EMPLOYMENT TRIBUNALS

Claimant: Mrs J Luck

Respondents: R1: New Code Partnership Limited
R2: Mr M Dev

Heard at: Liverpool **by video**

On: 14 and 15 October 2024 and in Chambers on 15 November 2024

Before: Employment Judge Aspinall

Representation
Claimant: Mr Callaghan, Counsel
Respondents: Mr Baker

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaints against the second respondent are dismissed on withdrawal.

2. The claimant was not an employee of the respondent accordingly her complaint of unfair dismissal and her complaint of breach of contract notice pay are not well founded and fail.

3. The claimant was not a worker of the respondent accordingly her complaint of unauthorised deduction from wages for both shortfalls in pay and holiday pay are not well founded and fail.

REASONS

Background

1. By a claim form dated 15 January 2023 the claimant brought complaints of constructive unfair dismissal, breach of contract notice pay and shortfalls in pay as unauthorised deduction from wages and outstanding holiday pay brought as a deductions complaint.

2. The respondent defended the complaints saying that Mrs Luck had never been employed by either the first or second respondent. Mrs Luck and her former

husband Mr Ian Luck had set up a limited company together Euromark Coding and Marking Limited ("Coding") from 1996 but that after the breakdown of their relationship in 2008 she had not worked there.

3. Mrs Luck agreed that she had not gone into work from 2008 onwards but that it had been agreed that she would receive payment from the company. It was Mrs Luck's position that she had been employed by Coding and continued to be employed after 2008 and that her employment had transferred to the first respondent New Code Partnership Limited (New Code) on 14 February 2017 by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and that in 2022 and 2023 she had been underpaid or not paid at all by New Code.

4. She said when she protested about this she received an email from the second respondent telling her that she had never been an employee of New Code. This was the final straw for her which caused her to resign and claim unfair dismissal and outstanding payments. The respondent New Code said that, not only had Mrs Luck never been its employee nor worker but that she had not been an employee or worker for the company from which it acquired assets on 14 February 2017 either. It said that there was a TUPE transfer as a result of which it acquired employees but it was from Euromark Marking and Coding Limited ("Marking"), a different company which had been incorporated on 26 May 2010, from the one Mrs Luck said she had set up and worked for. It said Mrs Luck did not transfer to it from Marking.

5. The claimant never suggested that she had worked for Mr Dev personally, though pointed to the fact that he had paid her on one occasion and she cited this as proof of his acknowledgment of her as an employee of New Code. She withdrew her complaints against him personally.

6. The matter was originally listed for a one day hearing in July 2024 but at the joint application of the parties it was relisted for a two-day hearing.

7. The Tribunal was made aware by Mr Shaun Luck of ongoing dispute between the Luck family and Mr Dev and New Code as to ownership of New Code which may lead to litigation. For that reason, the factual findings are limited.

Timetable

8. We agreed to spend some time during the morning preparing a list of issues. We agreed to hear evidence to accommodate the attendance by video of Mr Shaun Luck.

List of Issues

9. The parties agreed the following List as accurately and comprehensively reflecting the complaints in the Claim:

TUPE

1. **Was the Claimant an employee of Euromark Marking and Coding Limited (Marking) within the meaning of section 230(1) of the ERA 1996?**

2. **If so, did the Claimant's employment transfer by operation of the TUPE Regs to New Code Partnership Limited (New Code) on 14 February 2017?**

3. **Was the Claimant after 14 February 2017 employed by New Code**

4. **What terms of employment existed in relation to pay, notice, leave?**

S13 ERA

5. **Was the claimant a worker for New Code?**

6. **Whether worker or employee, on what terms was she engaged in particular in relation to pay and annual leave?**

7. **What were the wages if any properly payable to the claimant from 14 February 2017 to 28 November 2023?**

8. **Did the claimant suffer an unauthorised deduction from those wages so that from December 2022 she was short paid, in March 2023 received no payment whatsoever and then short paid April and May 2023 with June being her last payment.**

9. **Did the respondent withhold pay entirely from July 2023 to the claimant's resignation on 28 November 2023?**

10. **What annual leave if any was due to the claimant on termination of employment?**

11. **What was the claimant's annual entitlement?**

12. **How much, if any, had been taken in any one year?**

13. **What amount of leave if any was the claimant allowed to carry over in any one year?**

14. **What amount of outstanding leave should be award?**

UNFAIR DISMISSAL

15. **Was the short payment and withholding of payment a fundamental breach of contract entitling the claimant to resign?**

