EMPLOYMENT TRIBUNALS

Claimant: **Mr J Richards**

Respondent: **David Duggleby Limited**

Heard at: **Leeds** **On:** **30th October 2018**

Before: **Employment Judge Eeley**

Representation
Claimant: In person
Respondent: Mr Wilkinson, counsel

RESERVED JUDGMENT

The claimant was not an employee or a worker within the meaning of section 230 of the Employment Rights Act 1996. The Tribunal therefore does not have jurisdiction to hear his claims. The claimant's claims for unfair dismissal, wrongful dismissal and unpaid holiday pay fail and are dismissed.

REASONS

1. By a claim form presented on 18th April 2018 the claimant brings claims of unfair dismissal, wrongful dismissal and a claim for unpaid holiday pay arising out of his time working with the respondent. The respondent denied the claims contending that the Tribunal did not have jurisdiction to hear them on the basis that the claimant was neither an employee nor a worker within the meaning of section 230 Employment Rights Act 1996. Further and in the alternative, in the event that the Tribunal did have jurisdiction, the claims were denied on their merits on the basis that the claimant had been fairly dismissed for misconduct.

2. The following issues arose for determination:
   a. Was the claimant employed by the respondent under a contract of employment such that the Tribunal has jurisdiction to hear his claims?

b. If the claimant was not an employee was he nevertheless a worker within the meaning of section 230(3)(b) ERA 1996 such that the Tribunal has jurisdiction to hear his claim for unpaid holiday pay?

c. If the Tribunal has jurisdiction to hear the claim of unfair dismissal:

   i. Was the reason for dismissal the potentially fair reason of conduct? If not, was there a potentially fair reason for the dismissal?

   ii. If the dismissal was by reason of conduct did the respondent have a genuine belief in the claimant's guilt which was based on reasonable evidence following a reasonable investigation?

   iii. Was the decision to dismiss fair pursuant to section 98(4) of the Employment Rights Act 1996 and did it fall within the 'band of reasonable responses'?

d. If the decision to dismiss was procedurally unfair should compensation be reduced to reflect the chance that the claimant would have been fairly dismissed in any event following a fair procedure pursuant to the principles enunciated in Polkey v AE Dayton Services Ltd[1987] IRLR 503?

e. If the decision to dismiss was unfair should the basic and/or compensatory award nevertheless be reduced as a result of the claimant's conduct pursuant to sections 122(3) and 123(6) of the Employment Rights Act 1996?

f. If the claimant was an employee, did he commit a repudiatory breach of contract entitling the respondent to dismiss him summarily (i.e. without notice)?

g. If the claimant was an employee or worker to what holiday pay was he entitled?

3. In order to determine the issues in this case I have had the benefit of written and oral witness evidence from the claimant and from William Duggleby (Managing Director) and Emma Cornhill (Trainee Valuer) on the part of the respondent. I have also been referred to various pages within a bundle of documents running to (147) pages and have listened to the audio recording of a meeting between the claimant and Mr Duggleby which took place on 8th March 2018. I received oral submissions on behalf of both parties together with a skeleton argument on behalf of the respondent for which I am grateful.

Findings of fact

4. The claimant carried out work for the respondent as a "Consultant Valuer" from 1st December 2014 to 16th February 2018. He had previously been engaged by the respondent under a contract of employment prior to 2013 before he left to pursue other business interests on a freelance basis in the Antiques and Fine Art trade. When previously employed by the respondent the claimant worked pursuant to a written contract of employment similar in terms to that set out at (p32) of the bundle. The respondent is an antiques auctioneers and valuers business.

5. After his initial employment with the respondent the claimant set up other businesses. When he returned to work for the respondent the

claimant was not issued with a written contract but instead worked pursuant to a verbal agreement. There was no agreement regarding notice periods for termination of the engagement. When the claimant returned to work for the respondent he accepts that he was asked to do an average of three days per week although which days of the week he was to work were not specified. He says that it settled down to being Monday to Wednesday. He accepts that the respondent offered to fit the work around his childcare commitments. The invoices in the bundle indicate that in fact the numbers of days worked per week and the actual days worked varied to some extent over time. Some weeks he did two days a week and some weeks he did four. Some weeks he worked Mondays and others he did not. He sometimes worked Thursdays. He was not criticized or disciplined for this variation in days worked. His start and finish times also varied to some extent pursuant to the flexible working agreement. Records show start times of 8.45am, 9.00am, 9.15am, 9.30am and 10.30am. Finish times included 1pm, 5pm, 4.45pm, 2.30pm and 7pm. Text messages also show the claimant asking if he is needed for work on particular days which, again, is inconsistent with there being fixed days of work.

