EMPLOYMENT TRIBUNALS

Claimant: Mr Z Chmielinski

Respondent: Carter Brothers (Rochdale) Limited

Heard at: Manchester **On:** 28 October 2020
30 November 2020
(in chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Ms D Hargreaves, Finance Director

JUDGMENT

The judgment of the Tribunal is that:

1. The claimants claim of unlawful deductions in respect of:

   (a) holiday pay, succeeds;

   (b) wages for 2 December 2019 to 2 January 2020 fails and is dismissed;

   (c) for emergency leave fails and is dismissed;

   (d) rent and office expenses fails and is dismissed.

2. The claimant's claim of unfair dismissal succeeds.

3. The claimant is awarded :

   (a) a basic award less 50 % for contributory conduct;

   (b) his agreed salary from 13 December 2019 to 2 January 2020 less 50% for contributory conduct.

4. A remedy hearing will now be listed.

REASONS

Introduction

1. The claimant brought a claim of unlawful deduction of wages and unfair dismissal. The unlawful deduction of wages related to deductions made for absence and failure to work in December 2019. The claimant had given notice but has previously clarified he does not bring a constructive unfair dismissal claim in respect of that, rather he says that the respondent dismissed him during his notice period on 5 December 2019 when they withdrew his internet and intranet access.

2. The respondent says that the claimant was not an employee at the relevant time but was a self-employed consultant. They submit that they were entitled not to pay the claimant for days spent not working for the respondent, other than as agreed. The respondent did not argue the claimant had less than two years' service if he was found to be an employee.

3. The claimant accepted that if he succeeded with his unfair dismissal claim he would only be entitled to losses from the date of dismissal to 2 January 2020 when his notice ended. The claimant indicated that he claimed £10,000 but this was in relation to the cost of renting an office and the related bills.

4. The issues were

   (1) Was the claimant an employee or a worker?

   (2) If the claimant was an employee, did the respondent dismiss him on 5 December 2019 or on any other date?

   (3) If so, was it a fair or unfair dismissal?

   (4) If an unfair dismissal, what remedy is the claimant entitled to? The respondent relies on s122(2) **Devis v Atkins**, contributory conduct and **Polkey**.

   (5) If the claimant was a worker, is he entitled to be paid wages for 2 December 2019 to 2 January 2020, for emergency leave when his child was sick,for holidays and for office rent and expenses?

Witnesses

5. I heard from the claimant himself and from the respondent's Finance Director, Ms Debbie Hargreaves.

Findings of Fact

6. The Tribunal's findings of fact are as follows.

7. The respondent manufactures large industrial mixing machines for the rubber industry, namely for tyre manufacturers such as Pirelli and Dunlop, etc. They design and build every component for the machines at their factory in Middleton and then

ship the final machines out across the world. They also provide backup maintenance where required.

8. The claimant was a Project Manager. He had worked for the respondent when training to be an engineer, and had returned to work for them on 24 April 2017. He was, until July 2019, very highly regarded by the respondent. He would help design the components for the machine and complete the technical drawings, working with the production and purchasing departments.

9. In January 2019 the claimant advised the respondent that he was going to move back to Poland but stated it would be difficult getting a new job. He had a conversation about this with Ms Hargreaves. She did raise concerns with him leaving as he was a very important part of their project team, but he assured the respondent that he would complete the project he was working on and would not be leaving until June/July when that project should have been completed. The project was started in January and generally most of the respondent's projects took nine months to complete, and the claimant's part in it should have been completed by the end of June.

10. Ms Hargreaves had a further informal conversation with the claimant when he asked if he could work for the respondent remotely from Poland. She was unsure about this as this had never been allowed before. The claimant assured Ms Hargreaves he could work off his laptop anywhere in the world provided his computer was in the office in Middleton and connected to the network.

11. Ms Hargreaves spoke to the respondent's Managing Director Mr Peter Fletcher about this, and they decided they would be willing to give it a try.

12. The claimant asked Ms Hargreaves if she could follow this up with an email and then he would stop looking for a job in Poland. Ms Hargreaves emailed the claimant on 1 February advising that they would be willing for him to work for them either as an employee or as a consultant.

