EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr D Soltys	**AND**	Biobrade Limited (in creditors voluntary liquidation)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham by CVP **ON 31 August 2021**

EMPLOYMENT JUDGE Dean sitting alone

Representation
For the Claimant: in person
For the Respondent: in person

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant at all material times was employed by Biograde Limited.
2. The claimant's employment with the Biobrade Ltd the respondent company terminated on 20 November 2020.
3. On termination of employment the claimant had an entitlement to 18 days accrued and paid holiday pay. The respondent had paid the claimant for 22.5 days paid annual leave 4.5 days in excess of his accrued entitlement.
4. The respondent made an unauthorised deduction from the claimant's pay in the sum of £856 and the sum of £856 is ordered to be paid by the respondent to the claimant.

REASONS

Background

1. The claimant was employed by the respondent from 3 June 2019 until 21 November 2020 as a Lab technician. The respondent business is one engaged in the manufacture of orthopaedic prosthetics. The claimant initially brought a claim that he had been unfairly dismissed which claim was dismissed as the claimant had less than two years service with the respondent.

2. The claims brought to be determined at this final hearing are that on termination of employment the respondent failed to pay the claimant his accrued and untaken holiday pay and that the respondent made an unlawful deduction from his pay. The claimant asserts that he had understood his employer to be either Biograde Limited or Mr Clifton Bradley, the owner of the business or Sub-4 Ltd however as he was unable to identify with certainty the name of his employer at the date of his dismissal he has named all three in the alternative in the claim he has brought.

The Issues

3. What is the identity of the claimant's employer at the effective date of termination?

4. **Holiday Pay (Working Time Regulations 1998)**

    a. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

5. **Unauthorised deductions**

    a. Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted?

6. Law
7. The relevant law is that contained at s13 of the Employment Rights Act 1996 which provides the right not to suffer unauthorised deductions from wages.

8. The claimant seeks payment of accrued and untaken holiday pay at the appropriate rate and the relevant law is contained at Regulation 13 to 16 of the Working Time Regulations 1998.

9. Evidence

10. Neither party at this hearing has been represented and they appear as litigants in person. Mr Bradeley is the former sole director and managing director of Biobrade Ltd a company that was placed in Creditors Voluntary liquidation on 11 May 2021, Mr Bradley is now the sole director and shareholder of Sub-4 Limited and he has attended to provide evidence on behalf of all the named possible respondents. I have had the benefit of the pleadings, with 12 numbered attachments to the ET3. In addition the parties have submitted to the tribunal additional loose documents that have been presented to me. I have heard evidence from the claimant and from Mr Clifton Bradley who is the owner of the business that employed the claimant.

11. In readiness for the hearing both parties were notified of directions for preparation for the hearing however after the hearing the claimant sought to introduce further evidence at 16:36 on 31 August 2021 by email. The respondent was asked for comment on the claimant's additional information in relation to his holiday and a response was received on 2 September 2021 by email 10:30am.

Findings of fact

12. At the commencement of the hearing I considered first the application made by the respondent that the response submitted on 10th of March 2021 should be accepted. The respondent's response was due to be presented in time by 6 March 2021 however it was presented together with an application for an extension of time on the 10th of March 2021. The Notice Appearance on Form ET3 was accompanied by 12 attachments being core documents to which the respondent's have referred in this case. Having heard the respondent's application for an extension of time for the response to be accepted the respondent's application was successful and the hearing continued at this final hearing to determine the merits of the case.

13. The claimant was employed from 3 June 2019 until 21 November 2020 as a technician. The respondent's business was that of the manufacture of Orthopaedic orthotics a company owned by Mr Clifton Bradeley who was an employee of the company and the sole director. Mr Bradley describes himself as *" Managing Director Consultant Podiatrist & Ex-England & GB Athlete*". The business is a small one which during the relevant period of the claimant's employment employed Mr Bradeley and the claimant and nine others [Doc 4]. The respondent company does not have the resources of an HR department and Mr Bradeley was the only manager in the business. Alongside the main business of Sub-4 Ltd Mr Bradeley operated a business known as Biobrade Ltd which supplied vitamin supplements.