6. He initially charged the respondent the sum of £10 an hour for his services but this was increased in September 2016 to a rate of £12.80 per hour. I accept the respondent's account that the claimant set this increased hourly rate by submitting an invoice based on the higher hourly rate and to the extent that there was any discussion between the parties it was very much on a 'take it or leave it' basis. The respondent had to agree the increase if it wanted to retain the claimant's services.

7. The respondent provided some evidence as to comparable pay rates within the organization which it had calculated by looking at the annual salaries and hours of its employees and working out a pro rata hourly rate. The comparable hourly rate for a "Valuer (responsible for department)" engaged as an employee within the business was £8.77.

8. The parties are agreed that the claimant charged for his services via invoice (under the trading name "Express Picture Hanging Services") and that he accounted for his own tax and national insurance. Indeed, in the course of cross examination the claimant accepted that, whilst he did not think about his employment status every day, when he came to complete his accounts on an annual basis he would have thought of himself as self employed. He certainly did not contend that he was an employee at any stage before the respondent sought to terminate his services and never asked the respondent for a written contract of employment.

9. The claimant's work for the respondent was not his only source of income. He continued with his other businesses. He set up a business called "Jamie Richards Fine Art" which was advertised to the public at large and which had its own website. It undertook to source antiques and decorative goods for members of the public. It would either buy the object and then resell it to the member of the public or would arrange a sale direct between the owner and the member of the public for which it would take a commission. The activities of Jamie Richards Fine Art overlapped to some extent with the respondent's business activities and to that extent he would be in competition with the respondent when working in his own

business. The claimant continued this business throughout his period of engagement with the respondent.

10. The claimant had a further business called "House Clearances Scarborough" which was also advertised via website and which he continued to work on throughout his engagement with the respondent. This business was engaged in going into residential houses, valuing the contents and either selling the contents or arranging for them to be sold on. Sometimes he would sell the objects through the respondent's business. The respondent was also engaged in organizing house clearances. This business was therefore also in competition with the respondent. The claimant would often sell items through his business that he had purchased from the respondent at auction and he also sold a quantity of items at auction generated from his house clearance business.

11. The claimant also did a job with Angus Ashworth for Hull City Council. Angus Ashworth was also the respondent's direct competitor. Whilst the respondent may not have been happy about this, no sanction was ever applied to the claimant for having worked with the respondent's competitor in this way.

12. Throughout the claimant's engagement with the respondent the respondent was aware of his outside activities which were at times in competition with the respondent business. They consented to the claimant continuing to work on his own businesses and did not take any disciplinary action against the claimant to prevent this or otherwise present him with an ultimatum that he should quit his outside business interests. Other employees were not allowed to compete with the respondent's business and this is reflected in the terms of the sample written contract of employment.

13. The claimant also worked under the trading name "Jamie Richards Express Picture Hanging". This was not a limited company but was a name that he used to trade with the respondent and which he included on his invoices for his services with the respondent.

14. Whilst working with the respondent the claimant did take some holidays. On his own account he only took two periods of holiday and they were probably in the middle year of his engagement. I find it unlikely that he would have limited himself to so little annual leave from the respondent's business. However, it is clear that if the claimant decided to take holiday he would tell the respondent via its receptionist and did not seek permission for the time off. The claimant did not set out any holiday authorization procedure which he thought he was required to follow. There was only one documented example of the claimant taking holiday leave within the bundle (p41C). The terminology suggests that the claimant asked the receptionist to tell the respondent that he would be off work rather than to ask permission on his behalf. Furthermore, this message was passed on just over one week prior to the proposed annual leave. By contrast, the sample written contract of employment used by the respondent for its other employees provides detailed restrictions and requires employees to seek give a minimum of four weeks' notice of intended annual leave. The contract also makes clear that the leave year runs from 1st January and that unused holiday allocation cannot be carried

over from year to year and the only entitlement to payment for unused holiday entitlement is at the termination of employment. In cross examination the claimant accepted that these holiday procedures and restrictions did not apply to him and he was, to that extent, a special case in comparison to other employees.

