



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Walsh

**Respondent:** Brac Contracts Ltd

**Heard at:** London Central

**On:** 13 August 2020

**Before:** Employment Judge H Grewal

## Representation

Claimant: In person

Respondent: Mr A Clark, Director

# JUDGMENT

The claim for holiday pay is well-founded and the Respondent is to pay the Claimant the sum of £1,800 gross (the Claimant will be liable for any tax payable on that payment)

# REASONS

1 In a claim form presented on 3 March 2020 the Claimant claimed that he was owed holiday pay under the Working Time Regulations 1998. He claimed that he had worked for the Respondent from 3 June 2019 to 18 December 2019 and had accrued 14 days' holidays but had not been paid for them when his employment terminated. In its response the Respondent said that the Claimant was not entitled to holiday pay because he was a self-employed independent contractor/tradesman. Early Conciliation ("EC") was commenced on 5 February 2020 and the EC certificate was granted on 3 March 2020.

## The Issues

2 The issues that I had to determine were as follows:

2.1 Whether the Claimant was a “worker” as defined in the Working Time Regulations 1998 and, therefore, entitled to make claim for holiday pay under the Regulations;

2.2 If he was, how much holiday pay he was owed.

## The Law

3 The effect of Regulations 13 and 13A of the Working Time Regulations 1998 (“WTR 1998”) is that in any leave year beginning after 1 April 2009 a worker is entitled to 5.6 weeks’ leave.

4 Regulation 2(1) defines a “worker” 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.”*

5 The issue of whether an individual undertook to do or perform personally any work or services for another party depends on the terms of the contract agreed between them. Whether or not the contract includes an obligation to do the work personally is determined by construing the contract in the light of the circumstances in which it was made – **Redrow Homes (Yorkshire) Ltd v Wright [2004] IRLR 720; Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51 and [2018] UKSC 29.**

6 There is limited guidance from the higher courts on how to determine whether the other party to the contract is a customer or client of a profession or business undertaking carried on by the individual or an employer of a worker. In **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181** Langstaff J said, at paragraph 53,

*“... a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal’s operations, will in most cases demonstrate on which side of the line a person falls.”*

7 Regulation 14 WTR 1998 provides,

*“(1) Paragraphs (1) to (4) of this regulation apply where –*

*(a) a worker’s employment is terminated during the course of his leave year, and*

*(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and 13A differs from the proportion of the leave year which has expired.*

*(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

*(3) The payment due under paragraph (2) shall be –*

...

*(c) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula –*

$$(A \times B) - C$$

*where –*

*A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;*

*B is the proportion of the worker’s leave year which expired before the termination date. And*

*C is the period of leave taken by the worker between the start of the leave year and the termination date.”*

## **The Evidence**

8 Unfortunately, there was very limited evidence in this case. Neither side was legally represented or understood what the legal test for determining “worker” status was and what evidence was required. The Claimant and Mr Clark each produced a very short witness statement (one page long). Although there had been an order for documents to be exchanged and for a bundle to be produced, no bundle had been produced. A very small number of documents had been sent to the Tribunal in advance of the hearing. A few more were produced at my instigation in the course of the hearing. The Claimant and Mr Clark gave oral evidence. On the basis of the limited evidence before, doing the best I could, I made the following findings of fact.

## **Findings of Fact**

9 The Respondent is a construction company that builds and renovates properties. According to its response form, it has five employees. In June 2019 the Respondent was doing building work on a Grade 2 listed residential building in Knightsbridge.

10 The Claimant is a bricklayer. A friend of his who was working as a bricklayer on the building in Knightsbridge informed him of the potential availability of work on the site and provided him with a contact telephone number for the Respondent’s Contracts Manager, Lee Russell. The Claimant telephoned Mr Russell and spoke to him about working as a bricklayer on the site. Mr Russell agreed to take him on as a bricklayer on the site. The expectation was that he would work five days a week

(Monday to Friday) and it was agreed that he would be paid £180 for every day that he worked. There was no agreement for him to send someone else to do the work if he was not able to do it himself. There was no agreement that he would be paid any holiday or sick pay if he took holidays or was unable to attend work because he was unwell. It was agreed that the Claimant would start at the Knightsbridge site on 3 June 2019. The Claimant was not given any written contract.

11 In order to be paid, the Claimant had to submit an invoice every Monday for the days that he had worked the previous week. The Claimant submitted manuscript invoices which contained his name, address, personal bank account details, the dates he had worked and the sites on which he had worked. Payments were made into his account on the Tuesday. In respect of each payment the Respondent produced a "Sub-Contractor Payment Certificate" in which the Claimant was referred to as the "sub contractor." The Claimant worked under the Construction Industry Scheme ("CIS") which meant that the Respondent deducted 20% tax from his pay and paid that directly to HMRC. That counted as advance payments toward the Claimant's tax liability. The payment certificates produced by the Respondent showed the dates and the sites on which the Claimant had worked, the daily rate, the total gross payment, the amount deducted for tax under the CIS scheme and the total net payments.

