Case No: 2304809/2020

EMPLOYMENT TRIBUNALS

Claimant: **T Sterry**

Respondent: **Automotive Repair Systems Limited**

Held at: **London South Employment Tribunal by video hearing**

On: **7 July 2021**

Before: **Employment Judge L Burge**

Representation
Claimant: In person
Respondent: Ms Kerr (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim for holiday pay was withdrawn by the Claimant;

2. The Claimant was an employee of the Respondent;

3. The Claimant resigned from his employment, he was not unfairly dismissed; and

4. The provisional remedy date of 9 December 2021 is cancelled.

REASONS

The evidence

1. The Claimant, Tony Sterry, gave evidence on his own behalf. Phil Howlett (Operations Director) and Andrew Patterson (CEO and Managing Director) gave evidence on behalf of the Respondent.

2. The Tribunal was referred during the hearing to documents in two hearing bundles of 93 and 63 pages.

3. Both the Claimant and Ms Kerr gave oral closing submissions.

Issues for the Tribunal to decide

4. At the beginning of the hearing the Claimant confirmed that he was withdrawing his claim for holiday pay because he had been paid for his holiday.

5. The Tribunal agreed with the parties that the issues to be decided were:

    a. Was the Claimant an employee of the Respondent? If so,

    b. What was the reason for the Claimant's employment terminating? Was the Claimant dismissed for a potentially fair reason in accordance with s.98 of the Employment Rights Act 1996 ("ERA")? The Claimant said that he was either constructively dismissed or he had been made redundant. The Respondent said that the Claimant resigned. The Claimant said that the repudiatory breach was offering him positions that did not suit him when he returned to work after lockdown.

    c. If the Claimant was dismissed, did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?

    d. No directions having been provided or agreed in relation to remedy, it was agreed that remedy was to be decided at a further hearing on 9 December 2021 at 14.00, if the Claimant was successful at the liability hearing.

Findings of Fact

6. The Claimant worked for the Respondent, initially as a Night Shift Technician at the Respondent's Head Office Orpington and then as a Workshop Manager, from 6 June 2016 to 1 July 2020. The Respondent is a company carrying out automotive repairs, the majority of which are carried out by mobile technicians. Mr Howlett gave evidence that the Respondent employed approximately 90 people and had 30 people who were selfemployed.

7. When the Claimant started at the Respondent, it was the Respondent who designated his employment status as self-employed and he only got paid for the work he undertook.

8. When the Claimant was working the night shift, one night the day shift had not put out enough work, the Claimant and his colleague thought this was

not acceptable as it would not enable him to earn enough money and accordingly the Claimant chose to go home and not work. The Respondent did not complain to the Claimant about this.

The 2016 contract

9. In September 2016 the Claimant was offered the position of Workshop Manager. Following a meeting between the Claimant and Mr Howlett, by letter dated 2 October 2016, Mr Howlett wrote to the Claimant saying:

*"Below is an outline of **what will be expected** and of course your remuneration package.*

Your hours will remain the same, as they are now, 7am – 4pm. As much as possible I would like you to stick to this as both [Mr Patterson] and I firmly believe home and work like needs to have the correct balance.

I suggest that the billing you are required to do is done in the 1st 2 hours of the day leaving you free to run the workshop and men for the remainder.

You will be required** to carry out or delegate the following **each day:

- *Quotations of ALL retail and trade cars*
- *Quote on ALL Caterham and Dartford vehicles ASAP*
- *Hand out jobs to technicians and night shift*
- *Organise stock for technicians and keep a control of usage*
- *Ensure the building is kept clean and tidy*
- *Do something with the paint room to organize and clean*
- *Ensure you check ALL cars for final quality check*
- *Carry on with and complete Jamie Speights training*
- *Attend the Process Managers meeting once month with brief report of issues*

Below is the remuneration package we spoke on and agreed with you:

- *Basic Pay Guaranteed - £40k*
- *Billing of £2.5k per month - £2k*
- *5% of anything billed over £2.5k*
- *5% of profit paid at the end of each ¼*
- ***You will remain on self employed basis and will therefore pay your own tax and NI.***
- ***You will have 4 week non submission paperwork (Holiday) this is unpaid.***

I will issue a new contract for you, which will have your new title and a brief outline of the above.

