EMPLOYMENT TRIBUNALS

Claimant: Mr D Moore

Respondent: Westlake Civils Limited
Chad Burrows

Heard at: Manchester **On:** 16 and 17 December 2019

Before: Employment Judge Holmes
Ms S Khan
Mr Q Colborn

REPRESENTATION:

Claimant: In person
Respondents: Mr S Hoyle, Consultant , Croners

JUDGMENT

It is the unanimous judgment of the Tribunal that :

The claimant's claims that he was a worker for the purposes of the Employment Rights Act 1996 , and an employee of the first respondent for the purposes of the Equality Act 2010 have no reasonable prospects of success and his complaints of unlawful deduction from wages and of discrimination on the grounds of his race under s.39 and s.40 of the Equality Act 2010 are struck out pursuant to rule 37 of the 2013 rules of procedure.

CASE MANAGEMENT ORDERS AND NOTICE OF HEARING

1. The claimant has permission to amend his claims of race discrimination to claim that he was a contract worker for the purposes of s.41 of the Equality Act 2010, and he can pursue his claims of race discrimination on that basis.

2. That permission, however is conditional upon the claimant complying with the following orders of the Tribunal:

   a) The claimant do by **31 January 2020** provide to the respondent (and not the Tribunal) hard copies of all documents that he intends to rely upon to show that he was employed by Pavemoore Limited ; and

   b) The claimant do by **17 February 2020** make and serve upon the respondent (and not the Tribunal) a further witness statement setting out full details of his employment status with Pavemoore Limited; and

   c) Setting out with more detail each and every occasion upon which he claims that he was subjected to any detriment (e.g, being verbally abused, being denied payments that were due, or any other form) by the respondent.

3. For the avoidance of doubt, if the claimant fails to comply with any of these provisions, his claims may not be amended, and as none will then remain, all his claims will stand dismissed.

4. In the event that the claimant complies, the respondent has permission to amend its response by **9 March 2020**.

5. The respondent will prepare a further hearing bundle for the amended claims, and the further hearing. This is to be agreed by **23 March 2020** and a hard copy provided to the claimant by **30 March 2020.**

6. The respondent has permission to serve any further witness statement in response to the amended claims , and the claimant's further witness statement , by **24 April 2020**.

7. The amended claims be heard by an Employment Judge sitting with members on **22 and 23 June 2020 at Manchester Employment Tribunal , Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA.**

REASONS

1. In this case the claimant Mr Moore has brought two claims, one of unlawful deduction from wages and the other for race discrimination, both of which arise out of his engagement, to use a neutral term , by the respondent which came to an end on or about 1 April of this year having started in July of 2018. The respondent which is now represented by Mr Hoyle of Croners, but was previously unrepresented, has defended the claims on the basis that the claimant is not a worker , either for the purposes of the Employment Rights Act 1996 , under which the unlawful deduction from wages claim is made, or the Equality Act 2010. He is not an employee for those purposes either, that being the legislation under which he brings his complaint of race discrimination.

2. The claimant has given evidence before us this morning, and this afternoon and has two witnesses , but as those are relevant not to the issue of worker status , he has not called them at this stage in the proceedings. They are relevant to his substantive claims when we hear those. There have been two bundles of documents actually produced to the Tribunal, one from the respondent's side and one from the claimant's side. Having heard the claimant's evidence on this issue in its totality, Mr Hoyle for the respondents has made an application under Rule 37 of the Tribunal's rules of procedures that the claimant's claims , as they appear before us presently , should be struck out on the basis that they have no reasonable prospects of success. That would be pursuant to Rule 37(1)(a) of the Tribunal's 2013 rules, and he makes that submission at this stage on the basis that the claimant's prospects in respect of both of those claims are such that the Tribunal could safely strike them out , as he will not be able to satisfy , and has not satisfied the burden of establishing that he is a worker, or employee, for both these relevant pieces of legislation.

