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EMPLOYMENT TRIBUNALS

Claimant: Mr D Harvey
Respondent: Navarre Transport Services Limited

Heard at: East London Hearing Centre

On: 2 May 2018

Before: Employment Judge Goodrich

Representation

Claimant: In person
Respondent: Mr R Taylor (Owner of the Respondent)

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was a worker for the Respondent and entitled to holiday pay.
2. The Respondent is ordered to pay the Claimant £4895.48 holiday pay.

REASONS

Background and the Issues

- 1 The background to this case is as follows.
- 2 The Claimant issued proceedings on 14 July 2017.
- 3 Initially, the Claimant's claim was rejected by the Employment Tribunal. His early conciliation certificate with Acas was taken out against Navarre Transport Services

Limited. His ET1 claim named Mr Taylor as the Respondent. The claim was rejected because of the difference between the two.

4 The Claimant subsequently explained that his naming Mr Taylor as the Respondent was a mistake. His claim was accepted.

5 The Claimant's claim was for holiday pay. In his details of claim the Claimant stated that he was claiming 44 days holiday pay. He stated that he should have been employed and not self-employed and gave details of his working arrangements with the Respondent.

6 A judgment in default was entered against the Respondent on the basis that they had not submitted an ET3 response by the deadline. The case was listed for a remedy hearing.

7 Initially the remedy hearing was listed for 16 October 2017. The Claimant did not attend the hearing and the case was adjourned with Case Management Orders being made.

8 On 5 January 2018 Employment Judge Jones considered the case. She extended the time limit for the Claimant to bring his claim. She extended the time limit for the Respondent to file their response and accepted the response.

9 The basis of the response was that holiday pay was not owed because Mr Harvey was offered work on a self employed basis and was not employed by Navarre.

10 Following one hearing, which was vacated as, due to severe weather conditions, the Claimant did not attend, the case was listed for this hearing.

11 At the outset of the hearing I discussed with the parties the issues in the case. The issues are relatively straightforward, although the law surrounding them is not. If the Claimant was a worker or employee of the Respondent within the meaning of Regulation 2 of the Working Time Regulations 1998 he was entitled to holiday pay. If he was not a worker, as defined in that Regulation, he was not entitled to holiday pay.

The Relevant Law

12 An individual who is a worker, as defined in the Working Time Regulations has an entitlement to annual leave, as set out in Regulation 13 and 13A of the Working Time Regulations ("WTR").

13 Regulation 2 of the WTR gives the definition of worker as meaning:

"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.”

14 In the case of *Byrne Brothers Ltd v Baird* [2002] IRLR 96 EAT guidance was given as to how regulation 2 of the WTR was to be interpreted. It was held that:

“The structure of limb (b) in reg. 2(1) is that the definition extends prima facie to all contracts to perform personally any work or services but is then made subject to an exception relating to the carrying on of a “business undertaking”. The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand, cannot in some narrower sense be regarded as carrying on a business. The policy behind the inclusion of limb (b) can only have been to extend the protection accorded by the Working Time Regulations to workers who are in the same need of that type of protection as employees in the strict sense – workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours. The reason why employees were thought to need protection is that they are in a subordinate and dependent position vis-à-vis their employers. The purpose of reg. 2(1)(b) is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, 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 sufficiently arms length and independent position to be treated as being able to look after themselves in the relevant respects.

Drawing that distinction in any particular case would involve all or most of the same considerations as arrived in drawing the distinction between a contract of service and a contract for services, with the boundary pushed further in the putative workers favour. It may be relevant, for example, 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) is to lower the pass mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might do as workers.”

15 In the case of *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 EAT guidance was given that a focus on whether the purported worker actively markets his services as an independent person to the world in general on the one hand, or whether he is recruited by a principal to work for that principal as an integral part of the principal’s operations, within most cases demonstrate on which side of the line a given person falls.