16. **Did the claimant delay or affirm the breach if any or waive the breach if any between July and November or was she continuing to work under protest?**

17. **What was the last straw entitling the claimant to resign? Was it the 7 November 2023 email in which the second respondent told the claimant she was not and had never been an employee of the first respondent?**

18. **Was the Claimant entitled to terminate her contract of employment without notice by reason of the Respondent's conduct in accordance with s.95 (1)(c) ERA 1996.**

19. **If so, what award if any is due to the claimant?**

20. **Basic award, any reduction or deduction**

21. **Compensatory award, any reduction or deduction, including Polkey?**

BREACH OF CONTRACT

22. **Was the claimant an employee of New Code, as above, was there a complaint arising out of the contract or termination therefore on termination for notice pay?**

23. **If so, what was the notice to which the claimant was entitled?**

24. **What was her continuous service as an employee if any with New Code on termination?**

25. **How much notice if any should be awarded?**

Documents

10. The parties had prepared a joint electronic bundle of 231 pages. Two pages were added by the respondent at pages 66A and 66B. During the hearing a further 4 pages were added at 232 to 236 which the claimant said showed she was an employee.

11. There were witness statements from Mrs Jackie Luck, her son Mr Shaun Luck for the claimant and Mr Martin Dev for the respondent.

Oral evidence

12. I heard evidence from Mrs Jackie Luck. She gave her evidence in a straightforward way but was evasive when asked about obligations to do any work. She had been a director of Coding until the relationship broke down with her former husband so that she resigned as a director in 2006. She says she remained a shareholder of Coding so went in for board meetings. She was deliberately evasive about which company she says she had worked for. She said she thought that probably one company Coding had just dissolved (she accepted that Companies House showed it had dissolved in 2015) and Marking had probably carried on. She wanted the Tribunal to accept that she did not understand the different legal identities and that as she continued to receive payments and as it was better for her to stay at home and just be paid, she must have been employed by someone, some legal entity, that was now New Code.

13. The Tribunal found that on credibility in relation to what duties the claimant had performed and when, she was not a reliable witness. The claimant accepted under cross-examination that her CV which listed administrative duties performed until 2023 was a work of fiction because she had not performed any duties at all since before 2008. On the issue of outstanding holiday pay she was also not credible because she accepted that she did not know what her holiday entitlement was and never sought permission to take leave, did not think she needed to, nor ever gave information about taking annual leave.

14. Mr Shaun Luck gave his evidence in straightforward way. He was clear that his mother had not worked for New Code.

15. Mr Martin Dev gave his evidence in a straightforward and helpful way. He was clear and credible when he said he was honouring legacy payments to Mrs Luck because of the family relationships and not because of any employment

obligation.

The Facts

16. In 1996 the claimant and her then husband set up a business which became incorporated as Euromark Coding and Marking Limited on 2 October 1996 ("Coding"). The claimant was a director of that company. She was also a shareholder of 40% of the shares. The business grew.

17. By 2008 she and her husband separated. Following the separation in 2008 and concerns of her sister Denise about her financial position, her former husband sent a letter dated 10 November 2008. Its content is set out in full:

> *"Dear Jackie*
>
> *re-Terms and Conditions of Employment*
>
> *as per our conversation, here is a summary of what we discussed today.*
>
> *Also, I've had a number of conversations with Denise and she asked about reassurances for your future. I'll tell you what I told her and I'd appreciate it if you would let her know that I've taken the steps in order to make everyone feel a bit more secure. I'm really sorry for the way things have panned out but I hope that in the future you'll see that it was the right thing for us to separate.*
>
> *You're currently employed by the company and there is no reason for that to change. Your employment terms are staying the same and you will receive annual pay increases in alignment usually at the rate of inflation, with all other employees of the company.*
>
> *We have agreed to split the mortgage payments 50-50.. These payments will be total up and paid in addition to both our salaries in the same way that it has always been done and sent to the joint account as usual.*
>
> *The various payments to the banks will be made from there. If you have any other suggestions as how to do this then please let me know.*
>
> *You will always be a 40% shareholder in the business will be entitled to any dividends the company generates. If the business is sold, obviously you will receive that percentage of the sale value.*
>
> *If you are in agreement with the terms and conditions above please sign and date of the end of this letter where applicable.*
>
> *I hope this will give you a bit of reassurance about your future and that one day you might understand that this was the right thing to do."*
>
> The claimant signed and dated the letter on 10 November 2008.

