EMPLOYMENT TRIBUNALS

Claimant: **Mr R Richardson**

Respondent: **Extreme Roofing Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **5th – 7th August 2020**

Before: **Employment Judge McLaren**
Members: **Mr. T Burrows**
Mr. M Rowe

Representation
Claimant: In person
Respondent: Mrs. S MacDonald, Director of the respondent

JUDGMENT

The unanimous decision of the tribunal is that

1. **The claim for direct discrimination under section 13 of the Equality Act 2010 fails.**

2. **Mondi was neither an employee nor agent of the respondent for the purposes of section 109 of the Equality Act 2010.The respondent is not liable for any alleged acts of unlawful harassment by Mondi.**

3. **The claimant is not an employee and therefore cannot pursue a claim of unfair dismissal and his claims for automatically unfair dismissal for asserting a statutory right in contravention of the Employment Rights Act 1996 fails.**

4. **The claimant is not a worker of the purposes of section 230(3) of the Employment Rights Act 1996 and his claims for unlawful deduction of wages and holiday pay fail.**

5. **The claimant is not entitled to statutory notice.**

REASONS

Procedure

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable. Both parties were able to take an active part in the proceedings and had a full opportunity to put their case. There were some limited technical issues, but both confirmed at multiple points during each day that they were able to participate.

2. On the first day it was clear the case had not been properly prepared by either side. There were 2 bundles and no witness statements. There were documents the claimant had labelled witness statements that he wished to be treated as such, but there appeared to be no equivalent document from the respondent. The respondent had produced a written statement from their accountant but had misunderstood what a witness was and had therefore not produced its own witness evidence.

3. The claimant, while he had been sent a copy of the respondent's bundle by post and by email had declined to open it because he considered it had been served late. The respondent had received the claimant's documentation but had not had an opportunity to read all of it. We discussed the best way forward. Mrs MacDonald, on behalf the respondent, volunteered that she had prepared a document she was intending to use for the purposes of the hearing which was her response to the issues list. We agreed that she would send this document to the court and to the claimant and we would consider whether or not that should in effect be her witness statement and that she should give oral evidence for the respondent.

4. Once all parties had received that document and had an opportunity to consider it, it was agreed that we would proceed in that way. The tribunal panel would take the claimant's documents identified as witness statements as that and would also take Mrs MacDonald's document as her witness statement.

5. Mrs MacDonald's preference was that the case was adjourned generally and relisted for some time in the future as she felt that she had not properly understood what witnesses were. We considered whether we should adjourn but concluded that there had been a preliminary hearing on this matter at which Employment Judge Burgher had explained matters to the parties and a very clear issues list have been identified. To postpone the hearing meant that it was likely to be listed for many months in the future and, considering the overriding objective, on balance the delay that would involve was more prejudicial to the parties than any prejudice the respondent would suffer by proceeding today. We addressed any lack of preparedness by giving the parties the afternoon to read the documents and to consider the questions they needed to ask each other.

6. To further assist, because both parties were unrepresented, with their agreement, the panel asked each a detailed set of questions to ensure that the panel heard evidence on all of the issues. Thereafter each was invited to add

anything else of relevance before they were cross examined. Both parties were given the opportunity to present all the evidence they wished on their own terms. We directed them to the agreed issues list and invited them to use this as a guide to the evidence required. The claimant was unfocused at times and referred to issues that were not part of the proceedings, but we were satisfied that this was a fair hearing,

7. We heard evidence from the claimant on his own account and from Mrs Macdonald on behalf of the respondent. We were provided with a bundle with 10 tabs from the respondent and a separate bundle with 17 attachments by the claimant.

8. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by helpful submissions from both parties.

Issues

1. The issues to be determined at the full hearing are as follows:

Direct Race Discrimination (section 13 Equality Act 2010)

2. Did the Respondent treat the Claimant less favourably than they treat or would treat others in failing to investigate his complaint against Mondi and dismissing him?