3. That application has been considered. It is an unusual one to consider at this stage of the proceedings , and was originally put as a submission of no case to answer as it were. That is a practice which is not encouraged in Employment Tribunals , but in terms of striking out , a Tribunal may as Rule 37(1) says itself, at any stage of the proceedings, either on its own initiative or on the application of a party, make such an order. So there is no bar upon the Tribunal considering an application even at this stage in the proceedings, and particularly when the claimant has given evidence, and so all the potential facts that he is going to rely upon . If all possible arguments and evidence have been put before the Tribunal , it would be in a position to make a proper judgment on the application, so the Tribunal has acceded to the application to consider such an application, and we have done so.

4. In terms of the approach we have taken , it has been to accept the claimant's evidence where he has given evidence, or if the documents establish clearly something that is beyond doubt. We are entitled also , on such an application, if there is any dispute as to any factual matter to consider the prospects of the claimant establishing something that is still unestablished. But in overall terms we take the claimant's case and his evidence at its highest for these purposes , and , where necessary, give him the "benefit of the doubt". We do , however, have to consider whether or not any contentions he makes, particularly factual ones, have any real prospects of success.

5. The facts giving rise to this application, and indeed to the case as a whole , are that the claimant was until June 2017 , and probably thereafter as well for some time , a self-employed groundworker working in the construction industry. In June 2017 he incorporated the company Pavemoore Limited , of which he is one of two directors and one of two shareholders, the other being his partner and the Companies House information shows that for the first year that company was dormant, it filed no accounts other than those required for dormant companies . In July 2018 the claimant having continued to work as a self-employed groundworker then was introduced to Mr Chad Burrows of the

respondent Westlake Civils Limited by a mutual friend , and the way in which the arrangement between them came about has been described in the evidence. It was a relatively informal arrangement, with , as doubtless both sides now deeply regret , no documentation whatsoever. Be that as it may, a verbal agreement is still an agreement , and the agreement made between the parties was that the claimant , and four other people would form a five man team to do groundworks for the respondent, initially at an Atlas Street site with a WA9 postcode. The discussion between Mr Moore and Mr Burrows was essentially summarised in an email message which is at page 2 of the claimant's bundle , in which Mr Burrows , who wrote it, refers to their meeting earlier that day , and sets out the brief terms that they had agreed. These were that there would be the five man team , working at the Atlas Street site and there was confirmation that the claimant's invoice would be paid directly into his bank every two weeks, work with one week in hand and the rates applicable to the various operatives were set out. The supervisor which was the claimant himself £19.00 an hour, experienced machine driver £17.00 an hour, experienced groundworker with dumper or low loader ticket i.e. authorisation for such a machine £17.00 an hour and labourer £12 an hour. The email continues "you are to supply all transport to site and all small tools to undertake the works" , and the details of the relevant Project Manager were provided. The claimant accepted in evidence that the company did not pay the other operatives those rates, but took £1 an hour off them.

6. Indeed, the transport was provided by the claimant in the various stages of the contract , until the very last week or so when his own van broke down and he was lent a van from the respondents. At all other times during the operation of this contract, he did indeed provide that vehicle, which had the name Pavemoore on it, with or without limited doesn't greatly matter, but he accepts that it had Pavemoore written on it, and that was used to transport the team to firstly the Atlas Street site. Thereafter there were changes , and the team were then required to work at other sites, Sugar Street site where by an email communication in February 2019 there was a reduction in the number of operatives required to only four , but in terms of the arrangements , other than that, they continued in the same way.

7. In terms of invoicing and payment, the claimant invoiced the work by sending in invoices upon which the name Pavemoore Limited was set out. On those invoices was reference to a bank payment, sort code and account number which the claimant confirms was in fact his own personal bank account and not that of the company , which at that time which apparently did not have its own bank account. Be that as it may those were the instructions to the respondent , and those are the instructions which it followed because the payments were indeed made into that account. Throughout this engagement the invoices came from Pavemoore Limited, whose registered address was the same as the claimant's home address , and indeed recently changed when he too moved address, but the address of the company and the address of the claimant was indeed one and the same.