18. A company called Euromark Marking and Coding Ltd (Marking) was incorporated on 26 May 2010. Mr Ian Luck was a director of Marking. The claimant was not a shareholder in that company. She was not a director. She

never did any work for Marking. In 2011 the claimant's son Mr Shaun Luck took over from his father as Managing Director of Marking. He knew there was an arrangement in place to provide financial support to his mother.

19. In 2015 Coding was in financial difficulty. The claimant as a shareholder gave personal guarantees to a factoring company. She still was not doing any day-to-day work for the company and had not done any work since before 2008. In 2015 Coding went into liquidation and was shown on the Companies House Register as dissolved.

20. The Tribunal saw a payslip referring to May 2016 showing a payment from Marking to the claimant in the amount of £ 2422.76. The Tribunal saw a schedule of employees dated 27 June 2016 listing the claimant as an employee of Marking. In 2016 Shaun Luck was aware of Coding having been dissolved and that his mother had received payments from Coding. He was aware that payments had been made to her on the instruction of his father since the relationship breakdown in 2008. In July 2016 the claimant received a payment through Marking payroll and a payslip was produced showing £ 2400 net payment to her.

21. On 25 August 2016 a Mr Craig Martindale emailed Martin Dev to ask what salary was to be paid to Jackie Luck if any and said *again I assume none so that it goes through as dividend instead. Mr Dev replied on 25 August 2016 saying:*

> *"As per the work you did for Daniel identifying when… Jackie wage increased… That difference in price increase as discussed can you reverse this in August payroll so in effect by putting a minus figure we get back the PAYE…. Daniel will then make the payments that had been taken out as dividend…. In the month of August please ensure the salary goes through "as it was before".*

22. In February 2017 Mr Shaun Luck and Mr Martin Dev started a new company called New Code Partnership Limited ("New Code"). A schedule of employees to transfer from Marking to New Code was prepared by solicitors acting on the acquisition by New Code of Marking. The claimant was not on it. New Code did not acquire employees or anything else from Coding by this 2017 transfer, Coding had already been dissolved.

23. As part of the pack of documents prepared for the board of New Code there was a copy of bank statements for the bank account of Marking from 2012 and 2013. An entry on 26 March 2012 showed a payment of £720 to the claimant and a payment of £2381.64 with the reference "payroll private". The statement showed payments to other members of staff with the simple reference "payroll". The bank statement showed a similar entry on 26 May 2013 and 26 June 2013 to the claimant with the reference "payroll private" in the sum of £2526.84 and by October 2013 a payment of £2894.

24. Documents were prepared in 2017 by New Code to show its salary costs and included the payments to the claimant. Mr Shaun Luck saw those figures and understood them to be working figures for New Code's costs. He knew that the claimant did no work for New Code but regularly received payments from it because his father had said that the business would "look after Jackie".

25. The claimant never did any work for New Code. She had no email address at New Code. She was not willing to perform duties at New Code because she and Mr Dev did not get along and because she was happy to remain at home, carrying out work from time to time at a local charity shop. None of the employees at New Code would have known who she was if she had attempted to go in.

26. Sometimes payment was made from New Code to Mr Shaun Luck through payroll inflated to cover the amount of payment to the claimant, and paid onward from Shaun Luck to the claimant, his mother.

27. Mr Dev knew that payments were going out of New Code not for salary but because there was an historic family agreement between Ian Luck and the claimant to look after her and this is something Shaun Luck wanted New Code to continue paying.

28. On 7 April 2017, 13 April 2017, 28 April 2017 and 4 June 2017 New Code made payments of £ 600 to the claimant and its bank entry descriptor said, "Bill Payment to J Luck". The bank account statement for New Code from Santander in March 2017 showed a bill payment to the claimant for £600. The claimant regularly received an amount equivalent to £ 600 per week over the period from November 2008 to 2023 from various legal entities, Coding, Marking, Shaun Luck personally, Martin Dev personally and New Code to honour the arrangement made on breakdown of the personal relationship between Ian Luck and the claimant.

29. Mr Dev made payment personally to the claimant on occasion because he was respectful of Ian Luck and the claimant who had been founders of a business. He was aware of the arrangement that Ian would "look after Jackie". There were text exchanges between Mr Shaun Luck and Mr Dev in late 2022 discussing payment to Shaun Luck, the claimant and others.

30. Mr Dev and Mr Shaun Luck hoped and were working towards New Code being sold and that sale generating significant proceeds of sale that would be shared between them and Ian Luck and the claimant. The claimant was not a shareholder in New Code but Mr Dev was willing to share proceeds of sale if a lucrative sale was achieved because of his respect for the founders of the predecessor businesses and his awareness of the agreement between Ian Luck and the claimant from 2008 that she would be due a percentage of proceeds on sale. He honoured the routine £ 600 payments as a gesture of goodwill, until there were problems between Mr Dev and the Luck family.

