EMPLOYMENT TRIBUNALS

Claimant: Mr K Jones

Respondent: SHR Contracts Ltd

Heard at: Manchester (remotely, by CVP) **On:** 31st March 2022

Before: Employment Judge L Cowen

REPRESENTATION:

Claimant: Mr G Price (Counsel)
Respondent: Mr Shah (Director, SHR Contracts Ltd)

JUDGMENT

The respondent has made an unlawful deduction from the claimant's wages and is ordered to pay the claimant the gross sum of £2250 in respect of the sum unlawfully deducted.

REASONS

1. This hearing took place through CVP on 31st March 2022. The claimant attended through CVP, and was represented by Mr Price. The respondent was represented by Mr Shah (Director of the respondent), who attended through CVP.

2. Evidence was given by the claimant and by Mr Shah on behalf of the respondent. During the hearing reference was made to documents contained in an agreed bundle.

3. Judgment was reserved at the conclusion of the hearing on 31st March 2022. This document sets out my judgment and the written reasons for my judgment.

The issues

4. The claimant claims for unlawful deduction from wages. There are two areas in respect of which wages are claimed. These are:

   i) Wages not paid for work undertaken by the claimant between 12th-16th October 2020, and between 19th- 23rd October 2020, and;

   ii) 2.5 days of unpaid holiday pay, reflecting leave accrued but not taken during the claimant's work for the respondent.

5. It is accepted that the claim was brought in time.

6. The respondent opposes the claim on the ground that the claimant is not an employee and not a worker.

7. At the hearing, it was decided that given the relative simplicity of the claim, the preliminary issue of the claimant's employment status could be determined at the same time as the issues relating to the merits of the claim. The tribunal therefore had to determine the following issues:

i. Was the claimant a worker?

ii. Were any wages owed? If so, what wages were payable? As to this issue, the claimant submitted that he was owed wages for the final two weeks of his work for the respondent company, and that he was owed holiday pay. The respondent disputed that these sums were payable as he denied that the claimant was a worker.

The Findings of Fact Relevant to the Issues

8. The respondent is a provider of services within the construction industry. Mr Shah is the Managing Director of the respondent. From July 2020, the respondent was undertaking a construction project on behalf of a company called Abodos Construction Limited. The project was for the construction of a large building in Liverpool, and the work was to be completed in phases. The respondent's role was to supply labour for specific tasks and smaller projects within the overall construction project.

9. The claimant began work for the respondent on 22nd September 2020. He was engaged as a fixer; his role was to erect stud walls out of metal and fix outside boards. The respondent was clear that the claimant was recruited for his skills and experience. The claimant is not registered as a business for tax or VAT purposes.

Terms of work

10. The claimant did not have a written contract of employment. His evidence was that prior to his commencing work, Mr Shah explained to him that he would be paid £140 per day, and that his hours would be 8am-4pm, Monday to Friday. There was no discussion of holiday pay.

11. Mr Shah did not accept that he had spoken to the claimant. It was his evidence that he did not make any agreement with the claimant. He accepted that he would have been present on site, but that he did not deal with subcontractors. Mr Shah believes that the claimant would have been more likely to have dealt with Alistair Robertson, the co-director of the respondent. Mr Robertson sadly died recently. Both parties agree that Mr Shah was regularly on site.

12. I have concluded that there is not sufficient evidence before me to determine with whom the claimant spoke when he agreed the terms of his employment with the respondent. However, it is clear he spoke with someone acting in a managerial role for the respondent who had authority to recruit people. I found the claimant to be a credible witness and I accept his account regarding what was discussed regarding the terms of work. There is no evidence that the rate of pay was something proposed by the claimant, or negotiated for by him.

13. The claimant registered with the Construction Industry Scheme ("CIS") prior to his work on site commencing. The claimant's evidence was that he filled out forms in relation to this when he was given an induction at the site. This induction was provided by a person called Paul, who the claimant believed was a manager at the respondent company. I accept the claimant's evidence regarding his induction.

14. The CIS scheme enables construction workers to be paid with tax being deducted at source. The claimant's evidence was that you cannot work in construction without being registered for this scheme. Mr Shah agreed that such registration was required, but was not sure whether the claimant was required to show that he was part of the CIS when he first attended for work and Mr Shah explained he didn't know whether that happened. This perhaps reflects his limited involvement with those working on the site.

15. I have seen an HRMC verification form that confirms that the claimant was registered with the CIS, and I accept that he was registered with the scheme.

16. Mr Shah stated that he believed that the claimant would have signed a CIS agreement form when he started work, although he did not have direct knowledge of this matter. Mr Shah stated that the agreement he believed the claimant signed would have set out the terms of his work for the respondent, and would have covered such matters as the terms of payment, tax status and confirmation that he could be substituted for someone else. This form has not been produced in evidence.