Contractual terms and identity of employer

14. At the start of his employment the claimant was engaged in the business then known as Sub-4 Ltd Company Number 5075692. The claimant

throughout his employment ordinarily worked 40 hours a week. The claimant was not originally issued with a written contract however there is no doubt that he worked in the business known as Sub-4 Ltd. Mr Bradeley has referred me to an initial contract sent to the claimant 3 June 2019 [Doc 2] to a copy letter, not on headed note paper, signed by the claimant on 3/6/19 acknowledging receipt of the terms and conditions of employment and *"set out in an attached appendix and Company Handbook*". The attachments referred to in that letter have not been produced to me. The claimant denies that any such contract was issued to him in June 2019 however in his evidence he has confirmed that the 2019 contract was in fact issued to him and he signed it in 2020 retrospectively in order that he could evidence his employment and its duration to enable him to support his wife's visa application. I have not however had produced to me the contract that was referred to as being annexed to the covering letter signed by the claimant and Mr Bradeley and back dated to 3 June 2019. While the claimant has referring me to his statement document refuting the respondent's defence [para 1] and to inconsistencies in the documentation his allegations are somewhat disingenuous and did not openly reflect the true circumstances. I conclude that the claimant's efforts to undermine the credibility of the respondent's paper trail generally do not have merit. However, absent sight of the later produced contract dated 3 June 2019 and of any agreed terms I am not in a position to conclude that the terms of the claimant's employment were the same in substance as those contained in the contract signed on 14 May 2020. What is not in issue is the fact the claimant was employed in the business known as Sub-4 Ltd until 24 February 2020 when the name of the company changed to Biobrade Limited.

15. Mr Bradeley has referred me to the fact that on 24 February 2020 Sub-4 Limited [company number 05075692] changed its name to Biobrade Limited [Doc 3]. The claimant was not immediately informed of the change of name. On the same day another company of which Mr Clinton Bradeley was the sole shareholder and director, Biobrade Limited [company number 11674623] changed it's name to that of Sub-4 Limited. I accept the evidence given by Mr Bradeley that the name change was made as a result of the advice from his accountant that the business of Sub-4 Limited from 24 February 2020 was mainly the business which paid Mr Bradeley for his work as a clinician podiatrist and was the name by which his patients using his services of chiropodist and for sports injuries and orthotics knew him. In February 2020 when the name change was put into effect it was intended that the Orthotics manufacturing business would look to double it's targets. Regrettably the impact of the Covid 19 pandemic on the Biobrade Limited manufacturing business was significant as the customers for the business were closed during lockdown and the business declined. With effect 1 April 2020 all employees were furloughed until August 2020.

16. While working in the business that traded from The Old Bowling Green, Leek road Stoke on Trent Staffordshire ST9 0JQ the claimant gave

evidence that he worked 75% of his time in the Orthotics business that was originally Sub-4 Limited and 25% of his time in the other business owned by Mr Bradeley originally known as Biobrade Limited which packed vitamins supplements for sale.

17. On 4 May the respondent wrote to the claimant [Doc 6] the letter was clear and unequivocal in stating:

> *"The purpose of this letter is to confirm the terms and conditions of your employment, which are required to be given to you under the Employment Rights Act 1996, which are set out in the attached Appendix and in the Company's handbook given to you."*

The letter confirmed that:

> "*your previous employment with Sub-4 Ltd (company number 11674623) has ceased because of changes in the companies circumstances due to the Covid-19 business closure."*

In the event the claimant acknowledged the change in terms and conditions of his employment and the change of identity of the employing company as detailed in the appended contract [Doc 6] which he clearly read and accepted in his annotated acceptance [Doc 5] by which he excluded the operation of paragraphs 3 & 4. I find that the claimant in truth continued to work in the same business that he had always done the manufacture of Orthotics and it was only the name of the employing company that changed.