13. In the earlier conversation the claimant had said he needed to be paid the same amount of money as he received net in the UK. Ms Hargreaves said the respondent could do that as it would be a saving for them, she advised today, so it was an attractive proposition, but she expected he would have to pay tax or national insurance in Poland, and she advised the claimant at the time that she knew nothing about this, obviously, and that the claimant would have to take care of this. The claimant denied this and said that Ms Hargreaves had said she would take care of everything, including setting up a company for him, however I prefer Ms Hargreaves' evidence as it is inherently more probable she would say that she knew nothing about tax and national insurance in Poland than that she would volunteer to investigate this and/or set up a company in Poland for the claimant.

14. Ms Hargreaves said she was chasing the claimant throughout the rest of the year to finish off the project, and his failure to do so made her concerned as once he had left for Poland the respondent would have even less control over him than in the UK.

15. Ms Hargreaves then asked for a meeting with the claimant to discuss her concerns. The claimant said that as long as he was paid the amount (and wrote it down) there would be no problem. Ms Hargreaves related that the claimant then

said if he did well maybe he would get an increase. Ms Hargreaves said she responded, “one step at a time Zibi”.

16. There was a further meeting when it was discussed how it was going to work, there was a further discussion about the amount to be paid direct to the claimant and Ms Hargreaves wrote down £2,435.21 and the fact that the claimant would be responsible for paying tax in his own country and that he would be a contractor. Ms Hargreaves said she was worried but they would see how it went and if it worked out maybe something more permanent could be agreed, and they discussed the technicalities of how the claimant would work. It was agreed that the claimant would log on in the morning and the evening when he started and finished, and the respondent would also provide timesheets so that they could cost his contribution to the project. Ms Hargreaves stated that she told the claimant he would be classed as a contractor working for himself and that they would give him a project and agree a timescale, and it was up to him to work whatever hours were necessary to get the project done, even if it was more than his hours in the UK. Ms Hargreaves’ evidence was that the claimant agreed this, however the claimant said that the first time he heard about being a self-employed contractor was when the respondent spoke to ACAS after he had brought his claim. However, this cannot be correct as 1 February 2019 email refers to it. This was one reason why I did not find the claimant a wholly reliable witness, whereas Ms Hargreaves was as she was candid in the evidence she gave even where it did not help her case.

17. There was a discussion, Ms Hargreaves said, about setting up a company but that was for the claimant to incorporate himself as a company then he could invoice the respondent and it was likely to be a more favourable tax position. It was also agreed that he could work for other people at the weekend. The claimant took a phone from the respondent but he was using his own laptop once he moved to Poland. The claimant was claiming for the rent etc re relation to an office he had open in Poland however Ms Hargreaves stated that there was no agreement for this at all, the whole point of the arrangement was that the respondent would be saving money in a number of ways including the claimant working from home. I accept her evidence and there was no written documentation showing any discussion about the claimant renting an office.

18. It was also agreed that the claimant would not be able to work for the respondent in the month he moved but he could not afford to go without a monthly payment, so the respondent continued to pay him at that point in time. The respondent also agreed that the claimant's employment had ended and they would pay him any holidays due, and that they would still pay him for the month he was settling in provided he did as much work as possible in that period. The respondent did pay the claimant for his holidays.

19. The claimant left the country on 8 July 2019. He promised to finish the project he was working on in August 2019.

20. The respondent issued the claimant with a P45 which they sent to the address the claimant had provided in the UK. The claimant said he never received this because the respondent sent it to the wrong address, however I am satisfied that it was sent to the address that was agreed between the parties would be his postal address as, although the respondent requested one, he did not provide an address in Poland.

21. Once July had passed the respondent expected the claimant to move towards working to his normal level of service but the claimant, in effect, stonewalled Ms Hargreaves when she tried to chase up the work.

22. As a result of that project being very behind, financial problems were incurred by the respondent as the customer did not pay for the machine as it was not completed, and also put other orders on hold until the machine was delivered. As a result, wages were paid three working days late in September 2019. It was explained to everybody why this had happened but the claimant would not accept this and began sending emails to the whole company complaining about it. Ms Hargreaves and Mr Fletcher spoke to the claimant asking him to desist from emailing the whole company and advising him that it was partly due to his not finishing the project that there was not enough cashflow. It was a small company and such delays had a big impact.