16 All the relevant factors need to be considered. Some of the factors that have held to have been relevant, as well as those described above, involve issues such as whether the contract needs to be personally performed, or whether there is a right for the individual concerned to provide a substitute; the individual status for tax and VAT; the intentions of the parties; their respective economic bargaining power; and the degree of integration into the

workplace.

The Evidence

17 On behalf of the Claimant I heard evidence from the Claimant himself.

18 On behalf of the Respondent I heard evidence from Mr Taylor, the owner of the Respondent.

19 In addition I considered the documents provided to me by the parties.

Findings of Fact

20 I set out below the findings of fact I consider relevant and necessary to decide the issues I am required to decide. I do not seek to set out each detail provided to me. Nor do I seek to make findings on every detail on which the parties might disagree. I have, however, considered all the evidence provided to me and I have borne it all in mind.

21 To a large extent the parties were agreed as to the facts. The dispute was as to how the facts should be interpreted. In other words whether the facts were such as for the Claimant having been a worker of the Respondent, or not.

22 The Claimant is called Daniel Harvey. The Respondent is called Navarre Transport Services Limited. The Respondent is owned by Mr Roger Taylor. Mr Taylor's wife and son helped with the running of the business.

23 Prior to working for the Respondent the Claimant was working in an office job. He wanted a change.

24 An aunt of the Claimant was a friend of Mrs Taylor, Mr Taylor's wife. The Claimant needed work. Mr Taylor had work available for drivers.

25 Mr Taylor and the Claimant agreed to meet. They met in a pub to discuss the possibility of the Claimant working for the Respondent.

26 In the course of their discussion Mr Taylor gave details of the work his company carries out. I give further details below. In summary, the main business activity consisted of picking up building materials from builder's merchants and delivering those materials to customers of the builder's merchant.

27 In the course of the discussions Mr Taylor informed the Claimant that, in order to work for him, he would have to buy his own van. He would have to repair and maintain that van. He told the Claimant that he would be self-employed and have to be responsible for tax. He suggested that the Claimant register for VAT.

28 The Claimant has a wife and young children. He lives in Southminster, in Essex. Southminster is a considerable distance away from most of the customers served by the Respondent.

29 Mr Taylor lives in Romford.

30 Mr Taylor explained that he would not have taken on the Claimant if he was living at Southminster. It was too far out of London.

31 Mr Harvey's mother lives in Hornchurch, which is near Romford, and closer to most of the customers of the Respondent. Mr Taylor accepted Mr Harvey's proposal that he would live with his mother during the week. This is what he did whilst working for the Respondent, except that he would stay at his home if there was a job for him to do where he had picked up materials the afternoon before and would be delivering to Colchester the following morning (which occasionally happened).

32 The Claimant brought a van prior to starting working for the Respondent. On or about 1 September 2015 he started working for the Respondent. He continued to work for the Respondent until on or about 4 April 2017 when he left to start another job as a courier.

33 The nature of the Respondent's business, as described above, was to collect building materials from builder's merchants; then deliver the materials to customers of the builder's merchants.

34 Most of the builder's merchants were open from 8.00am – 4.00pm Mondays to Fridays and Saturday mornings. Any collections of materials would generally, therefore, need to be done before 4.00pm.

35 The builder's merchants the Respondent worked for had their fleets for delivering materials. They used the Respondent to supplement their in-house fleet.

36 The Respondent had about 10 – 12 drivers (or, according to the Claimant, about 8 – 12). All the drivers were treated by Mr Taylor as being self-employed. Not all worked consistently for the Respondent. Mr Taylor gave an example of someone who had his own business but would work for the Respondent from time to time when work was short.

37 Mr Taylor offered to pay the Claimant £120 per month if he put a company logo on his van in order to advertise the Respondent's services. The Claimant agreed to do this and the Respondent paid him for doing so.

38 Additionally the Respondent paid for the Claimant to have a polo shirt and high visibility jacket, both with the Respondent's logos on them.