8. Other than to provide the information about Pavemoore Limited which the claimant accepts he did in the discussion with Mr Burrows, because he would have no prior knowledge of it, the two not having worked together previously the claimant says he also provided his UTR which would be his Unique Tax Reference. But this would appear not to have been used, least of all because the invoices were coming from the company, and so there was no need for the respondent to process any PAYE or other tax payments because of the claimant's invoicing through the company. It also appears that the claimant during this time and indeed subsequently has used an email address which is at @Pavemoore.co.uk which is the company's email address, it also apparently has a website with that address as well. In terms of the status of the claimant , and indeed those operatives that were supplied with him to form this gang for the groundworks that were necessary, the respondent obtained and operated the details of the CIS scheme , which is a scheme under which a contractor will make deductions in respect of tax and national insurance for self-employed sub-contractors. Indeed it is a term of such a scheme that employees are not eligible for it , but in terms of the gang that were working under this contract CIS payments were withheld by the respondent pursuant to that scheme as it seems the claimant, and indeed the others in the team would all have relevant registration on that scheme.

9. In February 2019 there was some communication between the respondent and the claimant in relation to working elsewhere, and the provision of what has been termed a reference , and this is at firstly page 5 of the claimant's bundle, where there is a brief text or email message in which the respondent, Chad Burrows in fact sent him this. This was a confirmation that he had used Pavemoore Services for over twelve months and had found the standard of work excellent and had no hesitation in recommending the claimant and his operatives to other companies . There was a letter in very similar, in fact slightly more extended terms , which is at page 15 of the claimant's bundle, that too is dated 26 February and is in similarly congratulatory and glowing terms as to the work that was done.

10. The claimant did however experience from time to time difficulty in getting paid by the respondent. Meanwhile, for its part the respondent experienced some difficulty with the quality of work done by the claimant and the rest of his team on a contract in Mold. That actually first was raised in January of 2019 and there was an email at page 28 of the claimant's bundle of 8 January 2019, to which are attached some photographs of the site at Mold and the alleged poor finish for which the claimant's team was being held responsible. There was some dialogue about that potential claim wherein the respondent in fact was seeking that the claimant put matters right , and was discussing the cost that would be involved in that.

11. That continued, as it were, to rumble on, there was no immediate resolution, nor was there any actual invoice raised by the respondent against the claimant at that time and in the meantime the claimant and the rest of his team continued to work on what was, by then. a site at Sale.

12. By the end of March 2019 however there were further difficulties, and these came to a head in a telephone call between the claimant and Mr Burrows on 29 March . The ensuing text exchanges between those two men is to be found at pages 17, 18 and 19 of the claimant's bundle. The claimant had indeed rung Mr Burrows that morning about payment, and one of the text messages indeed refers to the need for them to phone quickly if he wanted paying today. Thereafter there had been a phone call between the claimant and Mr Burrows and whilst not having heard Mr Burrows' account of it, we accept for these purposes what the claimant says which is, in essence, that there was an argument about late payment and that he then went and informed the Site Manager that he was leaving, he had had enough and he was no longer going to "work for", as he put in those terms , the respondent. Not only did he do so, but so did the rest of the team, it was not just the claimant walking off in those circumstances, the whole team joined him and they effectively left the engagement. That led to Mr Burrows raising the very question in this text exchange, he had just been told that the claimant as, as he puts it , had "jacked" , and checked that this was right.

13. Thereafter, in a subsequent text on page 18 of the bundle reference is made by Mr Burrows to this "jacking" as he put it and he used the phrase "you just lost a good boss". In this email he tried to calm things down , and informed the claimant there was still more work that he could do and invited him to ring him. The claimant did not take up that invitation, and there was then further discussion about returning the van because , as will be recalled, the claimant was using the respondent's van at that time. In the ensuing exchanges on 31 March, in addition to the discussion about the van the claimant said,(all the top part of the text is missing) he asked Mr Burrows if he thought he was "taking the piss", but he said that he was not and that whilst he left it to Mr Burrows if he wanted to come up with a deal , and he used the phrase that it was up to him if he sacked them. In his reply Mr Burrows said he was not sacking him, they had loads of work and he did not know what the claimant was talking about in relation to a deal and in terms of payment he made the comment that the rates were agreed, and that there had been a phone call on Friday in which the claimant as, as he put it "kicked off" about wages. Thereafter, there was further conversation about the van , but that was the end of that exchange.