23. On 2 October 2019 the claimant tendered his resignation to end on 2 January 2020 due to the late payment. Ms Hargreaves' evidence was then that she had a lot of issues with the claimant not being available and many complaints from staff and customers. The claimant confirmed he was still leaving on 2 January 2020. The respondent employed a new Technical Manager on 22 November 2019 and asked the claimant to speak to him, in effect to do a handover. However, the claimant never replied to the Technical Manager's emails.

24. On 2 December 2019 the claimant complained that his November payment was down by £200. Ms Hargreaves said that the claimant had not worked for some days in November and therefore those days had been deducted. The claimant said it was an emergency and his child was in hospital, but the respondent was adamant that it was at their discretion whether emergency absence of that nature was paid in full or not. It was Ms Hargreaves' perception that after that conversation the claimant stopped working for the respondent entirely. Ms Hargreaves tried to ring the claimant but he never responded. She monitored his screen in the UK and there was no evidence he was working. Neither did he submit timesheets. The claimant said from 2-5 December 2019 he was helping a new start in purchasing and that after 5 December he was working on technical drawings. However there was no evidence of this and he did not mention this at the time. Accordingly I find the claimant was not undertaking any work over this period.

25. Ms Hargreaves instructed their technical department to block the claimant's access on 5 December 2019 for two reasons:

(1) She wanted to force him to get in touch; and

(2) In addition, she was concerned that projects had been opened and technical information had been accessed which were not legitimate for the claimant to access.

26. Nothing was heard from the claimant until 13 December 2019 when he contacted Ms Hargreaves and asked why had he been locked out. Ms Hargreaves opined that the claimant should have complained earlier about this as if he had been working he would have needed that access. The claimant said that he had complained to his manager via a WhatsApp group on 7 December, however the WhatsApp group was an informal group of peers and was not a route by which a serious complaint would be made. However, it is true he did raise it in this group. Ms

Hargreaves tried to find out what exactly had been posted on WhatsApp and who to, and whilst she was doing that a member of the group showed her the WhatsApp messages, which included some derogatory comments about Ms Hargreaves. Although the claimant denied this, it was the case that the WhatsApp group showed the last email Ms Hargreaves had sent him followed by the comments “fucking bitch” and “mother fuck”.

27. The claimant never finished the project which was due to be finished in June 2019, and the respondent had to pay thousands of pounds trying to sort the project out. Ms Hargreaves did not believe the claimant had done any work between 2 December 2019 and 2 January 2020 therefore she did not pay him for this period.

28. There was no actual email or message terminating the claimant's employment. The respondent maintained a position that he had refused to work for them. They did not restore his access and he did not in terms specifically address this. Neither did the respondent. However, the claimant did not do any more work for the respondent from 13 December 2019 to 2 January 2020.

Claimant's Contract of Employment

29. The claimant did have a contract of employment when he started his second period of employment with the respondent in 2017.

30. At paragraph 2 of the claimant’s contract of employment it states:

> “The duties are to be carried out loyally, diligently and in accordance with the company’s Code of Conduct, polices and procedure in force from time to time, and the reasonable directions of your manager and other company representatives.”

31. At paragraph 4.4 it states:

> “By countersigning this contract you authorise the company to deduct from your pay and/or credit to you any amounts which are due in accordance with the Employment Rights Act 1996 and any other relevant legislation including:
>
> (a) loans made to you by the company;
>
> (b) any monies due to the company from you;
>
> (c) excess of holiday pay over entitlement;
>
> (d) excess of sick pay over entitlement;
>
> (e) excess of expenses claimed by you;
>
> (f) excess of any other payment made to you by the company;
>
> (g) any money requested by you in writing to be deducted; and
>
> (h) losses suffered by the company as a result of your negligence of breach of company rules.”

32. In paragraph 5 the contract states:

> "In addition to your remuneration you will be reimbursed all reasonable expenses properly, wholly and exclusively incurred by you and authorised by your line manager in the discharge of your duties under this contract upon production of receipts or other evidence for them as the company may reasonably require."