39 The Claimant described his typical working day as follows. He would generally start work around 7.00am and be on the A13 ready to work. At some point after that Mr Taylor or his son would contact him by text or telephone call to tell him where to pick up and deliver goods. He would do so and obtain a proof of delivery slip for each job. He arranged for the proof of delivery slip to be taken to Mr Taylor's house, or would take them there himself, or if he met Mr Taylor during the course of his work would give him them. The Claimant kept an approximate record of the jobs he had carried out in order to check the payments made to him.

40 The Claimant registered for VAT and was self-employed for tax purposes.

41 At the end of each month Mrs Taylor would send the Claimant a text message asking to let her know of any congestion charges he had incurred. Mrs Taylor then notified the Claimant what amount he needed to put onto his invoice. He provided an invoice in the name of "D & N Harvey" and Mrs Taylor arranged for this to be paid.

42 Although the parties disputed whether the Claimant had always refused to work Saturdays (as Mr Taylor said); or did so later on, as he wanted to see more of his family (as the Claimant says) it is unnecessary to resolve this dispute. It is sufficient to record that the Claimant worked sufficiently for the Respondent to be earning between about £2,500 - £3,500 per month.

43 I find that the Claimant was effectively working full-time for the Respondent. There was never any discussion as to whether the Claimant could provide a substitute and he always carried out his work personally for the Respondent.

44 There appeared, at least to some extent, to be a dispute between the parties as to whether, or the extent to which, the Claimant could refuse work. Mr Taylor's evidence was that the Claimant was free to turn down any job he wished. The Claimant's evidence was that, in reality, if he wanted to continue to work for the Respondent, he needed to accept the jobs offered to him other than in exceptional circumstances. He gave an example of refusing a delivery to Ireland which other drivers had also refused.

45 I find that in reality the Claimant was expected to work full-time for the Respondent and to accept the jobs offered to him. I so find including because:

- 45.1 The Respondent was paying the Claimant £120 per month for his logo.
- 45.2 The Claimant had previously been working in an office job. He was not an individual who had previously been working in a similar business.
- 45.3 The Claimant had a wife and family and needed money.
- 45.4 He was living with his mother as a requirement for working for the Respondent during the week, so giving up time when he could otherwise have been with his wife and children.
- 45.5 Both parties agreed that, if the Claimant wanted a day off, he would need to notify the Respondent in advance.
- 45.6 I found the Claimant's evidence convincing that he was put under pressure to work. Even in Mr Taylor's words "people who want to earn a living say yes".
- 45.7 They disputed whether Mr Taylor became angry and abusive if the Claimant failed to answer his telephone (as the Claimant says); although Mr Taylor accepted that he expected the Claimant to pick up his

telephone, although Mr Taylor's answer to the question on this point was that he would not say that he was angry and abusive.

45.8 Mr Taylor's evidence was that the Claimant generally earned around £2,500 - £3,500 per month. This appears to me to be consistent with the Claimant working full-time for him.

46 There was never any written contract between the Claimant and the Respondent.

47 Towards the end of the time the Claimant worked for the Respondent and their relationship appeared to sour to some extent. From the Claimant's perspective Mr Taylor was difficult about time off he wanted. The Claimant explained that he had wanted time off for a Christmas play his daughter was in, in December 2016 and was told that he was needed. This was in December 2016. He went to work rather than attending the Christmas play but sat around waiting for work. He was told that other drivers were reliable and he decided that he did not want to work for the Respondent anymore.

48 From Mr Taylor's perspective the Claimant was less reliable than his other drivers. He had delivered late on a number of occasions to customers when timing was important. He tended to give him jobs where time was not critical.

49 At any rate, even if Mr Taylor had some dissatisfaction with the Claimant's work later on the time he was working for him, it was the Claimant that resigned, rather than having his service or services terminated by the Respondent.