31. In late 2022 Mr Dev became concerned about the finances of New Code and the spending of Mr Shaun Luck through New Code. He raised this and an altercation at New Code ensued to which police were called. The Luck family then evicted Mr Dev from one of their properties he had been renting. It also became apparent that the sale of New Code he had hoped for was not imminent.

32. Mr Shaun Luck knew that his mother the claimant had not done any work for any of the companies Coding, Marking or New Code since before 2008 and that there was no financial consequence to her, that is to say that she still got her £ 600 whether or not she was working.

33. In March 2023 there were problems with finance so that payment to her was late. On 27 March 2023 the claimant sent a text to Mr Dev saying:

> *"Martin, please please please do not instruct Shaun anymore to give me my money out of Boundary Road. My agreement as always been to get my money via the Company which we spoke last week over this same matter further to this can you please let me know when you'll be paying me this week as next week we are in April, Thanks Jackie"*

34. Boundary Road was a property owned by the Luck family that was being sold. In June 2023 those payments stopped. The claimant chased Mr Dev and was told that money that would have been paid to her was being used to fund litigation between Shaun Luck and his partner about access to their children, the claimant's grandchildren so there would be no payment to her.

35. The claimant took legal advice. On 9 October 2023 a barrister called Mr O'Callaghan sent a letter to New Code on her behalf saying that he was acting for her in relation to her ongoing employment with New Code and that she had been employed since February 2017 following a TUPE transfer. The letter referred to her original contract of employment with Coding dating from November 2008 and set out that she had not been paid since 9 June 2023, had been underpaid in December 2022 with short payments for four months thereafter of £400 each, had no payment in March 2023 and was seeking outstanding payments for June, July, August and September 2023. The letter warned that the claimant might act on what she saw as a fundamental and repudiatory breach of contract in failing to pay her wages since June. She then waited a month.

36. On 10 November 2023 she sent a letter to Mr Dev as follows:

> *"Dear Martin,*
>
> *I am writing to you as I understand you have informed my barrister that you will not be paying me for the month of November. In these circumstances I can no longer continue with this employment. This is my resignation with immediate effect."*

37. The claimant went to ACAS on 20 November 2023 and achieved a Certificate on 27 November 2023. She brought her complaint on 15 January 2023.

Relevant Law

38. Section 230 Employment Rights Act 1996 sets out the definition of employees and workers for claims brought under the Employment Rights Act 1996.

> **Employees and workers**
>
> **230 Employees, workers etc**
>
> **(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means 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;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

(6) This section has effect subject to sections 43K, 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K.

(7) This section has effect subject to section 75K(3) and (5).

Worker status

39. In Sejpal v Rodericks Dental Ltd [2022] EAT 91, it was said that, although the cases often talk of ideas such as 'mutuality', 'umbrella contracts' and 'substitution', these are not in themselves tests and are no substitute for the plain wording of the statutory definitions. It was said in the judgment that ETs are therefore advised to stick to those definitions and should take a structured approach to deciding on worker status, as follows:

a. A must have entered into or work under a contract (or possibly, in limited circumstances ..., some similar agreement) with B; and

b. A must have agreed to personally perform some work or services for B

However, A is excluded from being a worker if:

a. A carries on a profession or business undertaking; and

b. B is a client or customer of A's by virtue of the contract."

TUPE

40. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and its predecessor regulation brought into UK law requirements in the Acquired Rights Directive for protection of employees. That directive is no longer retained law in the UK but its recitals provided:

> **"Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers. It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded."**

41. Regulation 4 of TUPE provides:

> **4.— Effect of relevant transfer on contracts of employment**
>
> **(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—**
>
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**
>
> **(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.**
>
> **(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.**

Unfair dismissal

42. The claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

43. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27. The employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

44. Section 95(1)(c) provides that the employee must terminate the contract *by reason of* the employer's conduct. The question is whether the repudiatory breach played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he should or would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

45. Where there are mixed motives the Tribunal must decide whether the employer's conduct was an effective cause of the resignation. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying:

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

46. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract **W E Cox Turner (International)Limited v Crook [1981] IRLR 443**.