*Both [Mr Patterson] and I look forward to **this new chapter** with the business…."* **[Tribunal's emphasis]**

10. The Claimant subsequently got paid in accordance with this agreement. He received monthly documents called "remittance advice" that set out his pay. He would receive the £40,000 as "period fixed commission" (£3846.15 in a 5 week month and £3076.92 in a 4 week month). He would also receive commission, bonuses and deductions when appropriate. The Claimant's pay amounted to approximately £65,000 per year. The Respondent's witnesses tried to explain the "period fixed commission" in various ways such as that it was based on commission made in previous months by others working to the Claimant in the workshop or that it was a percentage paid depending upon the work done. The Tribunal rejects this. The Claimant's remittance advices available to the Tribunal clearly show that the "period fixed commission" remained fixed and it was the further commission and bonuses that varied. This was also in accordance with the agreement that had been reached, as set out above, leading to the letter dated 2 October 2016.

11. The Claimant attended work on Monday to Friday from 7am. He did all the large repairs whilst dealing with the day to day running of the workshop. This included doing all the estimates, making sure his colleagues knew what they were doing, dealing with customers, delegating work, stock ordering, cleaning the workshop, dealing with problems that arose and quality control. He would finish at 4pm and then carry on doing invoicing work at home. The Claimant worked very hard. He was a valued worker and liked by staff and customers alike. The Claimant got on well with Mr Howlett and Mr Patterson and enjoyed working at the Respondent. Like other customer-facing staff members he would wear one of the Respondent's Tshirts while working. The Respondent supplied most of the tools and materials, although the Claimant brought in some of his own hand tools.

12. The Tribunal finds that the Claimant's terms of work were set out in the letter dated 2 October 2016, he was required to perform the work contained therein and was paid accordingly. The Claimant got paid gross, without the deduction of tax and National Insurance. However, contrary to the agreement, the Claimant did get paid his basic pay for holidays – he received his £3846.15/£3076.92 monthly fixed payment regardless of whether he took leave or was off sick. There was, however, one exception when the Claimant was not paid holiday – he had a 6 week absence for an operation in 2018 and he was not paid for this period (see further below).

13. There was evidence of two occasions when the Claimant did not attend work, once when his wife had been bitten by a dog and another time when he was in pain with his back. He emailed and delegated the work to existing members of the team. Messages showed that Mr Howlett was supportive and understanding when the Claimant was off sick.

14. Despite the promise in the 2016 agreement saying that a new contract would be drawn up to reflect the Claimant's new title and the terms contained in the agreement, that contract never materialised. The Claimant chased Carole Kouzos (HR Manager) for the new contract but it never came.

The 2018 contract

15. In 2018 the Claimant was given a contract to sign. He gave evidence that initially he tore up a version of the contract because it did not contain his job description. The Contract he did sign was dated 16 February 2018. It was headed "contract for Service (Standard Contract for Dents and Wheels Paint & Trim contractors". The Claimant was not a Dents and Wheels Paint and Trim Contractor. He worked as the Workshop Manager.

16. There was no change to the Claimant's work or his pay after the 2018 contract had been signed. The 2018 contract was a contract for services and the Claimant was stated to be a contractor. The Tribunal finds that the 2018 contract did not reflect the reality of the agreement between the Claimant and the Respondent. In particular, the "Services" did not reflect the services that the Claimant actually provided, the "regularity of work" did not reflect the fact that the Claimant attended work Monday – Friday apart from when he was unwell or was on holiday, the "payment" terms did not reflect the reality of the Claimant's pay, which continued to be paid in accordance with the 2016 Contract.

17. Mr Howlett gave evidence, that was accepted by the Tribunal, that the Respondent does not tailor make contracts, instead they use standard contracts, this one was for the self-employed and there was another one that was for employees. Mr Howlett gave evidence that he himself is selfemployed also and does not have a tailor made contract.

The Claimant's departure from the Respondent

18. Unfortunately the Claimant began to suffer more with an existing health problem. He had 6 weeks off following an operation in 2018 and was not paid for those 6 weeks and did not ask to be paid. Over the last few years the Claimant's condition had become more and more uncomfortable and had led to his leg swelling and aching. He had a series of procedures to try to resolve the issue but unfortunately he continued to suffer. The Claimant gave evidence, that is accepted, that he had requested a less physically demanding role at the Respondent for approximately 18 months prior to his departure and was open with the Respondent about the struggle he was experiencing.