33. As regards holidays (paragraph 6) the contract states:

> "Your paid holiday entitlement will be 33 working days holiday in each complete calendar year inclusive of Bank Public Holidays…calculated from 1 January to 31 December each year."

34. At paragraph 6.3 the contract states:

> "On the termination of your employment you will be entitled to a day's salary for each day of holiday accrued but not taken in the year of your departure."

35. At paragraph 6.6 the contract states:

> "You are entitled to carry over five days' accrued holidays. You will not without prior written consent be entitled to carry forward any other amount."

36. Referring to sickness absence, paragraph 7.3 the contract states:

> Your entitlement to pay during sickness absence is at the discretion of the directors and will be deemed to include SSP and/or any social security benefits recoverable by you whether or not recovered in respect of your sickness or injury.

37. However, there did not seem to be anything specifically about payment during emergency leave, which of course is a statutory right but a statutory right to leave not pay.

38. In respect of the period after 8 July when the respondent states the claimant was working as a consultant, there were no agreed terms although I note the respondent relies on the terms of the employment contract in respect of not paying the claimant for his absence in November, however had he been self-employed it was unlikely he would be paid for the absence in November in any event.

The Law

Dismissal

39. Where it is not clear whether an employee has been dismissed the Tribunal is entitled to look at all the circumstances. There were no express words of dismissal here, therefore the test is "what would a reasonable employee understand from the words used?" (**Chapman v Letheby and Christopher Ltd** (EAT). Where ambiguous conduct is the issue the claim will usual be constructive dismissal, however as the claimant clearly stated he was not claiming this the Tribunal has to consider whether the employer's conduct could be an express dismissal. In **Kirkless MC vs Radecki [2009] CA** removing an employee from the payroll and negotiating a compromise agreement was sufficient.

40. Where an employer argues that the claimant has in effect resigned the Tribunal should consider the situation very carefully and such a finding will only be made in exceptional circumstances. The concept of an implied resignation or self dismissal is generally not accepted. In **LTE vs Clarke [1981] C** it was roundly rejected. Where for example an employee refuses to have an employee back after an act of misconduct this is a dismissal by the employer.

Employment Status Employment Rights Act 1996

41. Section 230 of the Employment Rights Act 1996 defines an employee as follows:-

> "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.
>
> In this Act a contract of employment means a contract of service or apprenticeship, whether express or implied, and if it is express whether oral or in writing.
>
> In this Act, worker means an individual who has entered into or works under or (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 professional business undertaking carried on by the individual".

42. In **Ready Mix Concrete 1968** three questions were set out to be answered in defining a contract of employment.

a. Did the worker undertake to provide his own work and skill in return for remuneration;

b. Was there a sufficient degree of control to enable the worker fairly to be called an employee;

c. Were there any other factors inconsistent with the existence of a contract of employment.

43. In **Cotswold Development Construction Limited v Williams 2006** it was suggested there should be a four-fold approach.

(i) Was there one contract or a succession of shorter ones;

(ii) If one contract did the claimant agree to undertake some minimum amount of work for the company in return for pay;

(iii) If so, was there sufficient degree of control to make it a contract of employment;

(iv) If there was insufficient control or other factors negating employment was the claimant nevertheless obliged to do some minimal work or a reasonable amount of work personally thus qualifying him as a worker.

Worker under 1996 Act

44. Section 233B of the Employment Rights Act 1996 is the same test as section 83 of the Equality Act 2010, substantially. It requires the tribunal to distinguish between a situation where an individual is not an employee but neither are they truly self employed by being in business on their own account.

45. The Supreme Court in **Bates van Winklehof v Clyde & Co LLP [2014] SC** stated:

> "Generally there are three tests to establish if a person is a worker or self-employed:
>
> (a) Is there an express or implied contract to perform work or services?
>
> (b) Is there an express or implied obligation to perform the work or services personally?
>
> (c) Is the worker performing the work or services in the context of running a business where the other party is a client or customer?"

46. In **Byrne Brothers (Formwork) Ltd v Baird [2002] EAT** it was held the intention was clearly to create an intermediate class of protected worker made up from individuals who were not employees but equally were not carrying on a business in their own name.

