EMPLOYMENT TRIBUNALS

Claimant: **Miss A Goddard**

Respondent: **Bluerock Developments Ltd**

Heard at: **Manchester** **On:** **24-25 September 2024**

Before: **Employment Judge Parkin**

Representation
Claimant: Miss J Twomey, Counsel
Respondent: Mr A Churchill, Managing Director

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's breach of contract claim for notice pay and expenses is dismissed since the claimant was not employed by the respondent under a contract of employment.

2. The claimant was employed by the respondent as a worker.

3. Contrary to section 13 of the Employment Rights Act 1996 read with the National Minimum Wage Act 1998 and regulations made under it, the respondent made unlawful deductions from the wages of the claimant in the sum of £4,876.56 gross (representing 13 weeks' pay for average 36 hours work per week at National Living Wage rate of £10.52 per hour). The claimant will bear the liability for tax and National Insurance on the gross sum.

4. Pursuant to regulation 14 of the Working Time Regulations 1998, the respondent is to pay the claimant compensation in lieu of accrued paid annual leave which she had not taken at the date of termination of her employment as a worker, in the sum of £437.64 gross (representing 7 days' leave at the daily rate of £62.52). The claimant will bear the liability for tax and National Insurance on the gross sum.

REASONS

1. The claim and response

The claimant presented a claim for unlawful deduction from wages, notice pay and holiday pay in her ET1 claim form presented on 20 October 2023. By its ET3 response presented on 12 November 2023, the respondent vigorously resisted that claim contending that the claimant was never an employee or worker but was to be paid only on a commission only basis of £7,000 per property sold; since she never sold any properties, she never earned commission and no payment was due to her.

2. The issues

2.1 The liability issues were identified at a case management hearing on 13 February 2024 in respect of the three claims as follows:

Unlawful Deduction of Wages

1. Was the Claimant a worker for the purpose of s.13 of the Employment Rights Act 1996?

2. Is the obligation on employers to remunerate workers at a rate not less than the national minimum wage pursuant to the National Minimum Wage Act 1998 an implied term of the Claimant's contract of employment with the Respondent?

3. How many hours per week was the Claimant required to work to perform her contractual obligations?

4. Has the Claimant been paid less than the national minimum wage for the period she worked?

5. If the Employment Tribunal finds the Claimant to have been paid less than the national minimum wage in any pay reference periods, is the shortfall properly payable to the Claimant under s.13 ERA?

Statutory Notice

6. Was the Claimant an employee for the purpose of s.86 ERA?

7. How many weeks' notice is the Claimant entitled to pursuant to s86 ERA?

8. What was the Claimant's weekly pay pursuant to s224 ERA1996?

9. Has the Claimant been paid for statutory her notice period? In the claimant's schedule of loss (and without challenge from the respondent), she added the sum of £42.80 by way of seeking reimbursement of telephone expenses.

Holiday Pay

10. Was the Claimant a worker for the purpose of the Working Time Regulations1998?

11. Did the Claimant accrue annual leave entitlement pursuant to Regulation 13 of the WTR?

12. How much annual leave entitlement did the Claimant accrue?

13. On termination, was the Claimant paid for accrued but untaken annual leave entitlement?

2.2 At the final hearing, these were summarised briefly in this order: whether the claimant was an employee or alternatively a worker of the respondent (or neither)?; if either, what hours was she required to or did she actually work for the respondent?; if an employee, what notice of termination and notice pay and reimbursement of expenses was she entitled to?; if either, whether unlawful deductions in the sense of non-payment of wages at the applicable statutory minimum were made, and, again if either, was she entitled to paid annual leave and compensation for accrued leave untaken on termination. There was no issue about whether the claimant had ever been paid any of these payments and thus there was no need for a separate remedy hearing since the awards were a matter of ready computation once liability was established.

3. The Hearing and the evidence

3.1 There was an agreed bundle primarily based upon disclosure from the claimant (1-612). On day 2, the claimant disclosed an email confirming the date of signing of the Commission Agreement as 24 April 2023 (the date being in dispute after the oral evidence of the claimant and respondent's Managing Director and effective sole controller Mr Alex Churchill). Both gave oral evidence and Mr Churchill was recalled and gave some additional evidence on day 2. The claimant gave evidence first, followed by Mr Churchill; her counsel agreed to make the first closing submission, with Mr Churchill making the final submission.