17. Mr Shah explained that there had been a theft and small fire at the construction site in November 2020 and the respondent's site office had been broken into and ransacked, with several items (including computers and filing boxes) being stolen. Mr Shah confirmed that any recovered items from the site office were placed in storage. He has reviewed these items, and confirmed that there were no further copies of the CIS agreement form. The theft/fire has been reported to the police. I accept Mr Shah's evidence of this incident having happened, and the effect it has had on his ability to recover relevant documents. The consequence of the CIS agreement form not being available is that I cannot make any conclusions regarding what it did or did not cover.

18. Regarding substitution, Mr Shah stated that the claimant, through signing the CIS agreement form, would have agreed that he would be able to substitute another person to do the work that he was expected to do if necessary. Mr Shah stated that this was possible to allow the work on the site to continue. Mr Shah did not say who would be paid should the claimant send in a substitute to perform the work to be undertaken. The claimant's evidence was that no agreement was signed, and no clause regarding substitution was agreed. As stated above, Mr Shah did not have a copy of the CIS agreement he says would have been signed by the claimant. Nor did he produce any CIS agreement, or substitution clause, that he could provide to the tribunal by way of example.

19. Mr Shah's evidence that such a clause would have been agreed was based on his experience that his business partner (Mr Rogerson) would often tell him that some of those working on site did not turn up, and some of these people had sent others in on their behalf. I have found that Mr Shah's evidence on this point was based on his general experience, rather than the specific circumstances of the claimant's work. He himself accepted that he was not "100% certain" regarding what happened with the claimant. Given the lack of evidence of any agreement regarding a substitution clause, I have concluded that there is insufficient evidence to conclude that such a clause existed and/or was agreed to by the claimant.

20. Regarding the hours of work, the claimant's evidence was that he worked between 8am and 4pm Monday to Friday. The work done was monitored by turnstiles on site. In his witness statement, the claimant explains that Mr Shah would direct his work on site and direct him regarding when breaks could be taken. In the questions asked of Mr Shah, it was suggested that the claimant's work was directed by his supervisor, Nick. Both parties accept that Mr Shah was regularly on site, though Mr Shah disputes that he had any day to day dealings with those who he refers to as subcontractors.

21. I have found that the claimant's work was directed by Nick, his supervisor, but that he would also have spoken to Mr Shah, who was managing the site more generally. This finding is based on the fact that it is not disputed that Nick was the claimant's supervisor, and it is not disputed that Mr Shah was regularly on site, and available to speak to those working there.

22. Regarding the claimant's freedom to undertake other work, Mr Shah's evidence was that as a self-employed contractor, the claimant was free to take up work with other clients, and that the work to be done for the respondent was confirmed in an ad-hoc manner, with work offered being for around a week, and the respondent then offering any available further work to the claimant, and the claimant advising whether they were able to complete the next stage of work, depending on whether the claimant had jobs on with other clients. Mr Shah stated that the claimant was free to come and go on site, and he could choose to not turn up for work if he didn't want to. The consequence of that would be that he would not be paid, and if this went on for a long period, someone else would be hired to complete the claimant's work.

23. The claimant's evidence was that he was expected to turn up to do the work that he had been hired to do. He did not agree with Mr Shah that he would have been able to take on work for other clients during the time he was supposed to be working for the respondent.

24. Mr Shah fairly accepted that his evidence on this issue was based on examples with other trades with which he was more familiar, and from his general experience of the site, rather than from his direct experience of the claimant's work. He referred to his evidence being based on "a general rule of thumb for all subcontractors". He fairly responded that he did not know how to answer when questioned about what evidence he had that the claimant had ever said during his work with the respondent that he would or would not go onto the next phase of work, or referred to having work for other clients.

25. I understand the difficulty Mr Shah has in presenting an account of the claimant's working arrangements, as he has explained that the person most involved with the claimant's work was Mr Rogerson, and that he had no real contact with contractors.

26. Given the evidence before me, I accept the claimant's evidence that he attended the site to perform work that he had agreed to do for the respondent and that he was expected to do for the respondent. I accept that if he said he was not available to perform this work because he was working for another client, he would have been told not to come back to work for the respondent.

27. The parties also gave different accounts of how the claimant would be paid for his work. The parties agreed that Mr Jones did not submit invoices. The claimant stated that he was paid through BACS into his bank account. He did not receive payslips. Mr Shah believed that a purchase order would have been generated by the respondent to pay the claimant for the work he had done. He used his experience of previous jobs to explain that a purchase order would have contained units – for example, a day would be one unit, and each unit would be payable by a fixed sum.