15. When working for the respondent the claimant was effectively left to his own devices. He was not subject to appraisals and there is no evidence of any specific line management. He was left to use his expertise, experience and discretion in the exercise of his duties. These duties included working on the respondent's premises unpacking and sorting items and valuing them for sale. He sometimes set up sales displays but was not customer facing. He did not work on auction days. He was not required to clock in and out to be paid for hours worked but received payment for all hours included on the invoices which he submitted. There was a fire safety signing in procedure for non-auction days where staff and visiting members of the public would sign in. This was not in operation throughout the entirety of his time working for the respondent.

16. The claimant's job was not one where a lot of tools were required. The claimant had the use of a computer terminal, if required, when at the respondent's premises although this was not specifically designated as his computer. He may have had the use of tape measures provided by the respondent and may have used the respondent's web subscriptions to access certain websites although he probably had access to those online tools with his own business also. The claimant had been provided with a branded fleece to wear when he was originally employed by the respondent pre-2013. When he returned to work for the respondent he sometimes wore that fleece but it was not required by the respondent during this second period of work with the respondent from the end of 2014.

17. The parties accept that the issue of the claimant sending along a substitute to work in his absence never arose. It was not discussed. The respondent's view is that the claimant could have sent a substitute as long as the substitute was appropriately qualified and experienced to do the job. Subject to that the claimant could make his own choice. The claimant does not know what reaction he would have been met with had he attempted to send a substitute.

18. Whilst working for the respondent the claimant would often talk to Ms Cornhill about his self-employed status, particularly when referencing his house clearance business. He said that he had more flexibility than employed Duggleby's staff. He would sometimes take calls for his house clearance business while at Duggleby's and occasionally asked Ms Cornhill to help him with his business on Saturdays, which she declined to do.

19. During his time working with the respondent the claimant was engaged in training up a trainee valuer, Emma Cornhill. They worked alongside each other. On or about 16th February 2018 the claimant sent a text message to Emma which stated: *"Family's away you could come round and test your mouth to mouth resuscitation"*. Emma's response was that the message was inappropriate. The claimant again responded with

"Sorry.?. Got to test the water every now and again. I've learnt a lot from this exchange. Sorry again.x"

20. Emma was very upset by this text message which she reasonably considered to be a sexual proposition. After some thought she went to her colleague Charlie for advice on what to do and was advised to raise it with one of the Directors. She than raised it with Jane Duggleby who passed the matter on to William Duggleby to resolve. Emma was visibly upset by the message and felt uncomfortable working alongside the claimant in the circumstances, particularly as she was in a long-term relationship.

21. Upon cross examination the claimant accepted that some elements of the text message were wrong but did not entirely accept that it was an inappropriate message. He sought to assert that the message was not entirely 'out of the blue' and was part of a previously flirtatious relationship between himself and Emma. Apart from the claimant's assertions there was no evidence before the Tribunal of the pair having had a previously flirtatious relationship and Emma denied that this was the case. Furthermore, the claimant had provided no evidence of this previous relationship to the respondent prior to termination.

22. The claimant additionally sought to paint a picture before the Tribunal of a workplace where such behavior was commonplace such that it could be considered acceptable. He referred to an alleged conversation with Ms Cornhill which had sexual overtones and which was about a lot of vintage police uniforms. Such a conversation was denied by Ms Cornhill and I accept that denial. Likewise, he referred to a conversation involving Jane Duggleby and an unusually named apparatus. He sought to suggest that he had been sexually harassed by Ms Duggleby's jokes about the apparatus. I note that he never made such a complaint before the Tribunal hearing and it was not corroborated by the alleged witness to it, Ms Cornhill. To the extent that there was some joking about the name of the auction lot I do not accept that this was sexual harassment of him or in any way comparable to sexually propositioning a junior colleague. The claimant's evidence in this regard was entirely self-serving.

23. On balance I find that this text message was not part of a previously flirtatious relationship between the two workers. I prefer Ms Cornhill's evidence to that of the claimant where is a conflict between the two. The claimant's reliability and credibility as a witness is significantly undermined by the fact that when he was initially confronted with the message he lied to the respondent and denied that he had sent it. He said that it was sent by his partner in an attempt to find out if there was 'something going on' between him and his colleague. He says that he lied because he was under pressure at the meeting with the respondent. This is not a good explanation or justification for the lie and does the claimant no credit. I also note that when the claimant recorded his second meeting with the respondent he did so covertly. He did not act in a straightforward and overt manner.