14. That was consequently the end of March, beginning of April effectively over that weekend the claimant's last invoice , or rather the last invoice from the limited company is at page 60 of the respondent's bundle, and is dated 29 March in the sum of £2,195 for conductive groundworks. With that document went a page that has now been inserted at page 60A of the bundle, a breakdown of that invoice in which the claimant's own hours are put down, and also those of Mr Noone, Mr W Moore and Mr Hill. The claimant's element of that is said to be £665.00. The claimant has in fact reduced his claim for unpaid wages to that sum notwithstanding that his original claim form was of course in the total sum of £2,195.

15. Shortly after that, on 15 April , the claimant instructed a Debt Collection Organisation My Credit Controllers and on 15 April at page 48 of the

respondent's bundle they contacted the respondent pointing out that they had been appointed to collect invoices on behalf of "Daniel Moore of Pavemoore Ltd" , and the invoice in question being that of £2,195 issued on 29 March , and that was followed up with a further email of the 17 April at page 50 of the bundle.

16. The respondent did not pay that sum , and on 18 April the claimant contacted ACAS under the early conciliation provisions and obtained a certificate the same day as he was entitled to and the same day also issued the Employment Tribunal proceedings before us. The same day or certainly the same date the respondent which had not hitherto taken recovery in respect of the Mold job any further, at that time then issued an invoice in which it sought payment of some £3,955 for the remedial works that were then required at Mold. As to whether this was received before or after the claimant actually instituted his Tribunal proceedings is a little unclear, but certainly this is the same date as the claimant himself was contacting ACAS and bringing these claims, but little or nothing turns upon his employment or worker status by reason of those facts, it seems to us.

17. And there effectively is where matters ended, with the claimant pursuing these claims and the respondent responding to them. They were the subject of a Preliminary Hearing on 30 August 2019 , in which the claims were identified and indeed these issues, albeit not as preliminary issues but these issues in relation to the claimant's entitlement to claim either the unlawful deduction from wages or the discrimination claims was identified and Case Management Orders made which both parties have, certainly by this stage, now complied with.

The submissions.

18. In terms of the submission made Mr Hoyle's is straightforward. He says that the claimant has no reasonable prospect of establishing that he was a worker for either purpose. He points to the incorporation of the limited company, the invoicing that the claimant used in order to obtain payment, the lack of clarity and indeed lack of understanding , perhaps , on the part of the claimant as to the consequences of using a limited company , and how the difference in law would operate between providing his services that way and actually being a worker or employee of the respondent. He contends that the circumstances show on the evidence that the claimant was free to work for others, he provided his own van and small tools, he made a profit effectively on the other workers that were supplied by him , and that in short, all the indications are entirely consistent with self-employment , or employment through the limited company . On no basis could it be said or found that the claimant was a worker of the respondent for either purpose.

19. The claimant is not legally represented or qualified , and did not make any specific responses to those submissions, but it might be helpful if we remind ourselves of what he has submitted in writing, because on page 1 of his bundle he has made some bullet points , which doubtless were made when he was able to reflect on these matters , rather than in the glare of the

Tribunal , and they are points that he would doubtless have made, or pointed us to if he had recalled that. We do take into account the bullet points that he has made there, which are these: that firstly a contract or other arrangement to do work or services personally for reward with Westlake providing all materials/equipment necessary to complete the work. The claimant says "The reward is for money or a benefit in kind, for example promise of a future contract or work, evidence showing a limited right to send someone else to do the work sub contract, evidence stating I had to turn up for work even if I didn't work to, employer reference detailing long term work, employer has to have work for them to do as long as the contract or the arrangements last and then I was paid every two weeks into my personal account, tax and national insurance were deducted by Westlake before payment was sent to me. See attached sicknote I had to send to Chad before I was able to have leave, I only completed work for Westlake within the duration of our working relationship and was their Site Supervisor."

20. Picking up on those last points , the claimant in a number of answers he gave, did indicate that he set great store by the fact that this was a long-lasting relationship, he had been working as he puts it , "for the respondent" for some continuous period of time and he indicated he was working exclusively for them . This was obviously a major factor in why he considered himself a worker.