28. Mr Shah could not provide direct evidence of any purchase orders completed in respect of the claimant's work. His evidence also referred to his general experience, rather than his particular knowledge of what happened to the claimant. I have therefore concluded that there is insufficient evidence to conclude that a purchase order was generated to pay the claimant. It is not disputed that pay for work done was paid into the claimant's bank account, and this is confirmed by the HMRC verification document.

The claimant's work between 22nd September 2020 and 12th October 2020

29. The claimant worked as a fixer from 22nd September 2020. His evidence was that Personal Protective Equipment ("PPE") and tools were provided by the respondent. Mr Shah did not accept this, and stated that he had never worked on a site where subcontractors were provided with PPE, and that this would be a significant expense for this company that he would be aware of. Mr Shah also believed that the subcontractors working on the site would provide tools, such as for example, a chop saw. He thought that subcontractors would share tools.

30. The tribunal has not heard evidence from others working on the site who might have been able to corroborate either parties' account of the working arrangements on site. However, I find it difficult to accept Mr Shah's evidence of the working arrangements given his acceptance that he was not involved in the day to day work of those working on site. I do however accept that he would have known about the financial expenditure of the company, and I agree that PPE and tools would have been a general expenditure of which he would have been aware. I have therefore determined that given the limited evidence before me, I cannot make any finding of fact regarding whether tools and PPE were provided by the respondent.

31. The parties agree that the claimant was paid for the work undertaken between 22nd September 2020 and 12th October 2020.

The claimant's work between 12th October 2020 and 23rd October 2020

32. In October 2020, the claimant's supervisor contracted Covid-19, and on 12th October 2020 the claimant was asked to undertake his role, which he agreed to do. The parties agree that he worked in this role between 12th October 2020, and the end of his employment on 26th October 2020. The parties agree that the pay for this role was £180 a day. Mr Shah stated that this pay rate had been proposed by the claimant, and accepted by the respondent. The claimant submitted that the figure was set by the respondent, and reflected the rate of pay that the respondent had paid to his supervisor.

33. As Mr Shah did not have direct involvement in these agreements, and explained that the person that would know about these matters was his business partner, I have accepted the evidence of the claimant regarding what happened regarding the agreement concerning his pay for the supervisor role. The work involved overseeing a team of workers, and undertaking the tasks that would have previously been undertaken by his supervisor.

34. The parties agree that the claimant worked in this role between 12th October 2020 and 23rd October 2020. The parties agree that he has not been paid for this work.

The termination of the claimant's employment and wages paid

35. On 26th October 2020 the claimant attended work to find that the site was closed; although his witness statement refers to attending work to find it was closed on 2nd November 2020, in his oral evidence, the claimant confirmed that this attendance in fact took place on 26th October 2020. Mr Shah explained that the site was in fact closed on 23rd October due to the respondent's client going into liquidation.

36. The parties agree that the claimant has not been paid for his final two weeks of work. Mr Shah frankly explained that he has not been paid for his final two weeks of work either as the respondent's client going into liquidation has wrought havoc upon the respondent. The parties agree that the claimant has not been paid any sum in respect of holiday pay.

The law

37. The claimant's claim is a claim for unlawful deduction from wages. Section 13 (1) of the Employment Rights Act 1996 ("ERA") provides:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

38. The term "worker" is defined in section 230 (3) of the ERA as "an individual who has entered into or works under (or, where the 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 services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly".

39. The term "wages" is defined in section 27(1) of the ERA as 'any sums payable to the worker in connection with his employment'. The term wages includes holiday pay (s.27 (1) (a)).

40. The Working Time Regulations 1998 ("WTR 1998") provide that workers are entitled to 5.6 weeks' leave each leave year (including any bank holidays the worker is entitled to take).

The parties' submissions

41. The claimant submitted that he was a worker and so entitled to wages in respect of both work done and accrued holiday pay. The claimant submitted that having regard to section 230 of the ERA 1996, there was a contract between the claimant and respondent, that the claimant was to perform this work personally (there being no right of substitution), and that the respondent was not a client of the claimant.

42. The claimant submitted that the labels adopted in the CIS were not determinative of the claimant's status, and invited the tribunal to look to the reality of the relationship between the parties. The claimant submitted that he was entitled to wages for the work done between 12th October and 23rd October at a rate of £180 per day, and that he was entitled to 2.5 days of holiday pay, to reflect the holiday accrued between 22nd September 2020 and 23rd October 2020.

43. The respondent submitted that the claimant was a self-employed subcontractor, and not an employee, or a worker. He submitted that the claimant did not fall foul of the IR35 rules because he was a self-employed subcontractor. The respondent submitted that the fact that the claimant was paid through the CIS meant that he was a self-employed subcontractor and so could not be an employee or a worker.