19. As the Covid-19 pandemic hit, on 23 March 2020 the Respondent temporarily closed. Once the Respondent re-opened the Respondent asked the Claimant to return but he could not as he was vulnerable and he was understandably concerned about catching Covid. The Claimant stayed off work, without pay. The Tribunal accepts the Respondent's evidence that they did furlough their employees but as they did not consider the Claimant to be employed they did not furlough him. Mitch, an employee of the Respondent, covered the role of Workshop Manager while the Claimant was off and performed very well in that role.

20. Towards the end of June 2020 the Claimant made contact with Mr Howlett via text message about his return to work on 6 July 2020. They arranged to meet at the end of June and at that meeting they discussed the Claimant returning in a different role. The Tribunal finds as a fact that Mr Howlett told the Claimant that he had cost the Respondent £16,000 the previous year, because this is corroborated in an email subsequently sent by the Claimant. There is disagreement about what the two offers comprised, but the Tribunal finds that in essence one job offer was to return to the workshop with lower targets and lower pay (no fixed wage) and the other was to return to the workshop with the same targets but to take online bookings as well, the idea being that this would involve less physical work. The Tribunal finds that these jobs would have been less physically demanding for the Claimant. The Claimant gave evidence, that is rejected, that he wanted to return in his old role as Workshop Manager. This does not accord with the fact that he had been asking for adjustments to his role, and it is not reflected in the contemporaneous correspondence (for example on 4 July 2020 the Claimant wrote "*I have mentioned to Phil that I need to take it easier on the repair side of things for quite some tim*e…". The Tribunal finds that neither party believed that the Claimant could return to his previous role as it was too physically demanding and so the issue was not raised.

21. The following day, on Wednesday 1 July 2020, the Claimant wrote to Mr Howlett:

"I would like to thank you for your time yesterday, also thank you for what you are trying to do for me in these testing times.

I am very sad to let you know that I will not be returning to ARS, I have given plenty of thought and come to the realisation that it is not for me anymore.

I'm letting you know now so you can make plans moving forward as soon as possible.

I would like to thank you and ARS for the last 4/5 years I have worked in the company, I do and will miss all members of staff.

I will have to arrange dropping in the keys and phone and collect my tools. Please can you let me know when this would be convenient for you, I'm thinking Saturday morning when you have less people around.

I would like to wish you and all at ARS all the best moving forward."

22. Mr Howlett replied by message:

Thanks for your email. Very nicely written and very kind. I'm really sorry that you have decided to finish but I do also understand.

I am coming in Saturday morning to meet my dad there to swap some wheels so shall I call you when I'm on my way in? I can meet you here and help you with your gear."

23. On 4 July 2020 the Claimant emailed Ms Kouzos (HR Manager) asking for any paperwork held on the file. He also asked her:

"I'm interested in your thoughts on the way I had no opinion other than to give in my notice at Automotive due to me being offered a new position that involved the running of the retail desk and all online inquiries witch is a full times job in itself and still have to invoice circa 50k a year to get to the wage that I was receiving.

This would have been an unachievable role and totally unrealistic for me to do as my position was already quite demanding.

I have mentioned to Phil that I need to take it easier on the repair side of things for quite some time ?..."

24. Ms Kouzos replied *"I was passed a copy of your resignation email which is on file, and from what I can see it looks like all was amicable. If you feel you need to speak on this further, I'd advise that you speak with either Phil or Andy directly…"*

25. On 7 July 2020 the Claimant replied:

"…Would anyone involved in my situation know how it feels to be told in a roundabout sort of way that they have found someone that is quicker than you and doesn't cost as much money, well I will tell you it makes you feel a little worthless and you give into it as nobody wants to be a burden on a company this is why I was forced to handed in my notice…"

26. The following day, on 8 July 2020, Ms Kouzos replied:

"*I have spoken with [Mr Patterson] earlier, and he too is surprised to hear this continued commentary from you. He explained that he made a call to you (1st July) directly following your resignation and stated that during the call he told you that he hoped that you would in fact stay with the Company.*

However, in response, you mentioned that "you were not the same person as 1 year ago"

There were 2 offers on the table…

You explained to Andy that it was time to move on and you both wished each other well. …

Tony, I am now questioning as to whether you are wanting to reconsider the two options offered to you by [Mr Patterson] and [Mr Howlett], or if you are ***wanting to retract your resignation***?"

[Tribunal's emphasis]

27. Later that day the Claimant replied:

"…Andy did mention that he would like me to continue to work for Automotive but given the offers that I had received it was impossible for me to do so.
I did wish Andy all the best for the future and still do.