21. The reference to a sick note is perhaps slightly diverting, in that although there is a sick note in the bundle at page 6 of the claimant's bundle, that is from 2 April 2019. In other words , it is after the relationship, whatever it was came to an end on 1 April. In other words, the claimant clarified he was not claiming sick pay whilst still working for, or employed by, the respondent. This will actually be part of the head of damages that he seeks if his discrimination claim succeeds, but this is not a case where the claimant has produced a sick note , and has said "I was during the currency of the employment off sick and I was paid sick pay" or anything of this nature. This post-dates the arrangement , and indeed the evidence is that the claimant did not get paid if he did not attend , and there is at least one occasion, maybe more in the papers supplied to the Tribunal, when he does not feature in the list of operatives , and no time is charged for him because he was not present. In one instance this was because he sadly had to attend a funeral , but he received no holiday pay in respect of that or indeed any other absences.

22. In essence, what he says , or would say , is that he only worked for the respondent during this time, as far as he was concerned he was "their Site Supervisor", this was he considers him working for them and he submits , or would submit , that he was a worker.

Discussion and ruling.

23. Those then are the competing contentions , and the evidence of the claimant in this regard, and, of course , there is also the documentary evidence. In terms of the law , the relevant provisions are in respect of the Employment Rights Act which is the deduction from wages claim, that is Section 230 of the

Employment Rights Act which provides that a worker is someone who works under either

(a) a contract of employment (that is not contended here; and)

(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.

That is the definition of worker for the purposes of the Employment Rights Act, but it is also the definition of employee under Section 83 of the Equality Act 2010. Although that section is in different terms, in that it merely refers to an employee as being somebody , under Section 83(3), working under a contract of employment, but that is not to be construed as it may be under the Employment Rights Act, say , for unfair dismissal purposes, and there is authority from both the judgment of Lord Wilson in the ***Pimlico Plumbers Ltd. v Smith [2018] IRLR 872*** and indeed, Lord Justice Under*r*hill in the judgment of the Court of Appeal in ***Secretary of State for Justice v. Windle and Arada [2016] IRLR 628*** , where it is clear now that the tests for both of those provisions are the same, and although the Equality Act does not carry on in the same wording as the Employment Rights Act, the test is indeed the same to be applied in both jurisdictions, and that has been held to be the case for some time now.

24. So, the test we have to apply now is the same one, and so that gives rise to the next question as to what is the test to be applied. The first part of the test, with all due respect to Mr Hoyle who perhaps rather took us to another issue, which is more related to employment status as against worker status, the first part of the test is that of personal service . The test of mutual obligation is important in relation to employment , but in terms of "worker" definition the first test is personal service. That there is personal service , of course, is not the end of the matter, because there can still be personal service in circumstances which mean that this does not amount to worker status. In terms of what the claimant has , or may potentially, established the first thing is has he established , or can he establish, the need for personal service at all? We note that there is nothing in the evidence that indicates that his own personal performance of any part in this contract was regarded as an important part of it. He was, we know, the supervisor, and was obviously in charge of the gang that he was putting together, but there is, with all due respect to him , no "unique selling point" identified in him by the respondents, or any evidence that suggests that it was essential to them that he personally carried out this work. He obviously did largely, and he obviously supervised the gang, but we can see on those occasions when he was not even present the contract did not stop, it just carried on. This is not a case , as we sometimes see , where in particular occupations or professions there is a particular skill and a particular area of work where the individual is essential to the contract , and so personal service is an essential part of it. But given, with

all due respect to both parties, the type of work that is involved in this work, which is relatively common place and hundreds if not thousands of people carry out in this country every day, the element of personal service on the part of the claimant seems to us to be rather missing, although we accept that he effectively put together the team . We also take on board the fact that the respondent , other than identifying the claimant and his brother, seemed not to be terribly concerned about who the rest of the team were. They did not carry out any checks upon them, they got their CIS details , of course, but in terms of who they were , and who had to turn up or did not have to turn up, it seems to us the respondent was unlikely to be very bothered , as long as the work was done. It was the work that mattered rather than the identity of the people that were doing it.