3. If so, did the Respondent treat the Claimant less favourably because of race?

Unlawful Harassment (section 26 Equality Act 2010)

4. Did the Respondent engage in unwanted conduct?

    4.1 Mondi calling the Claimant gay on 2 or 3 occasions;

    4.2 Mondi searching the Claimant's bag and commenting on a condom that was found;

    4.3 Mondi asking the Claimant to rub his back.

5. Did that conduct relate to the Claimant's sex or sexual orientation?

6. Did any such unwanted conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7. If so, did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In determining this the Tribunal should have regard to:

    7.1 the perceptions of the Claimant;

7.2 the circumstances of the case; and

7.3 whether it is reasonable for the conduct to have that effect.

Status

8. There is no dispute that the Claimant is a contract worker for the purposes of section 41 of the Equality Act 2010 to pursue the Equality Act 2010 claims.

9. Was the Claimant an employee of the Respondent as defined by section 230(1) of the Employment Rights Act 1996? This is necessary to for the Claimant to pursue a claim of unfair dismissal.

10. Whether the Claimant was a worker for the purposes of section 230(3) of the Employment Rights Act 1996. This is relevant for considering the Claimant's claims for unlawful deduction of wages and holiday pay.

Vicarious liability

11. Whether Mondi was an employee or agent of the Respondent for the purposes of section 109 of the Equality Act 2010 such that the Respondent can be liable for the alleged acts of unlawful harassment made against Mondi.

Automatic unfair dismissal asserting a statutory right contrary to section 104 of the Employment Rights Act 1996

12. Was the reason, or principal reason for the Claimant's dismissal the fact that he asserted a statutory right to pay under section 104 of the Employment Rights Act 1996?

Unpaid wages

13. Whether the Claimant is entitled to unpaid wages. The Claimant claims £400 shortfall for the formal contract and a further £50 for unpaid wages in June 2018.

Accrued holiday pay

14. The period of the alleged contract ran from 10 December 2018 to 29 April 2019. This is 19 weeks. If the Claimant is a worker this would mean that the Claimant would have accrued 2 weeks holiday. If so, what was the week's pay for the purposes of the holiday pay calculation. The Claimant maintains that he earned £350 each week. The Respondent contends that the Claimant earned on average £80 a week.

Notice

15. There was no provision for notice in the contract. The Claimant therefore claims statutory notice of 1 week.

Damage to personal property

16. Whether the Respondent is liable to pay the Claimant the sum of £150 in respect of alleged damage caused by Mondi to his gloves and trainers.

Finding of facts

The initial meeting

9. It was common ground that the relationship between the claimant and the respondent began on 8th June 2018. The respondent was carrying out a job of work outside the property in which the claimant was living. The claimant volunteered to assist the two individuals who were carrying out the work. They agreed and were impressed by his efforts. It was arranged that he would continue to work with them for the duration of this job which he did, and he was paid £40 a day for his work.

10. The claimant explained that during this period of work there was one day when no one from the respondent turned up, he thought it was perhaps because it was too hot to work, but he nonetheless could see a task that needed doing and worked all day on this. Part of his complaint is that he is owed wages for this one day, which he considered should be paid at £80. The respondent's position was that if the work crew had not turned up it was because there was no work scheduled that day and, if there was no work to be done on that day, then if the claimant did carry out tasks this was on a voluntary basis. We accept the respondent's position on this, we conclude that if the work crew had not been dispatched to carry out the work, given that the claimant was not part of the respondent's business at this time, there was no obligation to pay him for tasks he had not been asked to do and therefore this day's work was on a voluntary basis.The claimant agreed that he did not raise this until he issued employment tribunal proceedings.

11. It was also common ground that the work crew suggested that the claimant should meet one of the owners and directors of the respondent's business, Mr Scott MacDonald, with a view to him being offered work with the respondent going forward. Mr MacDonald attended the work site, met the claimant and it is agreed that he did offer the claimant the possibilty of future work.

12. Mr MacDonald did not attend the tribunal to give evidence and we only have the claimant's account of what occurred at that meeting. The claimant told us that Mr MacDonald spoke to him and to a neighbour very positively about the future of the respondent company. The claimant said that Mr MacDonald told him the respondent was shortly going to get a new contract to carry out work on properties in Haringey. That was soon going to be signed and then he would be able to give the claimant work at the rate of £100 a day, five days a week for at least eight years. The claimant was excited by the prospect of such long-term work and agreed.