Breach of contract notice pay

47. Under **section 3 Employment Tribunals Act 1996 and The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994 / 623** an Employment Tribunal has jurisdiction to hear a claim which arises or is outstanding on termination of employment. Where an employee brings a breach of contract claim an employer can counter claim a sum arising or outstanding on the termination of employment. The employee must already have brought proceedings under the Order in an Employment Tribunal against the employer for the employer to be able to bring a counter claim.

Annual leave

13 Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture in Wales or Scotland) except where, in the case of a worker partly employed in agriculture in Wales or Scotland, a relevant agreement so provides.

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but —

(a) subject to the exception in paragraphs (10) and (11) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

(7) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(8) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(9) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(10) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).

13A Entitlement to additional annual leave

(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is:

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a) the worker's employment is terminated; or

(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

(8) This regulation does not apply to workers to whom the Agricultural Wages (Scotland) Act 1949 applies (as that Act had effect on 1 July 1999).

Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless —

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Applying the Law

48. The parties provided written closing submissions.

49. The claimant withdrew her complaint against the second respondent. A separate dismissal on withdrawal judgment is issued.

EMPLOYEE STATUS AND CLAIMS ARISING FROM IT

Unfair dismissal

50. Turning then to eligibility to bring a claim for unfair dismissal. The claimant would need to show that she was an employee of the respondent at the date of

dismissal, that she had more than two years continuous service and that she was dismissed.

51. The claimant said that she must have been an employee of New Code because it was making regular payments to her and that she must have been acquired as an employee of New Code when it acquired Marking on 14 February 2017. That would require her to be able to demonstrate that she was an employee of Marking assigned to an entity that transferred from Marking to New Code immediately before the transfer.

52. The claimant has not been clear as to how she says she moved from being an employee of Coding to Marking, though she invites the Tribunal to infer that there must have been a transfer and that she must have been an employee of Marking because it made payments to her. In relation to Coding the claimant points to a document, the letter set out in full in the facts above, which she says amounts to an employment contract that attests to her status as an employee of Coding.

53. Addressing employment status, for the purposes of the unfair dismissal complaint, an employee is defined in section 230 (1) of the Employment Rights Act 1996 as "an individual who has entered into or works under a contract of employment. A contract of employment is defined as a contract of service or apprenticeship whether express or implied and if it is expressed whether oral or in writing.

54. There is no uniformly applied legal definition of a contract of employment. The test used today derives from Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 QB 497 and Carmichael and another v National Power plc 1999 ICR 1226 and Express and Echo Publications Ltd v Tanton 1999 ICR 693 CA.

55. In Ready Mixed, Mckenna J said:

> **"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …'."**

56. Lord Denning in Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 at 111, said:

> **"It is almost impossible to give a precise definition … It is often easy to recognise a contract of [employment] when you see it, but difficult to say wherein the difference lies."**

57. A Tribunal can consider the question was there a contract of employment by looking at the meaning an ordinary person would give to the words and may take into account the following factors:

a. There must be an obligation on the individual to provide work personally, meaning that it has to be the individual who does the work

and that they don't have the right to send somebody else along to do it.

b. There must be mutuality of obligation; that is to say that if work is offered it must be performed.

c. At the heart of an employment relationship is the idea that an individual is entitled to pay in return for work. If an individual is ready and willing to perform the work, but is not asked to do so, then that does not mean there can be no employment contract. What matters is the distinction between voluntary and in voluntary non performance of work.

d. The extent of direction and control exercised by the employer over the way in which work is carried out can be relevant.

e. The context of the business, the organization, the position of the individual in that business and the economic reality between the parties

58. The Tribunal has had regard to what had been agreed and looked at the practical reality of the situation and the relative bargaining power of the parties.

59. Whilst a document might contain relevant terms and evidence of their intention, it will not necessarily be determinative of employment status which is a matter for the Tribunal looking at the reality of the situation.

60. Further, in Carmichael the House of Lords confirmed that whether a claimant was employed under a contract of employment *is a question of law*, to be determined solely by reference to documents, *only* in circumstances where it appears from their own terms and/or from what the party has said or in practice did, either at the time or subsequently, that they intended all the terms of the contract (aside from those implied by law) to be contained in those documents. In circumstances where the intention of the parties has to be gathered partly from documents and also from oral exchanges and conduct, the terms of the contract *are a question of fact*.

61. This is a short summary, in clear English and without legal jargon, of a complicated and detailed area of law. Each side had the opportunity to make submissions on this area of law. The claimant chose to do so focusing on the distinction between voluntary and involuntary nonperformance. She sought to argue that there was a contract of employment that expressly did not require performance of any work. The respondent cited Ready Mixed on employment status and Autoclenz v Belcher in relation to sham arrangements.