47. In the recent cases of **Uber v Aslam [2017] EAT and Pimlico Plumbers Limited v Smith [2018]** the main test remains the obligation of personal performance: the obligation "personally to do the work" may be an implied one (**Manku v British School of Motoring Limited [1982] ET**). However, the fact that the individual does not actually perform all of the work personally will not necessarily mean that the contract is not a contract personally to do work. So long as the contracting party performs the essential part of the work he or she is free to assign or delegate other aspects to another person. For example, a solicitor may delegate some of the legal work in a case to an assistant and rely on a secretary to carry out ancillary tasks like typing and posting letters and other documents (**Kelly & Anor v Northern Ireland Housing Executive [1998]**).

Unfair Dismissal

48. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). The respondent here relies on some other substantial reason.

49. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> "A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

50. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) 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 sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

51. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

52. The Tribunal must not substitute its own view for the range of reasonable responses test.

53. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

54. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

55. The House of Lords in a decision of **Polkey v A E Dayton Services Limited [1988]** decided that where a case is procedurally unfair a decision would still be of unfair dismissal even if there was a strong argument the procedural irregularity made no difference to the outcome unless the procedural irregularity would have been utterly useless of futile. Rather the question of the irregularity making no difference would be addressed in terms of remedy. This principle has also been extended to cases where dismissal is substantively unfair, although it is most likely to apply to procedural irregularity cases. The outcome can be that it would have made no difference and the claimant, although unfair dismissed, would be entitled to no

compensation or the rectification of the problem would have resulted in a delay in the claimant being dismissed and therefore the claimant receives compensation for that delayed period.

Contributory conduct

56. The Tribunal must always consider whether it would be just and equitable to reduce the amount of the compensatory award pursuant to section 123(6) of the Employment Rights Act 1996, where an employee by blameworthy or culpable actions, caused or contributed to his dismissal. If the claimant did so do the Tribunal will have to assess by what proportion it would be just and equitable to reduce any compensatory award, usually expressed in percentage terms. The three principles are:

(1) That the relevant action must be culpable or blameworthy;

(2) It must have actually caused or contributed to the dismissal; and

(3) It must be just and equitable to reduce the award by the proportionate specified.

57. These principles were set out in **Nelson v BBC No. 2 [1980]** Court of Appeal.

Just and equitable/Devis v Atkins

58. Under section 123(1) 1996 Act any compensatory award shall be reduced by such amount as the Tribunal finds is just and equitable. The compensatory award can be reduced but not the basic award. One of the common situations in which this arises is where pre-dismissal misconduct is discovered post dismissal and that conduct would have merited dismissal **(Devis v Atkins 1977 HL)**. The principle does not apply to post termination conduct or conduct which was known about prior to dismissal but not acted on (**Mullinger vs DWP 2005 EAT**).

Unlawful deduction of wages

59. The claimant brings a claim of unlawful deduction of wages i.e. under Part II of the Employment Rights Act 1996.

60. The general prohibition and deductions are set out in section 13(1) of the Employment Rights Act 1996 ("the 1996 Act") which states that:

> "An employer shall not make a deduction from wages of a worker employed by him."

61. However, this does not include deductions authorised to be made by virtue of a statutory provision of contract or where the worker has previously agreed in writing to the making of the deductions (section 13(1)(a) and (b)).

62. Section 27(1) defines wages as "any sums payable to the worker in connection with his employment", and includes any fee, bonus, commission, holiday pay or other emolument referable to the employment. These may be payable under the contract or otherwise, as defined in the case of **New Century Cleaning Company Limited v Church [2000]** Court of Appeal as not extending beyond sums

to which the worker has some legal but not necessarily contractual entitlement. A deduction is defined as:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions). The amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion." (Section 13(3)

63. In order to decide what is properly payable the Tribunal has to decide what the contractual agreement is between the claimant and the respondent, and the approach to determining this is the same approach as adopted by the Civil Courts in contractual claims (**Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] EAT**).

64. One example would be where a Tribunal determines that the amount of wages an employee is contractually entitled to has been varied by agreement or there is a flexibility clause in the contract giving the employer the right to do so. In that situation the wages properly payable will be the reduced wages due under the varied contract or the flexibility clause, therefore when the reduced amount is paid there is no deduction, it having been contractually agreed that the wages would be reduced. Of course, it has to be established that that reduction was agreed. Section 13(1) states:

> "An employer must not make a deduction from the wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract."