24. Once the matter was passed to William Duggleby he asked the claimant to come in for a meeting. Whilst the claimant may not have been forewarned of the purpose of the meeting I accept that he was told its purpose when he arrived at it. He was confronted with the text message

and denied that he was the person who had sent it and blamed his jealous partner (see above). The claimant was told that his services were no longer required. Part way through the meeting he walked out.

25. The claimant came back into the office on 8th March for a further meeting which he had arranged. He recorded this meeting covertly. He asserted that he had been an employee all along and felt that he had been unfairly dismissed. He said that he wanted monetary compensation or he would take matters to an employment tribunal. The respondent did not alter its decision.

The law

Employee Status

26. The starting point for determining whether there is a contract of employment is the judgment of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, where he said as follows:

> '"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 ...'."

27. The idea of control needs refinement in the case of the skilled employee. In the case of a skilled employee it may be inconceivable that the employer could tell them *how* to do their job. In such cases 'control' could be said to mean not the practical ability to control but the theoretical and perhaps *ultimate* right to control.

28. In considering status it may also be relevant to consider the extent to which an individual is integrated into the respondent organization. Can he be seen to be part and parcel of the organization? Conversely, it may be helpful to consider the so-called 'economic reality' or 'business reality' test which can be seen as the converse of the organisational test. Where the organisational test asks whether the individual is truly part and parcel of the organisation the economic reality test questions whether he is truly independent of it and 'in business on his own account'. Looking at status from this angle it will be necessary to consider, in addition to the degree of control, the opportunities of profit or loss, the degree to which the worker was required to invest in the job in the way of provision of tools or equipment, the skill required for the allegedly independent work, and the permanency of the relationship. Was the worker really a small businessman rather than an employee? (Market

Investigations Ltd v Minister of Social Security [1969] 2 QB 173)

29. There is no exhaustive list of the considerations which are relevant in determining the employment status question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. Control will always have to be considered but it can no longer be regarded as the sole determining factor. Factors such as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task are also relevant. It may be relevant to consider the amount of the remuneration and how was it paid, whether the worker was tied to one employer or whether he was free to work for others, how the parties themselves saw the relationship and the arrangements for income tax and national insurance. How the parties themselves label their relationship is a relevant but not conclusive consideration. The status of the worker is to be decided by an objective assessment of all the factors, and the label attached by the parties is only one of those factors. The parties cannot change the nature of the contract by attaching the 'wrong' label. It may also be relevant to look at the particular terms of the contract in question; for example, a genuine contract for services would not normally be expected to provide for sick pay or contractual holiday or pension entitlements.

Worker status

30. If the claimant is not found to be an employee he may still be said to be a worker within the meaning of section 230(3)(b) which states:

"In this Act "worker" ….means an individual who has entered into or works under (or, where the employment has ceased, worked under)-
…
(b) any other contract, whether or 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;"

It is evidently necessary to consider:

- Whether there is a contractual relationship
- Whether there is an obligation of personal service
- Whether the 'employer' is actually the client/customer of the 'employee' acting in pursuance of his profession or business undertaking.

31. In Pimlico Plumbers Ltd v Smith [2017] IRLR 323 (which concerned the statutory definition of 'worker' which specifically requires 'personal service' Etherton MR summed up the case law on substitution clauses as follows:

> " ... In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

32. In Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT, the EAT gave guidance on the business/professional undertaking exception. Mr Recorder Underhil QC (as he then was) said:

> "The structure of limb (b) is that the definition prima facie extends to all contracts to perform personally any work or services but is then made subject to the clumsily-worded exception beginning with the words "whose status is not". The question is whether the contract between the applicants and the contractors falls within the scope of that exception.
> 17 We were referred to no authority giving guidance on that question; and we accordingly spell out our approach to it in a little detail, as follows.
>
> > (1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the applicants do not carry on a "profession" in the ordinary sense of the word; nor are the contractors their "clients".
> >
> > (2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than

"business" tout court; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the 1998 Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.

(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations—given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship—see below—but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.

(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu — workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998 , to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis- …-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) What we are concerned with is the rights and obligations of the parties under the contract—not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see *Carmichael v National Power plc [1999] ICR 1226* , especially per Lord Hoffmann at pp 1234–1235.