Closing Submissions

50 Both parties gave oral submissions, although they had little to add to the evidence they have given through their written statements and documents; supplemented by their answers to the questions I asked them.

Conclusions

51 There are some factors that suggest that the Claimant was a worker for the Respondent within Regulation 2 of the Working Time Regulations. There are some factors that suggest that he was not.

52 The main factors in favour of the Respondent's case that he was not a worker for them included the following:

52.1 Mr Taylor made clear that he wanted the Claimant to work for him on a self-employed basis.

52.2 The Claimant registered for VAT and had the benefit of self-employed status for tax purposes.

52.3 The main item of expenditure of the Claimant was the van he had bought.

52.4 The Claimant had no fixed hours of work and was paid for the jobs he carried out.

52.5 The Claimant was not paid for any days off he took.

53 There are other factors that point towards the Claimant having the status of a worker. These include:

53.1 The Claimant was an integral part of the Respondent's business, as were the other drivers. Without drivers the Respondent would have no business.

53.2 The Claimant was controlled by the Respondent. The customers he collected and delivered to were dictated by the Respondent. The price charged to the customers was dictated by the Respondent. The Claimant had to ask for permission to take time off. He was expected to accept the jobs provided to him.

53.3 To the Respondent's customers it is likely that the Claimant would have appeared to have been an employee of the Respondent, or at least working for them. The van he drove had the Respondent's logo on it. The polo shirt and high visibility jacket he wore to work also had the Respondent's logo on them.

53.4 Having in mind the guidance given in the *Cotswold* case, the Claimant was recruited by a principal to work for that principal as an integral part of the principal's operations, rather than being someone who actively marketed his services as an independent person to the world in general. This, the then President of the Employment Appeal Tribunal advised, would in most cases demonstrate on which side of the line a given person falls.

53.5 The Claimant carried out his work for the Respondent personally. On no occasion did he obtain a substitute. On no occasion was there any discussion about the possibility that he could do so.

53.6 On balance I consider that the factors in favour of the Claimant having been a worker for the Respondent outweigh those in favour of him not having been so. I have in mind that, in particular, as referred to in the *Cotswold* case, he was recruited to work as an integral part of the Respondent's operations, rather than being someone who actively marketed his services to the world in general. He was working for the Respondent, not a client or customer of the Respondent.

54 The Claimant is, therefore, entitled to holiday pay under the WTR. The Claimant did not have normal working hours, so that a week's pay is to be calculated by reference to his average remuneration over the previous 12 weeks that he received remuneration, as provided for in section 224 Employment Rights Act 1996. Neither party, however, provided me with details of what the Claimant was paid for March 2018. I am, therefore

taking the Claimant's average weekly pay for the last 3 months for which I have been provided with details of the Claimant's pay; namely December 2016 and January and February 2017.

54 For December 2016 the Claimant was paid £2,319.60, with £386.60 being deducted for VAT, so that his net payment was £1,933.00. For January 2017 the Claimant was paid £2,704.20, with £450.70 being deducted for VAT, so that the net sum was £2,253.50. For February 2017 the Claimant was paid £3,382.20, with £563.70 being deducted for VAT, so that the net payment was £2,818.50. The average gross payment for those months amounted to £2802 per month. Dividing that into a weekly sum amounts to £641.61 per week.

55 During the period in question, under the Working Time Regulations the Claimant worked for one year, 216 days, amounting to 1.59 years. As the Working Time Regulations give a worker the right to take 4.8 weeks paid holiday, the Claimant was entitled to 7.63 weeks paid leave.

56 7.63 weeks leave at £641.61 per week's pay amounts to £4895.48.

57 The Respondent is ordered to pay the Claimant £4895.48. The Respondent may deduct VAT from this sum, but only if it provides the Claimant with certificates that show that the deductions have been made and received from the authorities concerned.

Employment Judge Goodrich

10 July 2018