13. While we did not hear from Mr MacDonald, Mrs MacDonald's evidence was that the company could not guarantee itself eight years work and would certainly never engage an individual on the basis of such a long-term relationship. On the balance of probabilities we find it unlikely that a business owner would offer somebody an eight-year contract, particularly in the construction industry which is volatile. We find that Mr MacDonald did discuss the respondent's prospects with the claimant and was positive about the company's future but this did not amount to a contract with the claimant to engage him for eight years. We find that there was no agreement to provide any particular amount of work to the claimant, nor did this conversation place on him any obligation to accept all work offered.

14. On the claimant's account he worked for the respondent on at least five other jobs from June onwards. He confirmed that he had been paid for all of these jobs. Mrs MacDonald, who attended to give evidence on behalf the respondent, was unable to comment on this. We accept the claimant's account therefore that he did some further days work for the respondent in June and July after the first meeting.None of the issues in the case relate to these days.

The position in October 2018

15. Both parties agreed that the more substantial relationship between the respondent and the claimant was from October 2018 onwards. The respondent's bundle (9.3) contained an email sent by Mrs MacDonald to the claimant of 1 October 2018. This asked the claimant if he still wanted to work for them.This is consistent with there being a very limited relationship between the parties up tp this point. It set out that if he did, then he would have to apply to become self-employed with HMRC.He would need to have a unique taxpayer reference number, and once he had applied to become self-employed and had his number, he would then have to apply to join the Construction Industry Scheme. This scheme does not apply to employees, it is for self employed subcontractors only.

16. The email set out further details. On 7 October Mrs MacDonald emailed the claimant again asking him questions, has he been employed or self-employed before? did he had a unique tax reference? This email explained that the first step was that he would need a unique tax reference number which he could get from the HMRC.

17. The claimant replied on 8 October. He had been employed before, he thought he had a reference number as he had found one on a pay slip and he asked whether or not the code on that wage slip was what was needed. Mrs MacDonald replied on the same day and advised the claimant that, no, it was not the correct number. He would need to contact HMRC. She cut and pasted into that email some advice from the government website. This also contained a hyperlink to the area of the website the claimant would need to go to.

Construction industry scheme/the respondent's practice

18. Mrs MacDonald was asked by the panel to provide further details of this scheme. This was also referred to in a letter that had been provided by Edwin Slater on behalf of Westbury consultancy (page 4.6 to 4.7 of the respondent bundle). This organisation are accountants, tax and business advisers to the

respondent and have carried out this role since the formation of the respondent's business in 2008.

19. While we have not heard from Mr Slater in person, his evidence was not challenged by the claimant and we accept what he says. The respondent's business, by its nature is not conducive to long-term regular work and it is therefore the company's policy that subcontractors are taken on as and when required, rather than employees.

20. Mrs MacDonald confirmed this position. As far as she was concerned the respondent had never engaged anybody as an employee, but had always taken on self-employed subcontractors. They had always done so using the Construction Industry Scheme.

21. This scheme allows contractors and subcontractors to register. Once the subcontractor is registered, the contractor then deducts withholding tax from payments made to the subcontractor and these are passed to HMRC. The scheme applies to sole traders, whether they provide their labour only, or whether it is their labour plus equipment, to limited liability partnerships and to personal service companies. It does not apply to employees.

22. The process of registering requires an individual to have obtained their unique tax reference number. It is that which allows the contractor, in this case the respondent, to contact the HMRC and to be told what rate of withholding tax to deduct from the subcontractor. Weekly or monthly pay is then always subject to deduction of tax at this rate and the subcontractor may be able to obtain a tax rebate at the end of the year directly from HMRC.

23. Mr Slater's evidence was that the process of obtaining a unique tax reference number normally took between two or three weeks. Both he and Mrs MacDonald also confirmed that, while the respondent does not as a rule take on workers who do not possess this number, in the claimant's case, in order to assist him financially while he was in the process of obtaining this number, the respondent agreed to pay an advance to him.