18. I find that the claimant continued to work in the business that, following 24 February 2020 changed its name to Biobrade Limited. The terms of the contract signed on 14 May 2020 are not retroactive and apply only to the working relationship from 14 May 2020 and do not have retrospective effect. Notwithstanding the contractual confirmation about the name of the employing company the claimant was paid on a monthly basis and copies of the claimant's pay advice slips [Doc 11] confirm that the payer of salary was Sub-4 Limited. The claimant has suggested that he was in fact paid by Sub-4 and that was his employer at the end of his employment. I find that although there was some confusion over the incorrect Company number 11674623 being included in the original letter [Doc 5] it was evident to the claimant that the employing business was held out to be Biobrade Limited a fact subsequently corrected by the respondent [Doc 6]. Mr Bradeley has after the hearing submitted confirmation from his bank, in his email 3 September 2021 that the payments of salary were made from the bank account for the business that had originally been Sub-4 Limited and the account name had been changed to Biobrade Limited.

<u>Holiday entitlement</u>

19. I find that with effect from the claimant's acceptance of the new contract on 14 May 2020 he was bound for the first time by the contractual terms which included clause 19, Holiday Entitlement which confirmed the holiday year ran from 1 April each year and his entitlement was to statutory holidays entitlement which in accordance with the Working Time Regulations 1996 was to 28 days to include bank holidays. The

claimant had an annual entitlement to 28 days statutory annual leave to include bank holidays and by 20 November 2020 when his employment was terminated he had an accrued an entitlement to 18 days leave.

20. During 2020 the respondent business like very many others suffered during the Covid19 pandemic and staff including the claimant were furloughed for at least parts of the month from the start of April to 17 August 2020 [Doc 12]. During furlough the respondent's owner and managing director Mr Bradeley gave notice to the employees on 13 April 2020 which was written on Biobrade Ltd note paper signed by Mr Bradeley as manging director of Biobrade informing him that the company required him to take two weeks of his annual leave from 11 May to 22 May. The respondent gave proper notice of intention to direct leave under the working time regulations Regulation 15(3). During the period of annual leave the respondent asserts that the claimant was paid at his standard hourly rather than reduced furlough rates. On the respondent's account the claimant was directed to take 10 days annual leave in May from 11 to 22 May in a letter 13 April 2020. That account is not challenged by the claimant.

21. The claimant has asserted that during the holiday year commencing 1 April 2020 he had taken all Bank Holidays as holiday and some dates in September and October which he has not been able to identify. In contrast the respondent has produced holiday records for the claimant for leave on the 5 Bank Holidays which fell on 10 April,13 April, 8 May, 25 May and 31 August 2020 together with 10 working days holiday 11-22 May 2022. The record identifies the claimant as being on leave from 5 days from 17-21 August and 5 October and that he took half days on 2, 8 and 19 October a total of 22.5 days taken leave. The respondent's accountant records the leave to amount to 144 hours which, on an 8 hour day equates to 18 days entitlement.

22. The claimant following the hearing submitted additional information upon which the respondent was asked to comment. The respondent [Doc 11] in response submitted amongst other things a spreadsheet submitted on 2 September details the days of leave taken by the claimant identifying that of the 28 days annual leave entitlement, the claimant had taken 144 hours, in effect 18 days leave. That in truth underestimates the claimant's 22.5 days annual leave taken as recorded in the spreadsheet. The respondent's summary wrongly identifies the claimant's accrued entitlement to be 38 weeks leave in contrast to the 33 weeks of the year 1 April to 20 November. As at 20 November 2020 the date when the claimant's employment was terminated he had a total entailment accrued of 18 days. The task before me is to determine whether or not the claimant was paid for those days of leave he was paid at his rightful normal daily rate rather than the reduced furlough rate.