12 All the building materials that the Claimant required for his bricklaying work, such as bricks, cement, mixer shovels and grinders were provided by the Respondent. The Claimant only provided a small bag of hand tools. The Respondent also provided the Claimant with gloves, a high visibility vest and a hard hat. The Claimant and his friend, Danny, were the only two bricklayers working on the Knightsbridge site. Jason, the foreman, was often on site. Jason and Lee Russell instructed the Claimant on the bricklaying work that needed to be carried out. There was also a young labourer on site to do general work. Electricians and plumbers also attended on site to do electrical and plumbing work. On occasions the Claimant was asked to go and work on another of the Respondent's contracts – a pub called The Bricklayer's Arms in South East London.

13 Between 3 June and 17 December 2019 the Claimant worked five days a week a most weeks. He did not attend for on the following dates for the reasons given:

11 and 12 July – holiday in Exeter

16 August – attending the Employment Tribunal

27 August – day surgery

30 August – 9 September (7 days) – infection following surgery

13 September – reason not known

20 Sept – holiday in Norwich

Three days in November – influenza

14 When the Claimant knew in advance that he would not attend work on a certain day he told either Jason or Lee that he would not be attending on that day. When he became ill and could not attend, he normally contacted either Jason or Lee but not

always immediately. If they did not know why he had not attended, they made contact with him, either directly or through his friend Danny. The Claimant did not do any work for anyone else during that period and he never told anyone at the Respondent that he was working elsewhere at the same time. The Claimant did not invoice for the days that he did not work and was not paid for them. He did not ask for and was not paid any holiday pay for the days when he was on holiday or sick pay when he was off sick.

15 On 17 December 2019 the Claimant was told that there was no work for him until Christmas. He contacted Lee Russell after the New Year and was told that there was still no work and he should find something else.

## **Conclusions**

### **Was the Claimant a worker?**

16 The Claimant and Mr Russell, on behalf of the Respondent, verbally agreed that the Claimant would work five days a week on the Respondent's site in Kensington and that it would pay the Claimant £180 a day. The expectation that the Claimant was to work five days a week is clear from what happened subsequently. Unless the Claimant was on holiday or unwell, he worked five days a week. If the Claimant was not going to attend on a certain day he notified either Jason, the foreman, or Mr Russell of that fact. If he did not do so, the Respondent made inquiries about why he had not attended. It would not have done that if it had not expected him to work every weekday. I find that there was sufficient mutuality of obligation in the agreement between the Claimant and Mr Russell for it to amount to a contract. The Claimant was obliged to do bricklaying work at the Kensington site and the Respondent was obliged to pay him for it.

17 It is also clear that the agreement was for the Claimant to do that work or provide those services personally. There was no agreement that he could send anyone else in his place to do the work. He never did so. The agreement was for him to do the work. I was, therefore, satisfied the Claimant worked under a verbal contract whereby he undertook to do or perform personally work or services for the Respondent.

18 I then considered whether under that contract the Respondent was a customer of a business undertaking carried on by the Claimant or the employer of a worker. The agreement was between the Claimant personally and the Respondent. The invoices and the payment certificates bore the Claimant's name and address and personal bank account details. The Claimant did not have any company or office. He did not employ anyone. He could and did not send anyone else to do his work when he was unable to attend. Between June and December 2019 he worked exclusively for the Respondent. The Respondent's Contracts Manager and foreman instructed him on the work that he had to do. The Respondent supplied all the building materials that he required for his work. The Claimant was not paid for completing a particular task but for each day that he worked. If the Claimant was not able to attend work on a weekday he notified the Respondent. If he did not do so, the Respondent made inquiries about the reason for his non-attendance. Having taken into account all the above matters, I concluded that the relationship was not one between a business undertaking and a customer but between a worker and an employer. The Claimant was, therefore, a "worker" under the Working Time Regulations 1998.

Holiday pay

19 The Claimant worked for the Respondent for 28 weeks. 54% of his leave year had expired when his employment terminated. Under the Working Time Regulations 1998 the Claimant was entitled to 28 days' leave. He had, therefore, accrued 15 days' leave.

20 The Claimant had taken 5 days' leave (11 and 12 July, 16 August, 13 and 20 September). I accept that he had not been paid for those holidays. The Claimant has not in his claim form made any claim for holiday pay for holidays that he took. Any claim for those (under regulation 16(1) WTR 1998) should have been made within three months of 27 September 2019. Any claim in respect of them when the Claimant presented his claim would have been out of time.

21 In calculating how much the Claimant is owed under regulation 14, I take into account the period of leave that he had taken when his employment terminated. He had taken 5 days' leave. He was, therefore, entitled on termination to be paid for 10 days' holidays (15 – 5) that he had accrued but not taken. That equates to a gross figure of £1800.

Employment Judge

Date: 26 Aug 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

28/08/2020..

FOR THE TRIBUNAL OFFICE