3.2 Since the hearing was about 14 months after the working relationship ended; the parties' recollections were understandably far from perfect and their positions had become much more entrenched. Although there were few areas where there was dispute, I found the claimant very much more reliable in her evidence than Mr Churchill, based on her fully documented case and detailed witness statement. The respondent had provided a very brief response and grounds of resistance with a short witness statement. Despite his broad overview of matters between the parties generally, Mr Churchill had a poor recollection of finer details and in oral evidence made contradictions and plain errors. At paragraph 3 of his witness statement, he set out baldly that the claimant had contacted him unsolicited about doing some work for him, whereas it was clear from pages 611-612 that the opposite was the case. Likewise in his ET3 response, he stated expressly that the claimant worked no more than 10 hours a week and, in correspondence to her solicitors, (70) that his agreement with the claimant was for no more than 10 hours per week to be worked; in fact, there was no agreement about the exact number of hours to be worked by the claimant on the respondent's behalf. He was wholly wrong in his evidence that the £1500 payment initially made as a loan to the claimant was paid when he terminated the engagement; after checking both bank account and WhatsApp voice text messages, Mr Churchill acknowledged he paid it on 9 June 2023, a month before the termination of the relationship. His assertion that the Commission Agreement was made and signed in July 2023 at the end of the relationship but backdated was also wrong, as he acknowledged when the date of the "Docusign email", 24 April 2023, was shown him on day 2.

4. The Facts

Based on the oral and documentary evidence I have heard, the key findings of fact and inference on the balance of probabilities are as follows:

4.1 Mr Churchill and the claimant had been friendly when involved in sales working for other companies or clients.

4.2 By early 2023 Mr Churchill had set up the respondent, Bluerock Developments Ltd, as an investment advisory company to sell investment properties which were on the market to identified leads interested in investing in property particularly within the buy to let sector. This was not cold canvassing but following up warm leads. He was the respondent's only employee.

4.3 Mr Churchill approached the claimant to assist him with making sales to interested investment parties and she agreed to do so. The claimant was out of work and available to work from home although she was still looking for salaried employment elsewhere.

4.4 Mr Churchill wrote: "Hey mate, just a thought... I am actually looking for a salesperson part time... I have loads of investors with names, number, e-mail, experience, cash funds available etc they just need ringing and selling to but there's only one of me… £7,000 a deal for you with a list of Leeds who have inquired in the last couple of years, there's loads to go at... up to you if you want! Just a thought (Smiling emoji). Work from home and all that, I'd set you up a HubSpot log in with details". The claimant replied: "Hey! Oh really how many leads have you got? Yeah up for trying that as long as you pay me (Grinning emojis)… Could be happy doing that long term if it goes well (Thumbs Up emoji)" … I didn't get the job the other day cause they've lost their licence ((Thumbs Down emoji) Red flag! Happy to do this while still applying and if all goes well I'll do this full time" (521-522)

4.5 When their working relationship started on 13 April 2023, there was no express discussion between them about the claimant's status in working for the respondent whether as employee or worker or on an entirely self-employed basis. Nor was there any specific discussion of the hours of work the claimant would perform although they intended she would work part-time to start with; there was no requirement put upon her by Mr Churchill that she work a set number or minimum number of hours.

4.6 It was however expressly agreed at the outset that the claimant would receive payment for her work by way of commission only with the rate of commission to be £7,000 per successful sale.

4.7 Initially the respondent provided her with 400 leads to follow up. From early to mid-May 2024 onwards, it provided anything between 3 or 4 and 10 new leads daily. The respondent was purchasing in leads generated for possible sales on behalf of development companies to interested parties.

4.8 There was no specific discussion of what would happen if sales were not achieved or the claimant was not as successful in selling as she and the respondent hoped.

4.9 However, she sought something more formal In respect of the working relationship and therefore on about 24 April 2023 Mr Churchill provided to her a document entitled "Commission Agreement" (78-81) which the parties signed on 24 April. This was based on an American template he had sourced himself and then added to and removed sections from.

4.10 As he admitted in evidence, the document was sloppily drawn up. It labelled the claimant as an employee and that she would provide it with duties as needed, but wrongly went on to state that it (the respondent) agreed to be subject to its own supervision, advice and direction. It set out that the claimant should perform such duties as were customarily performed by an Investment Consultant and such other and unrelated services and duties as may be assigned to her. There was a provision such that she was not to contact or approach customers or clients after termination. The provision for payment by commission payments not only omitted to state clearly that this was the only way in which she was to receive remuneration but completely left out reference to the agreed rate of commission at £7,000 per sale. As to term, the agreement described the claimant's employment as for an unspecified term on an "at-will" basis and stated that if the claimant was in "violation" of the agreement, the respondent would terminate her employment with one week's notice and with compensation to the claimant only to the date of such termination, with that compensation paid to be her exclusive remedy.

