" stared on 05/05/2017 and ended on 97/01/2018. She presented her ET1 having obtained a conciliation certificate and no issues arise about the original timing of the claim. The claims for holiday pay and that the Claimant is a worker are new, separate, claims, albeit ones that are ancillary to whether the Claimant is an employee and arise out of the same factual scenario. A holiday pay claim has its own statutory basis. This is not simply a case of relabeling of facts. There has previously been no suggestion made that if the Claimant was an employee she was entitled to holiday pay. The financial details of this claim will not be known to the Respondent. The box claiming this in the ET1 was not ticked. While the Claimant had raised the possibility of a claim for holiday pay in an email to the Tribunal in early April, she had not previously raised the fact that she might be a worker. This was raised for the first time during the hearing. This was not a claim that the Respondent will have been aware of, although again it is in many ways a corollary of and ancillary to the dispute that exists as to whether the Claimant is an employee or is self-employed.

53) In this case, the Claimant first raised the issue of holiday pay by email to the ET shortly before the hearing. The Claimant explained that this was the first time she has been aware that she might have such a right. She explained she had, on several occasions during the course of this litigation, consulted and taken advice from CABs. She had not found this to be a very satisfactory experience. No-one had mentioned to her the possibility of a holiday pay claim.

54) There is no issue here that there was no claim made for holiday pay in the ET1 and nor was any mention made that the Claimant might be a worker. I must in the first instance be satisfied that (1) it was not reasonably practicable for these complaints to be presented before the end of the three month period; if I am so satisfied, then (2) I must be satisfied that the claim is presented within such further period as is considered reasonable.

55) With regard to the first part of the test, the only explanation from the Claimant as to why the holiday pay claim was presented so late and why it was not possible for her to have submitted it with in the three-month period, was that she was unaware of the possibility of bringing such a claim. While I have some sympathy with the Claimant's predicament here, as the right to the holiday pay would only arise if she were a worker or an employee and so was subsidiary to her main claim, which was for money she was owed, it does seem to me that it was not reasonably feasible to have made this claim at the time the initial ET1 was submitted. While employment tribunal time limits are meant to be strictly enforced, and ignorance of the law or one's rights is not generally sufficient to displace time limits, the Claimant here was completely unaware that if she succeeded in her claim to be an employee, that would give rise to an additional and further claim beyond her money claim. I was satisfied therefore that it was not reasonably practicable for a holiday pay claim to have been presented before the end of the three-month period. Therefore, I have considered what might be a

suitable period within which to make such a claim. From the oral evidence given by the Claimant she notified the Employment Tribunal once she became aware that she might have such a claim. She could be said therefore to be have acted as expeditiously as possible in regard to this claim. The main disadvantage that pertains to the Respondent, arises as much from the fact that no-one appeared to defend the Claim originally made in the ET1: the Claimant's calculation of what she is owed arises from calculation of hours and rates of pay. These would not on their face appear to be over complicated to analyse or challenge.

56) While many of the same criticisms can be advanced about the alternative claim raised that she was a worker, on the other hand, this could be said to be a matter of labelling based on the same facts. Many of the same considerations arise for determination of this point as arise when considering employment status. I did not think this disadvantaged the Respondent.

57) In this instance, I was prepared to allow both these additional claims to be advanced before me, despite the serious delays. I have found that the Claimant was neither an employee or a worker, and as such her claim for holiday pay also falls away.

58) For the avoidance of doubt, again as previously indicated, an employment tribunal's contract jurisdiction is limited (Employment Tribunals Act (ETA) 1996, ss 3 and 8; Employment Tribunal's Extension of Jurisdiction Order 1994). Any claim must be for breach of a contract of *employment* or other contract *connected with employment* and must arise or be outstanding on the *termination of employment*. In this case, as I have found that there was no contract of employment in place, and that the Claimant was not a worker, there is no basis on which I can determine the Claimant's claim that, having as she alleges, completed the task envisaged by the project, she had not been paid the total sum that had been agreed and was owed and was owed £700.

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Employment Judge Phillips

Date: 24 April 2019