The offers that you make reference to are conflicting on the offers that I was given [details of offers].

… I explained to Andy Patterson it was time to move on, My reasoning for this was due to the offers put before me being unacceptable. I did also wish Andy all the best for the future. Why wouldn't I I like Andy as a person.

… In reply to your last paragraph in your email it is a definite no, I do not wish to retract my resignation or reconsider any offer that Automotive have put before me as they seem to differ somewhat and one is unachievable.

I am sorry for the continued commentary but I need to be heard as it isn't fair the way that hard working individuals are treated within the "self employed" industry but I still wish you all the best because that's what I do."

Legal principles relevant to the claims

Is the Claimant an employee or a self-employed contractor?

28. Section 230 ERA defines 'employee' for the purposes of the ERA as follows:

(1) In this Act "employee" means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

29. In determining whether or not there is a 'contract of employment' the Tribunal should apply the 'multiple test' first formulated in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, as developed in subsequent cases and approved by the Supreme Court in *Autoklenz v Belcher & Ors* [2011] ICR 1157. This requires the Tribunal to consider whether there is:

(a) a contract between the individual and the alleged employer,

(b) an irreducible minimum of mutuality of obligation on each side,

(c) an obligation on the worker to provide work personally (or whether there is a genuine right of substitution), and

(d) whether there is a sufficient degree of control over the work by the employer / integration into its organisation.

30. Even where a contract specifies that a person is a self-employed subcontractor they can still be, in reality, an employee (*Autoclenz)*. In *Uber BV and ors v Aslam and ors* 2021 ICR 657 the Supreme Court held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining employment status. The Tribunal must look at the reality of the situation, not simply what is written in the contract.

31. A relevant indicator of employment status is whether pay is paid gross or on a PAYE basis, but it is not a decisive factor (*Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423, CA*)

Unfair dismissal

32. Section 94 of the Employment Rights Act 1996 ("ERA") states that an employee has the right not to be unfairly dismissed by his employer.

33. To establish a constructive dismissal, the Claimant must show that he terminated the contract under which he was employed (with or without notice) in circumstances in which he was entitled to terminate it without notice by reason of the Respondent employer's conduct (s.95(1)(c) Employment Rights Act 1996).

34. The relevant principles are found in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221. The test of a constructive dismissal is a three-stage one:

(1) was there a fundamental breach of the employment contract by the employer?

(2) did the employer's breach cause the employee to resign? and

(3) did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?

35. The House of Lords in *Malik and Mahmud v BCCI* [1997] ICR 606 describe the implied term of trust and confidence as being an obligation that the employer shall not:

> *"Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

36. Caselaw tells us that simply acting in an unreasonable manner is not sufficient, it has to be calculated/likely to "*seriously* damage" the relationship of trust and confidence where the balance has to be struck between an employer's interest and the employee's interest in not being unfairly and improperly exploited (*Frenkel Topping v King* EAT/01606/15).

37. Redundancy is one of the potentially fair reasons for dismissal listed in S.98(2)(c) of ERA. S.139 ERA states:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease— (i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

38. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied which states that:

"*the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

39. The manner in which the employer handled the dismissal is important in considering whether the Respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e. within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer.

Analysis and conclusions

Employee status

40. There was a contract between the Claimant and the Respondent. Caselaw tells the Tribunal that the terms of the contract are not the starting point and are not definitive. The Tribunal must ascertain the reality of the relationship and should balance factors that point to self-employed status and the factors that point to employee status in order to reach a conclusion.

41. When the Claimant started working for the Respondent it was as a selfemployed contractor – when he chose to reject the work one evening and went home, this was accepted without question by the Respondent. Then came the appointment as a Workshop Manager as set out in the 2016 agreement. The Respondent now controlled what the Claimant did "*Below is an outline of what will be expected" and "You will be required to carry out or delegate the following each day…"*. The Claimant's hours were set as 7am – 4pm. The Claimant would then go home and invoice on behalf of the Respondent. The Claimant was expected to work and did in fact work those hours and performed the tasks as specified by the Respondent. The Claimant carried out that role from 2016 to 2020 and, along with colleagues who were also customer facing, wore a company Tshirt. The Respondent supplied most of the tools and materials, although the Claimant brought in some of his own hand tools. The Tribunal concludes that there was a sufficient degree of control over the work by the employer and integration into its organisation.