(7) We should add for completeness that, although the 1998 Regulations are of course based on the Working Time Directive , we were referred to no provision of the Directive nor any case law of the European Court of Justice which sheds any light on the present issue. The Directive does not contain any definition of the term "worker".

33. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, *EAT* Langstaff J said that '… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls'.

Unfair dismissal

34. The relevant sections of the Employment Rights Act 1996 are as follows:

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held,

(2) A reason falls within this subsection if it-

…

(b)relates to the conduct of the employee,

….

…..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 122 Basic award: reductions

…

(3) Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further limit that amount accordingly.

….

Section 123 Compensatory award

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

….

35. It is for the respondent to show that the reason for the claimant's dismissal was potentially fair and fell within section 98(1)(b). If the reason does fall within section 98(1)(b) neither party has the burden of proving fairness or otherwise within section 98(4).

36. Where the reason for dismissal is conduct the tribunal is guided by British Homes Stores v Burchell [1978] IRLR 379 and will look to find whether the respondent had a genuine belief that the claimant was guilty of the alleged misconduct. It will then consider whether that belief in guilt is based on reasonable grounds and that such belief was reached after a reasonable investigation and a fair process.

37. The tribunal must be satisfied that the misconduct was sufficient to justify dismissing the claimant and that the decision to dismiss fell within the band of reasonable responses (Iceland Frozen Foods v Jones [1983] IRLR 439). The tribunal must not substitute its own judgment for that of the reasonable employer. The band of reasonable responses test applies to the procedural fairness as well as to the substantive fairness of the dismissal (J Sainsbury Plc v Hitt [2003] ICR 111). It applies to the appeal hearing as well as to the original dismissal. The tribunal must consider whether the process as a whole was fair (West Midlands Co-operative Society v Tipton [1986] IRLR 112).

38. In the event that there is a finding of unfair dismissal based on procedural flaws the tribunal can consider what would have happened in the absence of such procedural flaws and make a reduction in compensation accordingly (Polkey v AE Dayton Services Ltd). Furthermore, if there is a finding of unfair dismissal the tribunal can examine the claimant's conduct and conclude whether it was blameworthy or culpable and whether it contributed to the decision to dismiss. If so, it can consider reducing the basic or compensatory award by a suitable percentage.

Breach of contract claim

39. In the event that the claimant is an employee the Tribunal has power to determine a breach of contract claim for notice pay pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

40. The Tribunal must consider whether the claimant actually committed a repudiatory breach going to the root of the contract such that the respondent is entitled to dismiss the claimant summarily. In this case the Tribunal will consider whether the claimant committed gross misconduct. Unlike in an unfair dismissal claim the Tribunal will consider whether the claimant was actually guilty of the alleged gross misconduct rather than whether the employer had reasonable grounds for concluding that he had committed gross misconduct.

Holiday pay

41. In the absence of a specific contractual right to paid holidays the claimant must rely on the relevant sections of the Working Time Regulations 1998. Regulations 13 and 13A give the claimant a potential entitlement to 5.6 weeks' annual leave. The entitlement to compensation for accrued but untaken annual leave is set out, together with a formula for calculation in regulation 14.

42. The claim can be framed as a claim pursuant to regulation 30 of the 1998 Regulations or as a claim for unlawful deductions from wages under the Employment Rights Act 1996.

Conclusions

Status

43. Having considered all the available evidence I conclude that the was no contract of employment in this case.

44. It was difficult to establish whether there was really any requirement of personal service in this contract in circumstances where the parties had not actually expressly applied their minds to the issue. However, having heard evidence as to the work the claimant was being asked to do and the reason why he was being asked to do it (essentially the respondent needed a further 'pair of competent hands') on balance I conclude that there was no requirement for personal service consistent with a contract of employment. The respondent's requirement was for someone with equivalent skills, experience and competence in the role as the claimant. The was no requirement for the person working to be the claimant per se as long as the person concerned was suitably qualified and competent to do the job. It was not the claimant's individual and personal reputation which the respondent sought to engage. On that basis, I find that had the parties applied their minds to it they would have concluded that a suitably qualified substitute could be provided to carry out the work in the claimant's stead. The 'fetters' upon substitution were insufficient to constitute a requirement for personal service consistent with a contract of employment.