Decision on employment status

62. The Tribunal finds that the claimant was not an employee of Coding after 2008, was not an employee of Marking at any time, could not therefore have been an employee of Marking assigned to an entity that was then transferred by operation of the Transfer of Undertakings Regulations 2006 to New Code. The claimant was not an employee of New Code. Its reasons for those findings are

as follows.

63. The Tribunal heard oral evidence from the claimant. The Tribunal found that she was not credible when she said that she was ready willing and able to perform any duties for Coding after 2008. The Tribunal prefers her evidence in her witness statement and accepted in cross examination that it was express;y agreed between her and her former husband in 2008 that she would not come in, meaning that she would not do any work. There was no undertaking to provide service at all after 10 November 2008. Applying, Ready Mixed, there was no agreement for work to be done (in fact an express agreement that none would be done), no agreement to be subject to anyone's direction or control (the claimant did not have to, for example, report sick or ask to take leave) and the Tribunal finds that there was a term inconsistent with employment status which is that the claimant will be paid £600 per week (adjusted for inflation) but will do no work for that payment, indefinitely.

64. The document which the claimant said was evidence of her contract of employment was a letter dated 10 November 2008. It is set out in full in the facts section above.

65. There is no requirement in the letter of personal service, no requirement for the performance of any duties, in fact an express agreement that no duties would be performed, no mutuality of obligation, no direction and control, no terms (such as those that would ordinarily be included in a section 1 statement or employment contract) such as provision for job title, job description, annual leave entitlement, disciplinary and grievance procedures that might apply, pension provisions, other benefits no provisions for termination of the arrangement such as entitlement to give and receive notice. There was no agreement about any of those things in reality because there was no ongoing employment relationship. What the letter does do is go beyond terms that would ordinarily appear in an employment contract and discuss payment of mortgages on matrimonial property.

66. This is not a contract of employment, nor evidence of one. It is a record of the intention of Mr Luck and the claimant that the claimant would receive a payment of around £600 per week, increasing with inflation for the rest of her life. Stating that her terms and conditions of employment would continue, was not determinative. Although the letter says that the claimant is employed and there is no reason for that to change, the reality of the situation was that this letter recorded an agreement to make maintenance payments by a husband to his estranged wife through their company, at that time, Coding.

67. The claimant agreed as evidenced by her signature on that letter not to work for Coding on the basis that she would receive a payment in any event. The Tribunal accepts the respondent's submission that the letter does not amount to a contract of employment nor is it evidence of an oral contract of employment.

68. Reading that letter, and giving it its ordinary meaning it is clearly an agreement to pay maintenance payments but to describe them as salary to put them through the company, Coding.

69. The Tribunal finds that there was no employment relationship between the

claimant and Coding beyond November 2008. The existence of the payments and Mr Luck's attempts in the letter to describe the situation as employment was insufficient to amount to a relationship of employer and employee when looked at in the factual context set out above of there being an agreement not to work and payment to be made indefinitely.

70. The letter does not contain the entirety of the agreement between the parties so the Tribunal has looked beyond the solely legal question of interpretation of a contract, to the reality of the agreement in practice. That reality was evident throughout the claimant's oral evidence as she tried to hold to the position, which the Tribunal rejected, that she was ready willing and able to perform work and evident in the claimant's own message to Mr Dev on 27 March 2023.

My agreement has always been to get my money via the Company

71. That phrase is powerful in this case. It evidences that the agreement was for what the Tribunal is calling a maintenance payment, made to the claimant by Mr Luck but paid *via* the company. The Company in November 2008 was Coding. Marking picked up the arrangement to pay Mr Luck's maintenance payments to his former wife via Marking and then, for a while, so did New Code, until the fall out between Mr Dev and the Luck family and his decision to stop making payments to the claimant.

72. Turning then to the List of Issues.

<u>Was the Claimant an employee of Euromark Marking and Coding Limited (Marking) within the meaning of section 230(1) of the ERA 1996?</u>

73. The claimant was not an employee of Marking. She received payment from it of around £ 600 per week but she never did any work for it, was not and could not be called upon to do any work. She did not take annual leave, not give notice of leave or request leave and that was indicative of the absence of an employment relationship here. She had no email address, nobody who worked there would have known who she was. The existence of a payment made by the company to her was insufficient to amount to a relationship of employer and employee.

<u>If so, did the Claimant's employment transfer by operation of the TUPE Regs to New Code Partnership Limited (New Code) on 14 February 2017</u>?