<u>The claimant's position on the UTR.</u>

24. The claimant accepted that he had been asked in the chain of emails in October to obtain the unique tax reference number.He saw these as one conversation, not as several conversations. He also agreed that Mr MacDonald had asked him to do so but he had not been regularly reminded about this, nor had he understood that his continued engagement was conditional upon this.

25. The claimant's evidence was that he understood that he was required to get a unique tax reference in order to work on the Haringey contract, the role he said he was offered by Mr MacDonald as a full-time role for eight years. He also said that he did apply for and get this tax reference. He was aware that this had been posted to him by HMRC, but he had not been able to open that letter, nor did he have a copy. That letter had been misplaced and personal circumstances meant that he was no longer living at the address to which it had been sent.

26. The clamaint explained that he had many priorites that took precedence over the task of obtaining a tax reference. He considered addressing getting back on the electoral role, dealing with his daughter and family bereavement issues were all more important tasks.He could only deal with so much at one time.He was simply not able to go back to his home to collect the document.

27. He also thought that he was not required to obtain this tax reference to carry out work for the respondent on any of its other projects. He considered it was not relevant once the Haringey job was no longer possible. He also took issue with the respondent's conduct, moving straight to, as he saw it, dismissing him without giving him any warning that they might do so if he did not produce this reference number.

28. On his own account the claimant had applied for a UTR and so had gone through the process of declaring himself self employed in relation to his work for the respondent.We find that he accepted that he was self employed, at least in relation to the future work he expected to get.He did not give us any evidence that the tasks he would have carried under any contract the respondent had with Harringey were any different from those he carried out on any of the other properties he worked on for the respondent. We find that there would have been no such difference in tasks, organisation or control between this contract and the work he did at Great Portland Street or elsewhere.Accordingly if he saw himself as self employed for work on 1 property then that would be the same for all jobs for the respondent.

The claimant's work history with the respondent

29. He agreed that he began to work regularly for the respondent from October. He said that in around November or December Mr MacDonald told him that the company had lost the Haringey contract. On the claimant's account that meant that the contract that he had offered him back in June was now breached and voided. Instead, Mr MacDonald entered into a new contract with him. He told him that he could have work on the project at Great Portland Street and this would be for 4 to 5 months at a rate of £70 a day plus £10 a day travel expenses. He would be working five days a week during this period. We conclude, again, that it is highly unlikely that the respondent organisation who uses subcontractors exclusively would have agreed to provide full-time work for a fixed period to any individual . We find that Mr MacDonald telephoned the claimant when he had work to offer him and the claimant worked only on those days. We conclude that there was no contract or other arrangement between the parties that guaranteed any minimum or maximum amount of work.

30. The respondent had produced at page 10.1 of its bundle what it said was a schedule of advances made to the claimant. This showed that he had worked a total of 25 days for them and had been paid a daily rate of £70 together with a travel allowance of £10 for each day worked. They show the total payment of £2000. The claimant disagreed with the dates shown. On his account he had worked many more dates than this for the respondent.As the claimant did not have a UTR, the records were manual only and came from diary entries. It is possible these were not accurately transposed.For example, all agree he worked on the 12th April but that is not shown on the schedule.

31. The claimant said that in addition to the three days the respondent shows he worked in December, he did four jobs at other properties. In January he agreed that he started work again on the 16th or 17th of January and he said that from that time on he started doing 4/5 day weeks until the middle of March. From mid March onwards, work was reduced to 3 days a week. He had been paid for the days that he had worked for the company, but the respondent had not paid him his travel expenses which he said were due when working at Great Portland Street.

32. The claimant accepted he did not work for a couple of weeks in December/January because the respondent shuts down for 2 weeks. He also accepted there were other days he did not work for which he was not paid because of bad weather or scaffolding issues. On his own evidence the claimant did not work full time up to March. On balance we accept that the claimant worked more days than the repondent's schedule shows, but find he did not work full time.