42. The Claimant always carried out work personally. When he would be off work it was for personal reasons such as because his wife was bitten by a dog or he was in pain/off sick. The Claimant would ask other members of the team to pick up tasks. Contrary to the submission on behalf of the Respondent, this is not the same as substitution, it is what a responsible member of the team does when they are to be off work. The Claimant was expected to be in work and he felt an obligation to attend work. The Claimant did not arrange for an external person to cover his job as Workshop Manager when he was off. The tribunal concludes that there was an irreducible minimum of mutuality of obligation on each side and there was an obligation on him to provide work personally.

43. Both the 2016 agreement and the 2018 contract were signed by the Claimant and the Respondent. The 2018 contract is less relevant as it clearly does not reflect the terms of the Claimant's relationship with the Respondent. Under the terms of the 2016 Agreement, which the Tribunal found did reflect the reality of the relationship, it stated: "You will remain on self-employed basis and will therefore pay your own tax and NI." This is what happened, the Claimant was paid gross and was expected to pay his own tax and NI. However, the Tribunal concludes that while this did tip the balance somewhat towards an indication that the Claimant was selfemployed, it was not definitive.

44. The Claimant was paid a basic salary plus commission. The 2016 agreement was said to be a "new chapter" with the Respondent and the Tribunal concludes that the new chapter signified a different employment relationship – the Claimant was in an employment relationship with the Respondent from that time.

45. The 2016 agreement also provided that "You will have 4 week non submission paperwork (Holiday) this is unpaid". The Tribunal found that there was a period in 2018 when the Claimant took 6 weeks off for an operation, was not paid and did not request to be paid. Subsequently the Claimant took periods of leave and continued to receive his basic wage so was paid while taking holiday. The first period indicates self-employment but holiday pay indicates that the Claimant was an employee.

46. When the pandemic hit, the Claimant was not furloughed. He did not work and did not get paid. Nor did he complain that he was not being paid. In his email to HR after his dismissal he refers to himself as "self-employed", although he complains about how "self-employed" people are treated. This also tips the balance towards self-employed status, but the Tribunal concludes that it is not decisive.

47. The regular basic pay, holiday pay, personal service, Respondent's control over the Claimant's work, daily work expected to be done and in fact done leads the Tribunal to conclude that, on balance, the Claimant was an employee of the Respondent.

What was the reason for the Claimant's employment terminating?

48. The correspondence is clear that the Claimant resigned his employment because the two jobs offered to him were not acceptable:

"I am very sad to let you know that I will not be returning to ARS, I have given plenty of thought and come to the realisation that it is not for me anymore… I'm letting you know now so you can make plans moving forward as soon as possible… I explained to Andy Patterson it was time to move on, My reasoning for this was due to the offers put before me being unacceptable…"

49. When the Claimant is asked if he wishes to retract his resignation he said:

"… In reply to your last paragraph in your email it is a definite no, I do not wish to retract my resignation or reconsider any offer that Automotive have put before me as they seem to differ somewhat and one is unachievable."

50. The question, then, is whether there was a fundamental breach of the Claimant's contract of employment by the Respondent? The Claimant had asked for an alternative role on account of his health difficulties. He had made it clear he could not continue in his current role and did not ask to return to his current role. He was offered two different roles, neither of which were acceptable to him. He did not suggest an alternative, he did not

explore what else he could do, he did not try to start a discussion, he made the decision it was time for him to move on.

51. Firstly, the Respondent did act with reasonable and proper cause – the Claimant had asked the Respondent for an alternative role and the Respondent had proposed two different roles in response to that request. The Claimant initially replied with an amicable resignation. Secondly, the conduct of the Respondent was not likely to "seriously" damage the relationship of confidence and trust. Even if the Respondent had been unreasonable to offer those alternative roles, the Claimant should have acted reasonably and explored the issues he had with those roles. The resignation was premature. The Claimant then had a further opportunity to engage when he was asked whether he wished to retract his resignation but he declined to do so, he replied that it was "a definite no". The Tribunal reminds itself that the Respondent acting in an unreasonable manner is not sufficient, the breach has to be calculated/likely to "*seriously* damage" the relationship of trust and confidence. The Tribunal concludes that the Respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.

52. Redundancy does not arise on the facts of this case. There was no cessation of business or diminishing requirements for employees to carry out work of a particular kind.

53. The Tribunal concludes that the Claimant's employment came to an end by reason of his resignation and his claim of unfair dismissal accordingly fails.

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Employment Judge **L Burge**

Date 20 August 2021