23. I have considered the pay advice slips sent to the claimant to ascertain whether or not pay in respect of those days the claimant has been paid

at the full daily rate of £9 per hour (£10 per hour after 22 September 2020) or at the reduced furlough rate. Absent a clear evidence account from the claimant of his holidays taken I accept the record of the respondent. During the period when it is accepted by both parties the claimant was furloughed and did not work other than when he was on annual leave the respondent in April, May, June and July have paid full pay as opposed to furlough for 15 working days during which period the claimant took 14 days annual leave including 4 Bank Holidays. During August the claimant has confirmed that he returned on 17 August, he was recorded on leave for 6 days and was paid furlough for 1 week and the remainder of the month at full salary as he returned from furlough on 17 August [ET1]. Similarly, in October when the claimant was on leave for 2.5 days he was paid full salary for the entire month. The claimant has not identified clearly the days where he has not been paid for the annual leave taken by him.

24. The respondent asserts that at the date of termination of his employment the claimant had been paid for annual leave in excess of his accrued entitlement to the extent of 44 hours, that is 5.5 working days. I find that the claimant had an accrued entitlement to 18 days leave and was recorded as having taken 22.5 days annual leave in total that is 4.5 days in excess of his accrued entitlement. The claimant worked on average 8 hours a day and his then rate of pay for the excess annual leave had been paid at the hourly rate of £9 per hour until October 2020 when his rate of pay was increased to £10 per hour. The overpayment of leave was in the sum of £344 being 2.5 days, 20 hours at the rate of £10 per hour in October and 2 days, 16 hours at the rate of £9 prior to October 2020.

25. The respondent under the terms of clause 14 of the contract is entitled on termination of employment to deduct from payment any amount owed to the company including but not limited to any outstanding payments for excess holiday or overpayment of wage. The respondent in all the circumstances of the case is entitled to deduct from the claimant's final pay overpayment of 4.5 days annual leave pay in the sum of £344.

<u>Training costs</u>

26. The contract at clause 26: Repayment of training costs provided for authorised deductions of the cost of training course including at 26(c):

> "From time to time the Company may pay for you to attend training courses. In consideration of this, you agree that if your employment terminates after the Company has incurred liability for the cost of you doing so you will be liable to repay some or all of the fees, expenses and other costs associated with such training courses as follows;
>
> > *"(c) if you cease employment more than 12 months but no more than 24 months after completion of the training course, [50]% of the Costs shall be repaid;"*
>
> At the final paragraph of the clause the company provide:

> *"You shall not be required to repay any of the Costs under this clause if:*
> *(a) the Company terminates your employment, except where it was entitled to and did terminate your employment summarily; or*
> *(b) you terminate your employment in response to a fundamental breach by the Company."*

27. Also contained within the contract are terms at clause 29 restricting the claimant's ability to engage in a competitive business:

> *"You agree that during the period of your employment with the Company you shall:*
> *3. not without the Company's prior written permission be directly or indirectly engaged, concerned or interested whether as principal, employee or agent (on your own behalf or on behalf of or in association with any other person) in any person firm or company which:*
> *a. is or shall be in competition with the Company;"*

28. Mr Bradeley has suggested that the claimant was trained by him through his independent training company Biomechanics Academy [Doc9] the training identified in the Training Schedule was delivered to the claimant by Mr Bradley and Mr David Bridden on unspecified dates. Mr Bradeley confirmed that on termination of the claimant's employment an invoice was raised by his company Biomechanics Academy [Doc 10]. Mr Bradeley confirmed that Biobrade Limited did not settle the invoice but rather it was settled by a director's loan from Biobrade Limited to Mr Bradeley. In his oral evidence the claimant disputed that his training was anything other than on the job training delivered during the start of his employment and delivered before the contract was issued to him and signed by him 14 May 2020.