65. In respect of this contractual authorisation, this is defined in section 13(2) as a provision contained in:

(1) One or more written contractual terms of which the employer has given the worker a copy before the deduction is made; or

(2) One or more contractual terms (whether express or implied, and if express whether oral or in writing) whose existence and effect (or combined) the employer has notified to the worker in writing before the deduction is made.

66. In addition, there may be an issue here that a contractual term must be enforceable at common law if it is to authorise a deduction under section 13. This issue has arisen in the context of so-called penalty clauses which are prohibited at common law. In **Cleeve Link Limited v Bryla [2014] EAT** it was confirmed that a sum deducted under a penalty clause cannot be a lawful deduction under section 13. It rejected the employer's contention that so long as the criteria as set out in section 13 of the 1996 Act was satisfied, the deduction was authorised, and the question of enforceability as a penalty clause was properly the province of the Civil Courts.

67. Finally, it has to be established that the factual basis for the deduction has been met i.e. if a deduction for poor workmanship has been agreed it then has to be established that there actually has been poor workmanship.

Conclusions

Was the claimant an employee of a self-employed contractor?

68. I accept Ms Hargreaves' evidence that the intention of the respondent was that the claimant would be a contractor following his departure for Poland, however there are many cases where both parties agree the status is to be that of a contractor or a self-employed person but in fact the legal analysis leads to the individual being regarded as an employee. Accordingly, the label the parties put on it is not determinative.

69. In this case the matters in favour of the claimant were:

(a) that he was paid a regular amount and did not submit invoices;

(b) that the respondent referred to his employment contract for determining his terms and conditions;

(c) that there were no terms and conditions agreed in respect of his status as a contractor;

(d) that the respondent expected him to log in and out and provide timesheets.

70. Whilst the respondent stated these were for the purposes of assessing how to cost his job, they also clearly use them as a guide to whether or not he had been working at times.

71. In respect of the factors in favour of the claimant being a contractor, the respondent was unable to exert much control over the claimant, albeit that was not their intention, and the claimant did use his own equipment to a limited extent, that he had been advised he had to work the hours to get the job done rather than his contracted hours as an employee, and that he was to pay his own tax and national insurance in line with the requirements in Poland.

72. On balance, I find the claimant was an employee. The respondent expected him to work a reasonable number of hours, at least equivalent to what he had worked as an employee. There was no mechanism for paying the claimant a lump sum per project; there was no invoicing system. The respondent had an expectation that the claimant would undertake the work he was given and the respondent had no intention of not providing the claimant with work at any time: they certainly expected that work to be done within the normal parameters. He had to clock in and out. Had he been a contractor the arrangements would have been very different.

Was the claimant a worker?

73. The claimant was obliged to provide his work personally. Although the respondent denies this, it was very much his personal skills (although the respondent would say they felt that these were on the wane in terms of commitment towards the end) that were required. There was no evidence whatsoever that the claimant would be allowed to substitute an alternative person. Neither was the claimant in business

on his own account, he was expected to work for the respondent. Accordingly, the claimant was a worker and would be entitled to make an unlawful deductions claim.

Unlawful Deductions Claim

74. In respect of deductions I will first consider whether the payment claimed was properly payable and also whether the respondent had a separate right to make a deduction.

Emergency Family Leave

75. Given that I find the claimant was an employee, it is a logical step to find that he was still operating under the terms and conditions he had originally operated under. Accordingly, in accordance with those terms and conditions, the respondent could within their discretion not pay the claimant for days off. His statutory entitlement to emergency leave would be to have the time off, not to be paid in full for those days. Accordingly, the respondent was acting within the contract when they failed to pay the claimant £200 in November 2019 and no entitlement arose.

Wages in December

76. In respect of not paying the claimant for December, this depends on whether or not the claimant did do any work in December. I found the claimant's evidence on this unconvincing. No evidence was put in the bundle to show that he did any work whatsoever following the angry phone call on 2 December 2019, and it is far more logical (given the context of the claimant having resigned because he was annoyed he was paid three days late) that he would down tools, as it were, after the somewhat fiery phone call on 2 December. Accordingly, the respondent is entitled not to pay the claimant as he had not complied with the terms of his contract to undertake work.