44. The respondent referred to what was said by Lord Justice Legatt in **Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5 ("Uber")**, regarding the purpose of the relevant legislation being to protect vulnerable workers, and submitted that in this case, the respondent had no control over the claimant. The

respondent further submitted that the claimant chose to register through the CIS, and the significance of that is that he knew that meant he was a self-employed subcontractor rather than a worker. The respondent also referred to the case of **Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent) [2018] UKSC 29** when submitting that the claimant did not have the rights available to a worker due to his being a self-employed subcontractor.

45. The respondent submitted that as the claimant was not a worker, he was not entitled to claim for in respect of any deduction from his wages.

The Tribunal's Conclusions

Was the claimant a worker?

46. To answer this question, I have considered s.230 (3) of the ERA 1996. I have had regard to paragraph [76] of Lord Leggatt's judgment in *Uber*" regarding the distinction drawn in employment law between three categories of people: "*those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else"*.

47. Lord Leggatt went on to explain that although some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment, other rights apply to all who are deemed to be "workers" within the ERA 1996.

48. I have had regard to paragraph [76] of the judgment in *Uber*, which made clear the limitations of relying on the labels parties had applied to their relationship through the written contract when considering whether someone is a worker. I have also had regard to paragraph [87] of the judgment in Uber in which the Court emphasised that the determination of whether someone is a worker entails consideration of the facts of a particular case.

49. For an individual to be a worker under s. 230 (3) (b) of the ERA 1996 there must be a contract, whether express or implied, and, if express, whether written or oral. Whilst there were no written terms of agreement between the claimant and the respondent, I accept that there was a verbal agreement between the parties through which the respondent offered work to the claimant, and agreed to pay him if he performed that work.

50. There is also the requirement that the individual undertakes to do or perform the work personally. I have found that there is insufficient evidence before me of any written agreement regarding the claimant's right to substitute another to perform the work he had agreed to perform for the respondent. I have accepted the claimant's evidence that he attended the site to perform work that he had agreed to do for the respondent and that he was expected to do for the respondent. I accept that if he said he was not available to perform this work because he was working for another client, he would have been told not to come back to work for the respondent. I have therefore concluded that the claimant did personally undertake to perform work for the respondent.

51. Finally, to qualify as a worker under 230 (3) (b), the work or service provided must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking. I accept the claimant's evidence that he is not registered as a business for tax or VAT purposes. The claimant's work for the respondent was a full-time role and he did not undertake other work whilst

he was working for the respondent. The claimant was registered with the CIS scheme, a fact relied upon by the respondent as demonstrating his status as a self-employed subcontractor. However, applying *Uber*, the labels applied by the parties to their relationship are not determinative of whether the claimant is a worker within the meaning of the ERA 1996.

52. Looking to the nature of the relationship between the claimant and respondent, I have concluded that the claimant was directed by the respondent regarding what work to do, where to do it, and when to do it. I have found that it is not possible to determine whether material such as tools and PPE was provided by the respondent. I do accept that if the claimant had not attended work on a given day in order to pursue other commitments, he would not have been permitted to continue working for the respondent. I accept that the claimant accepted the respondent's invitation to work in the role of supervisor following his colleague becoming ill, and that this entailed increased managerial responsibility and increased integration within the company.

53. I have found that the respondent exercised significant control over the claimant's work, and that the claimant was not free to work as and when he chose. For these reasons, I am satisfied that the claimant, was working for the respondent as an individual, rather than as a business undertaking, and that he undertook work for the respondent, was paid by the respondent and the respondent was not his client or customer.

54. I am therefore satisfied that the claimant therefore falls to be treated as a worker within section 230 (3) (b) of the ERA 1996. This is consistent with the approach in *Uber*, as the claimant, being economically dependent on the respondent during the period of their engagement, requires protection.

55. There is no dispute between the parties that the claimant was not paid for his final two weeks of work. I have therefore determined that there has been an unlawful deduction of wages in the sum of £1,800 (this reflecting two weeks' work at the rate of £180 per day).

56. Having accepted that the claimant is a worker, it follows that he is entitled to holiday pay through section 27 (1) (a) of the ERA 1996 and the WTR 1998. There is no dispute that the claimant worked between 22 September 2020 and 23 October 2020. In this time, he accrued 2.5 days of annual leave.

57. This leave was not taken. Regulation 16 of the WTR 1998 states that a worker is to be entitled to be paid for annual leave at the rate of a week's pay. At the time of termination, the claimant's daily rate was £180. I have therefore determined that the claimant is entitled to £450 holiday pay.

58. My judgment is therefore that there has been an unlawful deduction from wages in the sum of £2250, and that the respondent is ordered to pay the gross sum of £2250 to the claimant.

Employment Judge L Cowen
Date: 18 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 May 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **3301403/2021**

Name of case: **Mr K Jones** v **SHR Contracts Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 19 May 2022

"the calculation day" is: 20 May 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.