29. I find that the contract is not retrospective in it's effect and in any event the invoice submitted in respect of *"training*" delivered before the completion of the contract was not on any reasonable reading of the claimant's contract a provision contemplating anything other than future training courses that the claimant may be paid for. The evidence given by Mr Bradeley was that the claimant was in any event trained by him at the start of his employment in June 2019 and thereafter on the job. What is clear is that Mr Bradeley accepts that the claimant 'picked up' the skills required to do his job quickly and there is no suggestion that the training to which the invoice of Biomechanics Academy referred was delivered after April 2020 when the claimant was placed on furlough until 18 August 2020.

30. Further, more clause 26 (c) which requires repayment of 50% of training course costs if employment ceases after 12 months but no more than 24 months after completion of the training course is subject to the proviso that:

> *"You shall not be required to repay any of the Costs under this clause if:*
>
> *(a) the Company terminates your employment, except where it was entitled to and did terminate your employment summarily*;"

31. The circumstances of the termination of the claimant's employment therefore require my consideration. The claimant was dissatisfied with the decision taken by the respondent to place him on furlough and other things such that on 21 September 2020 he had submitted his resignation but was persuaded to remain in the company's employment when he negotiated an increase in his hourly rate of pay from £9 to £10 an hour.

32. On 4 November 2020, in anticipation of the further period of national lockdown the claimants employer, Biobrade Ltd wrote to the workforce [Doc 7] to inform staff that once again they would be placed on periods of furlough and that some of them may be directed to take annual leave from 20 to 27 November. The claimant was aggrieved at the prospect of being placed on furlough as in his opinion there was sufficient work to support full time working. The claimant confirms that he submitted his resignation on 13 November. On 20 November 2020 the day on which the claimants notice was to expire, following a disagreement in the workplace between the claimant and Mr Bradeley the managing director, Mr Bradeley claims the claimant was abusive towards him, the claimant was called to a disciplinary meeting, without notice and informed that his employment would terminate with immediate effect because of his aggressive and abusive behaviour.

33. To support his claim that the claimant had been abusive towards him Mr Bradeley has produced attached to the claim form [Doc 8] a 'statement' from Mr. David Bridden, Orthotics lab Manager who states that he was witness to a confrontation between the two men in the corridor that:

> *"Mr. Soltys repeatedly called Mr. Bradeley incompetent, a liar and other insults. He behaved completely disrespectfully to the owner of the company.*
>
> *When Mr. Bradeley asked him "what lies have I told you, & how have I been incompetent?", Mr. Soltys said nothing and could not give examples."*

34. I have explained that, without Mr Bridden in attendance to be questioned about the account he gave, the evidence had relatively light weight. Having considered the disparaging view expressed by the claimant about Mr Bradeley and the claimant's own comments in his email to Mr Bradeley on 20 November 2020 I draw an inference that the claimant was not respectful of the directions given by Mr Bradeley and his management of the company and furlough arrangements. I find that at the meeting on 20 November 2020 Mr Bradeley as managing director of Biobrade terminated the claimant's employment with immediate effect.

35. On the evening of 20 November the claimant wrote an email at 20:59 to Mr Bradeley [Doc 8a] in which he confirmed that he had in the period since his resignation set up a company that would like the respondent business produce orthopaedic orthotics, albeit not on the scale of the respondent:

> *"so the path I'm deciding to go down is not so much orthotics, but just creative simple insoles with various colours and different cushioning/poron and also shoe sole repair and refurbishments."*

I find that although the claimant was setting up his business it was not at that time operational. The claimant also proposed to Mr Bradeley that they may make an arrangement whereby his business might also help out Biobrade. In response to the claimant's behaviour on 20 November and his email [Doc 8a] Mr Bradeley wrote to the claimant [Doc 1] which sought to confirm that the claimants conduct made his employment with the company 'untenable'. Referring to the claimant's email communication Mr Bradeley sought to suggest that the situation was 'completely unacceptable' and that:

> *" we are forced to cease your employment with us with immediate effect"*

In light of the evidence that I have heard I find that the respondent had in fact terminated the claimant's employment with immediate effect on 20 November. The respondent in their ET3 had stated in reply to question 6.1 responded to the claim and stated:

> *"I felt that I had the right to dismiss him for gross misconduct and asked him to leave the premises with immediate effect, even though it was officially his last day*"

I find that although the claimant's notice on resignation had been due to expire on 20 November the employment was in fact terminated by the respondent summarily on 20 November. I am not, in light of the evidence before me, able to find that the respondent had grounds to summarily terminate the claimant's employment and in strict application of clause 26(a) of the contract the respondent cannot require the claimant to repay the cost of training courses under the contract, were such training cost properly to be recovered under the contract.

Conclusions

Identity of Employer

36. In answer to the question of what is the identity of the claimant's employer it is evident that the claimant understood he aways worked in the business that was originally undertaken by Sub-4 Limited that of the manufacture of orthopaedic Orthotics and that the business had changed its name in February 2020 and he continued to work for the business under the changed name of Biobrade Limited. At the date of termination of his employment the identity of the claimant's employer was Biobrade Limited. When the claimant presented his complaint to ACAS initially on 15 December 2020 and the Early Conciliation certificate was issued on 16 December naming Mr Bradeley personally as the employer and to the Employment Tribunal 26 December 2020

Biobrade Ltd was trading. The claimant in his claim forn at question 8.1 stated:

> *"The company I worked for; Biobrade is run by a single person - Mr Clifton Bradeley."*

The claimant mistakenly viewed Mr Bradeley the managing director of the company, latterly known as Biobrade Limited to be his employer as he controlled the company and the associated business Sub-4 Limited. On the facts as I have found them to be the correctly identified employer was Biobrade Limited.

Holiday Pay (Working Time Regulations 1998)

37. The claimant's contract provides that the holiday year ran from 1 April 2020 to 31 March 2021. On the facts as I have found them to be based upon the objective evidence before me the claimant, in the holiday year in which his employment terminated, had an accrued entitlement to 18 days paid holiday.

38. The respondent paid the claimant in respect of 22.5 days holiday at normal hourly rate during the course of his employment. In accordance with clause 19 Holiday entitlement in his contract accepted on 14 May 2020 the respondent made a lawful deduction of £344 in respect of paid holiday taken in excess of statutory entitlement to accrued leave.

Unauthorised deductions

39. The respondent made an authorised deduction from the claimant's pay in respect of paid holiday leave taken in excess of that accrued entitlement in the sum of £344.

40. The respondent made a deduction of £440 from the claimant final pay of which deduction £96 amounted to an unlawful deduction.

41. Notwithstanding the respondent's acknowledgment that the claimant was due salary payment in November in the sum of £1200 less the lawful deductions tax and national insurance payment (£37.60) and any paid holiday pay in excess of accrued entitlement (£344) the claimant was due to be paid a net sum of £856. The respondent has failed to pay the claimant the entirety of the net sum of £856 due to the claimant.

42. The respondent sought to wrongfully recoup a payment of £1450 claimed to be recoupment of training fees. Such training as was undertaken by the claimant as was delivered by Biomechanics Academy was completed in June 2019 more than 12 months before the effective date of termination of the claimant's employment. In light of my findings of fact the respondent summarily terminated the claimant's employment on 20 November and in the circumstances, even were the terms of the contract signed on 14 May 2020 to have retrospective effect in respect of training costs properly incurred prior to that date, such termination by

the respondent without grounds to summarily dismiss the claimant are no longer effective being excluded by clause 26(a).

43. The respondent has no contractual claim for training cost incurred before December 2019.

Employment Judge Dean
27 January 2022