77. However after 13 December the claimant appeared ready and willing to work (although past history would suggest this was insincere) nevertheless access to the system was not restored. Ms Hargreaves says the claimant did not ask for it to be restored but neither did she offer it to him. Accordingly, my finding is that the claimant was due salary from 13 December 2019 to 2 January 2020. However, the respondent relies on para 4h of the claimant's contract to justify non payment as due to the claimant's negligence in not completing his work they had had a cashflow problem. However, I find that the claimant's action would not necessary come under the definition of negligence and that the respondent has not provided concrete examples of costs being incurred because of negligence. Further this could have been pursued via a counterclaim which has not been done. Accordingly, that period is due for payment. However due to finding below that the claimant was dismissed on 13 December 2019 that period is not payable under unlawful deductions but as compensation for unfair dismissal which has the consequences set out below.

Holiday

78. As a worker the claimant is entitled to holiday for the period July to 2 January 2010 subject to any holiday he actually took. I did not have this information in full. The claimant claimed half a day. If the parties cannot settle this issue they should request the tribunal arrange a remedy hearing.

Unfair Dismissal

79. In respect of unfair dismissal, the respondent denied that they dismissed the claimant, simply that he had stopped working during his notice period. If they had dismissed him it was for "some other substantial reason".

80. I find that that the claimant had indeed failed to undertake any work for the respondent up to 13 December. However, on 13 December the claimant was making an effort to resume contact, matters were not resolved either way at that point. The conduct of the respondent in not resuming access for the claimant and persisting in a position that he was in breach of contract put together is sufficient to establish that the claimant was dismissed on the 13 December.

81. Arguably the claimant could have had a constructive dismissal claim on 2 December, 5 December or 13 December but he has chosen not to pursue this option.

82. Accordingly, I find there was a dismissal on 13 December 2019. No procedure was followed, no doubt because the respondent believed the claimant was not an employee. Accordingly, the dismissal was unfair.

83. Whilst the claimant had behaved badly some investigation and hearing was required. However, had a fair procedure been carried out it is clear the claimant would have been dismissed, just a few weeks later than he was actually dismissed and certainly after the expiry of his notice period. Accordingly compensatory loss would be payable under the **Polkey** principle, only to the end of the notice period however the basic award would still be payable.

84. Further, I find that the claimant contributed to his dismissal on 13 December by failing to answer phone calls, failure to communicate with his new manager, failure to properly address the internet cut off properly, failure to complete any work and fill in timesheets. I would put this at 50% contribution in respect of the basic award and the compensatory award for 13 December 2020 dismissal.

85. However, I also find the following.

Devis vs Atkins/just and equitable

86. In addition, the respondent argued the claimant could have been dismissed for gross misconduct in the light of the comments he made about Ms Hargreaves on the WhatsApp group. I agree with this however the time it would have taken the respondent to go through a disciplinary process would have taken them beyond the 2 January 2020.

87. I find that the claimant could have been fairly dismissed for these comments and accordingly there is no compensation payable to the claimant for 13 December unfair dismissal save for the payment identified above of his salary from 13 December to 2 January. That payment is also however subject to contributory conduct which again I would put at 50% on the basis that whilst wrong the claimant had an expectation it was private although most employees would be aware that the chances are quite high that indiscreet comments on a work's WhatsApp group will 'leak' outside the group.

88. On the basis however of paragraphs 83 and 84 this finding makes no practical difference and the only compensation payable is the claimant's salary from 13 December to 2 January 2021 less 50%.

Rent and office expenses

89. There was no agreement at any time that the respondent would pay these costs on the contrary the respondent saw the arrangement as a saving and so it was inherently unlikely, they would have agreed to this. There was no written evidence this was agreed to and I did not find the claimant's evidence on this in the least bit convincing. Accordingly, this is not an expense the claimant can claim either as an unauthorised deduction or as part of any unfair dismissal compensation.

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Employment Judge Feeney

Date: 17 December 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 December 2020

FOR THE TRIBUNAL OFFICE