74. The claimant was not employed by Marking immediately before the transfer on 14 February 2017. She did not have employment that was protected by TUPE. There was no employment, there was no transfer of the claimant.

<u>Was the Claimant after 14 February 2017 employed by New Code, What terms of employment existed in relation to pay, notice, leave?</u>

75. The claimant did not become an employee of New Code. There were no terms of employment in place between her and (either Coding or Marking) and or New Code. The only arrangement was an ex gratia payment being authorised by Mr Martin Dev through New Code in respect, historically, of an agreement

reached between Mr Luck and the claimant that he, through Coding at the time, would pay her around £ 600 a week for life. The existence of the payments was not sufficient to amount to an employment relationship.

Was the claimant an employee of New Code, as above, was there a complaint arising out of the contract or termination therefore on termination for notice pay?

If so, what was the notice to which the claimant was entitled? What was her continuous service as an employee if any with New Code on termination?

How much notice if any should be awarded?

76. The claimant was not an employee. There was no complaint arising on termination of employment. She had no statutory right to notice. She had no continuous service as she had given no service since 2008.

77. Accordingly, the Tribunal has no jurisdiction to hear her complaints of unfair dismissal and her breach of contract claim for notice pay. The List of Issues went on to consider what if the claimant had been an employee.

Was the short payment and withholding of payment a fundamental breach of contract entitling the claimant to resign?

Did the claimant delay or affirm the breach if any or waive the breach if any between July and November or was she continuing to work under protest?

What was the last straw entitling the claimant to resign? Was it the 7 November 2023 email in which the second respondent told the claimant she was not and had never been an employee of the first respondent?

Was the Claimant entitled to terminate her contract of employment without notice by reason of the Respondent's conduct in accordance with s.95 (1)(c) ERA 1996?

If so, what award if any is due to the claimant? Basic award, any reduction or deduction Compensatory award, any reduction or deduction, including Polkey?

78. If the claimant had been an employee, the Tribunal would have found that the delay from June 2023 when she was told that she would no longer be getting paid until November 2023 when she resigned would have been problematic for her. The law of constructive unfair dismissal requires the employee to act in response to the fundamental breach and not affirm the breach by delay. That delay without any evidence having been produced that would have satisfied the Tribunal that the claimant was working under protest, would have been fatal to her complaint.

79. Further in the alternative, if that delay had not been fatal to the complaint then the delay from her barrister's letter of 10 October 2023 for a further month to her resignation in November 2023 would also have been problematic and potentially fatal.

WORKER STATUS AND CLAIMS ARISING FROM IT

80. Section 23 ERA 96 provides that a worker may present a complaint for unauthorised deductions from wages. The claimant relied on that provision to bring her complaints for the deductions from salary from June 2023 to November 2023, some shortfall payments in earlier months and unpaid holiday pay. She said those amounts were wages properly payable to her.

Was the claimant a worker for New Code?

81. The definition of a worker was considered in Pimlico Plumbers Ltd v Smith [2018] UKSC 29. The Supreme Court stated the court's only function was to consider whether or not the decision reached by the Employment Tribunal was one that was open to it on the facts. In that case, the Tribunal found that Mr Smith was a worker. He wore the respondent's uniform, drove its van and was represented to its customers as a member of its workforce. The agreement stipulated a maximum working week over five days, but there was no obligation on either side to give or perform work; although there was some flexibility in who did what work, there was no formal substitution provision. The Court of Appeal upheld the decision that the claimant was a worker focusing on the requirement to give "personal service" i.e. not be able to send somebody else along to do the work when offered, and whether or not the claimant was providing service to the respondent as a business client, particularly as he had regarded himself as self employed for tax purposes.

82. The Court of Appeal held that there was no business client relationship given the amount of control exercised over the claimant by the respondent and the fact that they even had a restrictive covenant to exercise control over him after he left. The case then went to the Supreme Court where the Tribunal's decision was upheld on the facts. The Pimlico case was plagued by ambiguities and contradictions in the documents between the parties and what happened in practice. It is of little assistance in this case where there is an express agreement that the claimant will not do any work.