33. The claimant told us that the reason that his working days were reduced from March was because Mr MacDonald wanted to finish the job at Great Portland Street so that he replaced the roofer on that project with another one and that new roofer brought his own labourer with him. The claimant's work was therefore taken off him. While the claimant understood why Mr MacDonald had done this, he considered that this was also breach of contract because he was no longer able to do the work that he had been promised.

34. The claimant recalled that he worked on 3 April, he then did a couple of days after that and the last day he worked for the respondent was 12 April.

The events of 12 April

35. The claimant says that on that day he was working in North London. Mr MacDonald arrived on site. Mrs MacDonald was also on site in the car. Both agreed that she did not hear any part of the conversation between the claimant and Mr MacDonald.

36. Mrs Macdonald was very clear in her oral evidence that she had not heard the conversation and was adamant she had never said to the contrary.The claimant pointed out that in the document accepted as her witness statement she said "Scott actually told him verbally in my presence".This does not, however, say she heard the conversation, but only she was present when it happened. We accept she was in the car and did not hear the discussion and do not find that the written document contradicts her oral testimony.

37. The claimant says that the conversation was not about any future work. Instead Mr MacDonald simply asked him to finish early on the job he was working on so that he could travel to the Great Portland Street site and give the workers their wages as he, Mr MacDonald, did not have time to do so on that day. The claimant told us that Mr MacDonald said that he would call the claimant as more jobs became available. The claimant thought it was inconsistent with him having been fired that he would be given cash to go and pay other workers wages.

38. The claimant recalls that Mr and Mrs MacDonald were going to Haringey, he thought to sign the contract.He believed that the respondent had now either

won or got back the Haringey contract that had originally been discussed with him in June.

39. Mrs MacDonald agreed that they were going to Haringey, but not to sign a contract. She explained that while they had been hopeful for a couple of years that they were going to get a contract, this had not in fact occurred. Local authority rules meant that the housing project was not able to take on any new contractors. They had instead been issued a waiver which would allow them to do ad hoc work on this project which was subject to a maximum fee cap.

40. Mrs MacDonald's account of the conversation between her husband and the claimant was very different. She explained that her husband reported to her that he had, as they had agreed, told the claimant that he could no longer provide him with any work because he had failed to provide the tax reference as required. Mr MacDonald had told his wife that the claimant had been okay and was pleasant about it and was accepting the situation. That was why he was still trusted to go and pay the wages to the workers in great Portland Street.

41. The claimant told us that he expected Mr MacDonald to call him with more work but that he left it for a couple of weeks because he thought that Mr MacDonald was away. As he had not heard anything from him by 29 April he decided to email to raise with him a grievance about events that happened on site between the claimant and Mr Mondi on 12 April, and also to raise his work situation.

42. We accept the respondent's position as to how it ran its business. On the balance of probabilities we therefore conclude that the claimant's continued failure to provide the respondent with the paperwork it required would mean that it would stop using the claimant's labour. As both parties agree that after 12 April the claimant was not provided with any more work, we also conclude that the conversation did take place as the respondent states. We accept Mrs MacDonald's explanation as to why the claimant delivered wages to other workers that day. We find that the claimant's engagement with the respondent was terminated on 12 April, prior to his raising his grievance.

<u>The grievance</u>

43. The grievance letter is at pages 8.4 to 8.9 of the respondent's bundle. This sets out a history of the relationship between the claimant and Mr Mondi. The specific complaints were that Mr Mondi had stolen the claimant's gloves and cut up his trainers for which he wanted compensation of £30 and £120 respectively.

44. In this grievance he also complained that Mr Mondi had searched the claimant's personal belongings and had commented to 2 others about a condom that was found.

45. The grievance letter did not contain any reference to Mr Mondi calling the claimant gay on two or three occasions, or asking the claimant to rub his back. Both these acts were noted in the issues list as potential unwanted conduct amounting to unlawful harassment. However, the claimant did not provide any evidence that these events occurred. They were not included in the grievance

letter, nor in any of the documentation submitted to the tribunal.They are not in the claimant's witness statement and he did not provide any further information about these events, although he was invited to tell the Tribunal about any other relevant matters that were not covered in his witness statement and his attention was expressly drawn to the issues list .We therefore conclude, in the absence of any evidence at all on these events that these two incidents did not occur.