25. But, even if that was not right, the crucial question it seems to us is whether or not the exemption in the Section 230 of the Employment Rights Act which excludes even contracts of personal service from the definition of worker should apply, and that exemption is where the status of the person doing the services are provided by virtue of the contract is not that of client or customer of any profession or business undertaking carried on, in this case, by the claimant. In our view it is manifestly plain that the respondent was a client or customer of a business undertaking carried out by the claimant. He carried it out through the limited company , as he puts it, and the way he put it in evidence , he traded through the limited company. The limited company provided the invoices, the limited company provided the claimant and indeed, the other members of the team who were themselves sub-contractors. The limited company provided the van, the limited company provided the small tools that were used on the work. It took a profit on the rates payable for the operatives it provided, paying them less than it was paid for their work. This is, it seems to us, a classic case of the two businesses contracting together , and one being the sub-contractor of the other.

26. Indeed it is notable that in the complaints that the claimant makes to the Tribunal , he has on occasion mentioned, albeit irrelevantly to the claims he makes , but in his emails to the Tribunal recently he has said that one of the issues he has with the respondent is that it has a reputation for “failing to pay its sub-contractors”. That rather shows to us that that indeed is what was going on, this was a classic sub-contracting arrangement between the claimant’s company, and the respondent.

27. All the indications are to that effect, and there is nothing from which we can find that the definition under Section 230 of the Employment Rights Act and indeed as applied to the Equality Act 2010, are satisfied and so we have to find that the claimant has no reasonable prospects of the claimant establishing worker status for either of those provisions, and consequently we are going to dismiss those claims pursuant to rule 37 as having no reasonable prospects of success..

Further issues – amendment of the claims.

28. After the Tribunal's determination of the application to strike out the claims as they presently stand, the claimant made an application that the claims be amended to put his race discrimination on the basis of Section 41 of the Equality Act, i.e. on the basis of the claimant , although not an employee or worker of the respondent, as we have determined, was nonetheless was a contract worker. That is not the way in which his claims have been put thus far, and this would therefore amount to an amendment . The respondents through Mr Hoyle object to that amendment.

29. The basis upon which he does so is understandably the fact that there has already been one Preliminary Hearing in this matter, and although the parties were not represented at it, the claimant had the opportunity then , or indeed subsequently to make this application, or to put his claims that way , and that to allow him to do so at this stage may well involve further time and expense, possibly even potentially an adjournment, all of which will put the respondents to further cost and time which he and it (because there are two of them) should not have to face in the light of the claimant's conduct of his claims so far.

30. The claimant has not responded to that in terms, effectively leaving it to the Tribunal to determine, but in terms of the amendment application Mr Hoyle recognises this is a matter in which the Tribunal has a discretion to be exercised judicially, and of course in accordance with the principles in the case of ***Selkent Bus Company v. Moore [1996] IRLR 661***, and those principles are that the Tribunal must consider the balance of hardship between the parties, the balance of prejudice, the consequences of not allowing the amendment and the consequences of allowing it. It must also consider the type of amendment it is, as to whether it introduces new causes of action and if so, whether they are connected with or arise out of the original subject matter of the claims . In respect of new causes of action , if they are not related to the original claims , consideration should also be given to whether they would be out of time.

31. This amendment , it seems to us, is connected with the original subject matter, although the race discrimination claims were not apparent until the Tribunal's preliminary hearing on 30 August 2019 . But those claims were clearly before the Tribunal as of then , and were set out in the orders that it made.

32. The claimant was proceeding , of course, on the basis that he was a worker of the respondent, as identified in the issues before the Tribunal in that hearing, but neither he, nor indeed the Tribunal, addressed the other possibility that has been identified today as to what would happen if it turned out that he was not a worker of the respondent. The Tribunal itself , of course, has raised that possibility , and it has done so , as Mr Hoyle understands, for the reason that it has to ensure a level playing field , and with an unrepresented claimant a failure to spot a potential alternative basis of claim under Section 41 of the Equality Act is not something that one would expect an unrepresented claimant (nor indeed occasionally in the Tribunal's experience even a represented claimant) to always to pick up, in terms of an alternative way of

putting the claims which of course, do not change in terms of their factual basis. The allegations going forward against the second respondent , and the first respondent as his employer do not change, there are no new claims arising out of that, what is changing is the basis on which the claimant be entitled to bring those claims now under Section 41.