83. In Uber BV v Aslam [2021] UKSC 5, [2021] IRLR 407 the Tribunal held that the drivers were "workers" because the true relationship was not the one that was set out in the "carefully crafted documentation" but because each time they switched on the app they were willing and able to accept assignments for Uber. There was an undertaking to submit to work when they turned on the app. They were then, when they accepted a job, providing service to Uber and were not self employed contractors receiving service (via the app) from Uber. The EAT restated the Autoclenz point about looking at the reality of the relationship. The Court of Appeal also upheld the decision of the Tribunal as did the Supreme Court. The Supreme Court judgment endorsed the realities test in Autoclenz and revisited Carmichael where there was no written agreement on the point about mutuality of obligation. It also considered, relevant to the gig economy cases where drivers log on and off apps, some points about how to measure working time.

84. Addison Lee v Gascoigne UKEAT /0289/17 also considered worker status this time for a cycle courier. The employer argued that this was a 'true' zero-hours contract which not only expressly denied any form of employment relationship, but imposed no obligations on either side, with the individual free to work or not. In this context, reliance was placed on a dictum from *Uber* in the EAT to the effect

that in such a case there would not be mutuality. The EAT disagreed, holding that: (a) the ET were entitled to hold that the written documentation did not reflect the reality of the relationship and so it was possible to look behind it; and (b) as in doing so the ET had found on the facts that that reality was that once the app was switched on there was an expectation that the individual would take any job offered (except in certain accepted emergencies such as mechanical failure), it was open to the ET to find that there was sufficient mutuality to establish the possibility of worker status. Whether it did so was then a question of applying the multi-factorial test, but this remained a question of fact so that the only challenge was perversity, which was not made out here.

85. In the claimant's case the reality was that there was an express agreement not to do any work. There was no question of the claimant being able to "log on" as such, no option to present herself for receipt of work if offered. The Tribunal finds that the reality of the situation between the claimant and Coding post November 2008 was such that there was no mutuality of obligation. The Tribunal rejects the claimant's submission that she was ready, willing and able to attend work. That was not credible as in the communications between her and Mr Dev she does not say that she wants to come in and work and does not refer to herself as being employed. She asks only for the payment that it has been agreed that she will receive. The reality was a maintenance agreement in 2008 between a separating husband and wife with the husband undertaking to make maintenance payments to her *via,* at that time Coding.

86. The position later was that there was no worker relationship with Marking and no worker relationship with New Code for the same absence of mutuality of obligation and true realities of the situation reasons.

Whether worker or employee, on what terms was she engaged in particular in relation to pay and annual leave?

What were the wages if any properly payable to the claimant from 14 February 2017 to 28 November 2023?

87. The claimant could not in oral evidence say on what terms she was engaged in relation to annual leave, or anything other than the payment arrangement and an agreement to share proceeds of sale. This was further evidence as to the absence of worker relationship. In Pimlico and Uber and Addison the claimants had each been able to offer personal service, be willing to accept assignments and in Addison there was the expectation that once the claimant logged on he would take jobs that were offered.

88. There were no "wages" within the definition in the ERA 96 payable to the claimant. There was no employment contract and no worker relationship. The payments made to her were not wages but were ex gratia payments made by New Code in honouring a legacy maintenance payment arrangement made by Mr Ian Luck and the claimant in 2008.

Did the claimant suffer an unauthorised deduction from those wages so that from December 2022 she was short paid, in March 2023 received no payment whatsoever and then short paid April and May 2023 with June being her last payment?

89. There were no wages properly payable, so no unauthorised deduction was made.

Did the respondent withhold pay entirely from July 2023 to the claimant's resignation on 28 November 2023?

90. New Code stopped paying the maintenance payments but as these were not wages properly due and the claimant was not a worker, that was not something that could be pursued under Section 23 ERA.

What annual leave if any was due to the claimant on termination of employment

91. The claimant was not a worker. Her rights to annual leave would have derived from the Working Time Regulations 1998 and were pursued here as a section 23 unauthorised deduction from wages complaint.

What was the claimant's annual entitlement?

How much if any had been taken in any one year?

What amount of leave if any was the claimant allowed to carry over in any one year?

What amount of outstanding leave should be award?

92. The claimant, not being a worker, had no annual entitlement to paid leave. She never asked for any, never took any and only pursued the amounts as part of a complaint post her purported resignation. The claim for unpaid holiday is not well founded and fails because the claimant was not a worker.

Conclusion

93. The claimant has sought to enforce a domestic maintenance arrangement paid via a Company through the employment tribunal against later, separate legal identity companies that may have inherited some of the work of the predecessor company which first paid her.

94. The Tribunal has no jurisdiction to hear complaints where the claimant was not an employee or worker. The claimant has failed to establish employee or worker status. The complaints must fail.

Employment Judge Aspinall

Date: 3 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5 December 2024

FOR EMPLOYMENT TRIBUNALS

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