46. The grievance letter also said that he was owed £400 in travel expenses and would like that. He also said that if the company had no intention of having him back that he should be paid notice pay of £1400. He wanted that together with £400 unpaid travel expenses and £150 for his damaged property which was a total of £1950 . He stated that Mondi had put him through pain and suffering and accused him of racism.

47. Mrs MacDonald replied to the claimant's letter the same day and said that this was a personal issue and not a work issue and therefore the respondent could not get involved. This email went on to say that "with regards to you working for us, we requested several times that you provide a UTR number and be registered for self-employment so we could pay your tax. This is the reason we could not give you a permanent job".

48. The respondent has not had any other grievances raised to it as it does not have employees Mrs MacDonald explained to us that the respondent did not feel it was appropriate to investigate this grievance at the time because both the claimant and Mr Mondi were self-employed subcontractors and it was therefore not something that the respondent could address. They were not the respondent's employees.The claimant considered the decsion to ignore his grievance was based on his race.He was unable to articulate any more than this. We accept the respondent's reason.

How work was carried out

49. It was common ground that the claimant was engaged to provide labour only and therefore any tools or equipment that he used belonged to the respondent or to other individuals on site. It was also agreed that the claimant was not paid any holiday pay or sick pay.The claimant told us he thought about that but didn't raise it as he felt Scott couldn't afford it at the time and as a new worker he wanted to keep his head down.

50. The claimant did not think that he could send a substitute if he was unable to work. Mrs MacDonald was also a little unsure but concluded that, if the individual had been appropriately registered and trained,and Scott agreed, that was possible. We conclude that there was no effective right of substitution and certainly no unfettered right.

51. While on site it was again agreed that the claimant would carry out the tasks that he could see needed doing. It was also agreed, however, that Mr MacDonald issued instructions for what work was to be carried out every day on site. These instructions were either given to the claimant directly or to Mr Mondi who passed them onto the claimant. The "what, how and when"of his daily tasks was therefore determined at the overall direction of the respondent, with some limited autonomy on behalf of the claimant.

52. Both parties agreed that the claimant was free to work for anyone else on days he was not engaged by the respondent. Mrs MacDonald considered that the claimant was also free to turn down work offered to him by the respondent. The claimant was less certain that if he did that he would be offered work in the future. We find that this was, nonetheless, possible, and that there was no expectation either that the respondent would offer work or that the claimant would accept it.

53. We have accepted that the claimant worked more days than the respondent showed,but that this was not full time or guaranteed in any way. Indeed the claimant complains that he lost regular engagement on Great Portland Street. He also told us that he waited for Mr Macdonald to telephone him to offer him jobs on a weekly basis.This is not consistent with an arrangement for full time working.

54. Mr Mondi was engaged in a similar way. He was also engaged as a labourer. He had no formal or informal authority over the claimant, was not in a position to give him instructions or orders as to how work was to be carried out. Both individuals were working in the same hierarchical position within the respondent organisation. We accept Mrs MacDonald's evidence that Mr Mondi was engaged as a self-employed subcontractor and had completed the appropriate paperwork for that to be the case.

Relevant Law

55. We were not directed to any particular areas of law. The claims are brought under s13 , s26 and s 41 of the Equality Act 2010 and s13 and s104 of the Employment Rights Act 1996. There was also a claim for holiday pay under the Working Time Regulations 1998.There was an issue as to employment and worker status as defined by s 230(1) and s 230(3) of ERA1996. In reaching our decsion we also considered the following.

Employee or worker?

56. The question of employment status has been the subject of many decisions. A starting point is the decision of Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497.This case determined that the key tests for the existence of a contract of service were that:

- An agreement exists to provide the servant's own work or skill in the performance of service for the master ("personal service") in return for a wage or remuneration.
- In the performance of that service, the master has a sufficient degree of control over the servant ("control").
- The other provisions are consistent with a contract of service ("other factors").