33. Mr Hoyle is concerned , understandably, in relation to what the claimant may now produce, and whether that may give rise to the need for further enquiries and even an adjournment. That may be so, but it seems to us that that is a matter to be considered as and when that occurs. Bearing in mind the claimant is unrepresented these are relatively difficult and abstruse areas of law that one would not expect an unrepresented party to be familiar with, we do consider on balance particularly given that this case was listed for two days and will not at the moment necessarily overrun by reason of this amendment being granted . But we will allow the claimant who loses more by that claim not going forward than the respondent does if it does, the claimant would be left with no claims in the light of our ruling if we do not allow the amendment , whereas the respondent is still facing a race discrimination claim, the wages claim having of course been dismissed, but the respondents face no more really than they originally faced when the claims came before the Tribunal, certainly at the end of August this year.

34. So, for those reasons, the balance to be exercised we think does tip in favour of the claimant , and we will allow his application to amend his claims to put them forward on a Section 41 basis. On this basis the Tribunal adjourned overnight for the claimant to provide further documentation relating to his own employment status with his own company, as the Tribunal considers that he has to show that he was an employee of it, supplied by it to the first respondent, in order to come within s.41.

Further developments – the hearing on 17 December 2019.

35. Further to the claimant's application the previous day to amend his claim of race discrimination to bring it under Section 41 of the Equality Act 2010, which the Tribunal granted, overnight the claimant as he was requested to do, obtained and sent to the Tribunal and to Mr Hoyle representing the respondents a number of emails to which there are a number of attachments. The number of attachments is considerable , and amongst them are not only documents that the Tribunal does require for the purposes of the Section 41 claim, but, it seems and Mr Moore accepts , some other documents which are not relevant to that issue - screenshots, texts etc including even apparently a picture of a sheep. The upshot of that has been that neither the Tribunal nor perhaps more importantly, Mr Hoyle for the respondents, has been able to open or print off the various documents that the claimant has sent through. The claimant himself has been unable to print off the documents and bring them with him, apparently for various reasons but he is relying upon them being attachments to his emails , and the position is that as late as this morning further emails have come through, to which there are further attachments , including potentially some highly relevant documents in relation

to his tax position with the company, and even another one that I have seen, a draft tax return for Mrs Moore, although it has not been completed .

36. That is an indication of the type of document that is amongst the attachments that the claimant has sent through in the various emails sent to the Tribunal.

37. In those circumstances the Tribunal, as put to Mr Moore , has two choices, one is that because his Section 41 claim is at the moment still unclear, and in particular the documents in support of it have not been disclosed until very late in the day , and then in a form that cannot be understood or responded to, that basically , we should revoke the permission we gave yesterday to allow him to amend his claims to bring the Section 41 claims. That is one option , and it is the option that was urged upon us , understandably, by the respondent.

38. The other possibility is that we do not revoke that permission, but we make it conditional , and the conditions would relate to the provision in hard copy and in a timely fashion of all the further relevant documents , that can then be responded to equally in a timely fashion , and with due evidence, and further documents if necessary. That would enable the claimant to maintain the Section 41 claim , provided that he complied with the conditions and that is the choice it seems to us before us. It is the choice that Mr Moore agreed was the only choice that we had , and Mr Hoyle of course was not suggesting anything other than the first of those two choices which is that we do not go any further down this route, we revoke the amendment permission entirely in which case the claimant's claims remain dismissed and there is nothing left to go forward.

39. We had to weigh up these competing arguments , and the actions of the claimant . We do take into account that the claimant has not done nothing , if anything he has perhaps done too much or done the wrong thing, particularly in terms of email attachments . Whilst it was the case that he was told that the Tribunal would be able to print off attachments , it did not mean this many, unfortunately. Mr Hoyle has had so much that his inbox is actually blocked, so in terms of him seeing them before today , or during the day, he has had that difficulty.

40. In any event, it seems to us that even if these documents had been available in hard copy today from what we have seen of them, and in particular from one document that I have referred the parties to, a tax computation report for 2018/2019, in which Mr Moore's income is broken down to the two sources from the company, that these documents would not have led to the matter being concluded today , because they would have doubtless have led to either more disclosure, or certainly more questions . There is nothing, as it were, in them, that we have seen so far or can see that would put the matter clearly one way or the other, so in terms of what would happen if we did seek to proceed today , then we would not have got very far.