45. In any event there was insufficient control exerted by the respondent over the claimant. The claimant decided his days and hours of work and rates of remuneration. When at work he was not subject to real control over the way in which he carried out his work and his performance levels were not appraised. The respondent was not able to apply disciplinary sanctions to the claimant and did not control or limit his other business interests. He was free to continue his own businesses and, in some circumstances, work in competition with the respondent. The remainder of the respondent's workforce did not have this freedom. Furthermore, the claimant's ability to take time off was not subject to control. He was not

subject to the usual holiday authorization procedure applicable to other employees.

46. The parties themselves did not characterize the relationship as one of employer and employee. The claimant did not assert he was an employee until after the end of the relationship and during its course he would have said he was self-employed.

47. The respondent was not obliged to offer the claimant work and the claimant was not bound to accept it albeit that once he accepted the work and did it he had to be paid for it.

48. The hallmarks of the relationship were those of someone in business on his own account. He was free to compete with the respondent and, to a large extent, dictated his own terms of engagement. As a matter of practicality the claimant was paid gross and accounted for his own tax and national insurance. The claimant operated through a limited company and received payments via invoice. He was not integrated into the organization. He was not required to wear a uniform. He was not customer facing and so would not be identified as a 'face of' the respondent business. On the website he was referred to as a "consultant valuer" when other employees were not referred to as 'consultants'. This is consistent with the claimant not being presented to the public as an employee of the business.

49. This was not an 'equipment intensive' role and so the issue of who provided equipment is not of great assistance.

50. I have also considered whether the claimant can be said to be a worker within the meaning of section 230(3) of the Employment Rights Act 1996. As set out above the requirement of personal service is not really present but more importantly, and perhaps decisively, I conclude that the relationship was such that the respondent was in fact a client or customer of the respondent's business undertaking. He was essentially freelance operating through a portfolio of businesses and this was but one of his sources of income. Hence, he marketed his services to the public at large and did not provide these valuer services exclusively to the respondent. Hence, he acted in competition with the respondent at times. He was not integrated into the respondent's business and invoiced and ran this income stream in a similar way to his other business interests.

Substantive claims

51. Given that I have determined that the claimant was neither and employee nor a worker it is not necessary for me to determine the substantive claims. However, had I been persuaded that the claimant was in fact an employee and entitled to claim for unfair dismissal I would have concluded that the respondent did dismiss him for misconduct, namely the sending of the inappropriate text message to the trainee valuer. Had this not happened there is nothing to suggest that the respondent would have terminated the claimant's engagement in any event.

52. The contents of the text message speak for themselves and I would have concluded that it was inappropriate in all of the circumstances. It

clearly made Ms Cornhill uncomfortable and could be seen as sexual harassment. The respondent's belief in the claimant's misconduct would have been found to be genuine and based on reasonable grounds. Dismissal would have been found to fall within the band of reasonable responses.

53. Had I been required to determine the unfair dismissal claim I would have considered that the claimant was in fact guilty of culpable conduct which contributed to the decision to dismiss. That conduct was the sending of the text message. Furthermore, the discovery that the claimant had lied about sending the message would also have entitled the respondent to dismiss the claimant in early course. These factors mean that a 100% reduction in compensatory and basic awards would have been warranted pursuant to section 122(3) and 123(6) of the Employment Rights Act 1996. In such circumstances any failure to follow a formal disciplinary procedure prior to dismissing the claimant, whilst potentially rendering the dismissal procedurally unfair, would not have resulted in an award of compensation.

54. It follows from the findings above that if the Tribunal had had jurisdiction to determine the wrongful dismissal claim I would have concluded that the claimant committed a repudiatory breach of contract and the respondent was entitled to dismiss him summarily without notice.

55. Had the claimant been found to be a worker and so entitled to claim for unpaid holidays I would have concluded that his entitlement was limited to his statutory entitlement in the absence of a contractual agreement to the contrary. The only claim which could have been supported by the evidence would be that for accrued but untaken holiday at termination of employment. The claimant did not have a right to carry over untaken holidays from one year to the next and so could only have claimed in respect of his accrued but untaken holidays in the 2018 holiday year. As the holiday year ran from January 2018 only 12.6% of the annual entitlement had accrued at termination. He would be entitled to 5.6 weeks leave per annum but pro rata'd for a 3 day week this would total 16.8 days per annum or 2.12 days accrued.

Employment Judge Eeley
Date 15th November 2018