57. Since Ready Mixed Concrete, three areas have attracted the greatest degree of case law attention,these are personal service and substitution rights, control and mutuality of obligation,sometimes referred to as the irreducible minimun,however, all the factors need to be taken into account.

58. A worker is defined under section 230(3) of ERA 1996 as:

> "an individual who has entered into or works under (or, where the employment has ceased, worked under):
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

59. The test of whether an individual is "carrying on a business undertaking" and whether the "employer" is a "customer" of that business is similar to the test of whether a contract is a contract of service or a contract for services. Relevant factors could include: the degree of control exercised by the "employer"; the exclusivity of the arrangement; its typical duration; the method of payment; which party supplied the equipment used; the level of risk undertaken by the worker; and HMRC's view of the status of the individual. Mutuality of obligation is also relevant to the consideration of worker status.

Vicarious liability

60. At common law, an employer is vicariously liable for a tortious act (such as negligence) carried out by an employee in the course of his or her employment. Vicarious liability may also arise in respect of a relationship that is 'akin to employment'.

61. The questions to consider are whether there is a relationship between the primary wrongdoer and the person alleged to be liable which is capable of giving rise to vicarious liability? and then, is the wrongful conduct so closely connected with the acts the primary wrongdoer was authorised to do that, for the purposes of the liability of the employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of its employment ?

62. The general rule is that no liability arises for the negligence or other torts committed by an independent contractor in the execution of the work for which they were engaged.

Burden of proof

63. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

64. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR

1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

Conclusion

65. Having made the findings of fact set out above, we have then considered the relevant law and applied that to those findings.Using the issues list as our guide we conclude as follows.

66. The respondent did not investigate the claimant's grievance against Mondi. The claimant asserts this was because of his race.We do not consider that the claimant has proved facts from which an inference of discrimination could be drawn, nonetheless we have gone on to consdier the respondent's motives.

67. We have found that the arrangement between the parties ended on 12 April, whereas the grievance was presented on 29 April. We find that the respondent did not investigate the grievance because it felt it had no standing to do so as it considered it was not the employer of either individual. That was its reason and we find that the claimant's race played no part in that decision.

68. The claimant complained of three incidents of unwanted conduct. We find that he has not presented any evidence of two of those incidents and therefore find that these did not occur. We have not made any finding as to whether or not Mondi did search the claimant's bag and made the comments attributed to him as that is only relevant should the respondent have vicarious liability for Mondi.

69. We have found that Mr Mondi was a self-employed contractor and that the respondent did not control his actions. The respondent did not control either the tasks that he did or the manner in which he did them, save in very general outline. This was not a relationship akin to employment. We conclude that there was therefore no vicarious liability. Accordingly the respondent cannot be liable for any harassment that may have occurred, nor is it liable to pay for any damage that may have occurred to the claimant's property from the same individual.

70. In considering employment or worker status we have concluded that the arrangement between the respondent and the claimant was a contract for personal service. There was no effective right or indeed unfettered right of substitution. Once the claimant had accepted a task it was for him to do that task personally. He did not provide any equipment and he worked under the general direction of the respondent, with limited autonomy as to how when and where he did the tasks.These factors could point to an employment or worker relationship. Critically, however we have found that there was no mutuality of obligation. There was no irreducible minimum amount of work the claimant had to provide for the respondent. There was no expectation on either side that the claimant would be provided with a certain amount of work and that he would do that amount of work. This was an arrangement whereby the claimant was contacted when there was work available and if he wished to take it he could do so. He was therefore neither an employee nor a worker.

71. As he is not an employee or a worker his claim for unpaid wages, accrued holiday pay and notice pay do not succeed.

72. As he is not an employee the claim for automatic unfair dismissal also does not succeed. In any event, we have found that the principal reason that the arrangement between the parties was terminated was not because of anything he said in the grievance, but prior to that as a result of his failure to comply with a provision of documentation about his tax status.

Employment Judge McLaren
Date: 20 August 2020