41. That said, and given that the claimant has as we have just said clearly done something to comply with the Tribunal's orders, but possibly not the right

thing, but there is, if anything, too much information, not all of which is relevant, he has clearly unearthed and sought to put before the Tribunal and the respondent relevant material in relation to his employment status. For those reasons, we are not going to revoke the permission we gave yesterday, but we are going to make it conditional , and the conditions we are going to impose are effectively for Mr Moore, now in a timetable that we will set in a moment to provide disclosure of relevant documents in hard copy to the respondent initially, not to the Tribunal because the Tribunal does not need anything until it gets into a bundle. The essential thing is for Mr Moore to disclose these documents in hard copy, relating to his Section 41 claims , and to pick his way through the various documents so that he selects those which are relevant to the issue of his employment status with his own company, and he sends those to the respondent , who will then be given permission to respond thereto, again in a timetable that we will set but we do consider the justice of the position is such that the claimant ought to be allowed to have the permission provided he complies with these conditions.

Postscript.

42. To make clear what the claimant needs to do, he has to establish that he was an employee of Pavemoore Limited. If he cannot show that, we do not see how he can succeed in his s.41 claims. He therefore needs evidence of his employment status with his own limited company. A Director and shareholder can be an employee of their company, and often this will be established by a written contract of employment which establishes that position. The claimant has not produced any such document in this case thus far, and there may well not be one. The crucial period, of course, is between July 2018 and March 2019.

43. Amongst the documents that the claimant has disclosed are documents from the company's accountants. These appear to show that whilst the claimant took dividends in the financial year 2018/2019 of some £32,500 , he also had earned income of £8,424.00. It is, however, unclear where that income was earned (it may have been other employment, benefits or pensions), but if the claimant is to establish that he was an employee of the company, he needs to provide evidence of this. He may consider obtaining evidence from, and calling his accountant, or perhaps his wife, who may be better able to give evidence about these more technical and legal aspects of the claims (she too is a Director of the company).

44. If the claimant complies with these conditions, he can maintain the amended claims, and we have made case management orders on that basis.

45. He will also be required to submit a further Schedule of Loss, setting out what he is seeking in the amended claims. He should be clear that he cannot use the amended claims to pursue payment of the unpaid invoices, which were the basis of his original claims. The treatment of which he complains is potentially a "detriment", or series of detriments, for the purposes of s.41 , but his losses, particularly his financial losses are not the amount of the unpaid invoices, as these sums were not payable to him, but to his limited company.

Rather, if he succeeds, he would be entitled to an award for injury to feelings, but any financial loss, if the Tribunal was satisfied that the non – payment was on the grounds of the claimant's race, would not be the amount payable to the limited company. As it is, in the course of the proceedings the claim has reduced his claim for unpaid "wages" to £670 as the portion owed to him personally.

46. Further, in terms of the reason why the respondent did not pay the invoices, it will obviously be its case that the reason had nothing to do with the claimant's race, but with the alleged defective work done by him/his company at Mold.

47. If that is right, the claimant's only claims would be of the detriments he complains of in terms of manner in which he was spoken to by Chad Burrows. His witness statement does set out some details, but he is very unspecific about dates. He must now make a further statement, in more detail. That can therefore cover both his employment status and the details of his claims of detriment.

48. After further case management in relation to the bundle, and permission to the respondent to serve further witness evidence, the amended claims can then be heard.

49. Whilst we have heard some evidence, this has been confined to the issue of the claimant's status in relation to the respondent, and we have not considered the merits of the allegations he makes about his treatment by Mr Burrows. We have struck out the wages claim and the race claims based upon the claimant's lack of worker status in relation to the respondent.

50. To that end, we do not consider that we are part heard , especially in relation to the claims as now amended. We consider that the amended claims therefore can be heard by any Tribunal, although any one , or more , of us may also be on that Panel. We have accordingly re-listed the amended claims as above.

51. <u>It will be noted that the dates for compliance with the Tribunal's orders have been varied from those discussed in the hearing to allow for the delay in promulgation.</u>

Employment Judge Holmes

Date: 20 January 2020

JUDGMENT SENT TO THE PARTIES ON

23 January 2020

FOR THE TRIBUNAL OFFICE

Note

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.

[JE]