4.11 Labelling the claimant as an employee under employment went far beyond what had been discussed, intended and agreed between the parties before the claimant started work on 13 April.

4.12 Mr Churchill was anxious to promote his investment advisory company and to achieve sales on behalf of it and for the claimant herself to make sales. She was committed to trying to do so.

4.13 By early to mid-May 2023 the claimant was fully established upon the respondent's new Hubspot CRM (customer relationship management) software. She had been provided with shared email access to the outlook software but no equipment was provided by the respondent and she worked at her own home.

4.14 Working from home on her own equipment, she set to work on the 400 leads. Then from early-mid May she worked also on the new leads which were coming in. Her work involved preparing for and making calls and sending emails and information to leads with a view to sales, inputting and updating the database and entering CRM notes, liaising with Mr Churchill and reviewing her efforts each day. After initial contact with the lead, she followed up with an email and then subsequent phone calls "chasing" the potential customer in hope of achieving the sale.

4.15 By 15 May 2023, Mr Churchill anticipated the claimant may soon be working flat out as there would be a lot more leads coming through from a marketing campaign. He said that he would order still more once they closed their first deal (534). He asked if she was OK to do a few days as full days as she would need to, to keep up with the volume. She said: "Yeah I work most days plus Saturdays now anyway so its fine. The more hours the more money…". They discussed her visits to the gym each day ahead of starting work around midday or thereabouts. There was no specific discussion of the length of the working day beyond her saying the gym put her in a good headspace for work and then she could work until the early evening if people wanted after work calls (534). It was often the case that she worked as late as 7pm.

4.16 On 17 May 2023 she had her only one-to-one meeting with Mr Churchill. Otherwise their relationship continued entirely by email or WhatsApp live messages or voice texts left for the other party.

4.17 Mr Churchill continued to give her clear directions about how to get sales notwithstanding her own experience as a salesperson and to seek to motivate her

to make calls with frequent references to the £7,000 commission for a sale. On 7 June he provided intensive instructions about how best to achieve a sale, based upon his own experience of doing so (560).

4.18 Unfortunately, the claimant failed to achieve sales, as was the pattern throughout her engagement.

4.19 On 23 June 2023, after she had been involved in team meetings or some editing, the claimant sent a WhatsApp message: “Happy to get more involved in the future with stuff like that if we sorted this salary out…Just an FYI. I'd be happy to get more involved in general to assist.” (517).

4.20 As time progressed with no sales, Mr Churchill became increasingly frustrated at her lack of achievement although without directly criticising lack of effort on her part.

4.21 Because of the friendly way the working relationship had started, she shared with Mr Churchill that she was experiencing serious financial difficulties with pressure from her landlord over rental arrears.

4.22 After she made him aware of difficulties with her landlord over rent arrears, Mr Churchill spontaneously made a payment to her of £1500 on 9 June 2023. This was gratefully received by the claimant (560). It was intended as a loan by Mr Churchill but later, after he terminated her engagement, he chose to write off the loan.

4.23 By June 2023, the claimant was more involved in the respondent's business by joining lead generation and marketing zoom calls with the other teams it was using, and editing some marketing materials. This all assisted her to understand the respondent’s products better and be best placed to secure sales.

4.24 However, she made no sales in 13 weeks. Reluctantly but understandably on 14 July 2023, Mr Churchill terminated the engagement and the need for the claimant’s services, having himself again become much more engaged in chasing sales.

4.25 On 14 July, he promised that if sales were achieved as a result of the claimant's hard work in securing a sale but with the actual legalities only tied up subsequently, he would pay commission of £5,000 per sale up to 1 September 2023. At the claimant's request, Mr Churchill put that promise of later commission in writing (514).

4.26 The first reference to the claimant having worked 42 hours a week for the respondent throughout the engagement came in her ET1 claim form presented on 20 October 2023. In fact, the claimant worked 36 hours per week on average across the 13 weeks across 6 days other than a Sunday. She took no paid annual leave.

4.27 The claimant received no pay during or after her engagement with the respondent and no compensation for accrued paid leave.

5. The parties’ submissions

5.1 The claimant contended she was an employee or alternatively a worker. The Commission Agreement set out the terms and conditions of the employment, being signed by both parties on 24 April 2023 and expressly calling her an employee. Her evidence was to be preferred to Mr Churchill’s wherever there was a dispute;

she was consistent throughout whereas he had been inconsistent. He was demonstrably wrong about who made the initial contact; he ultimately accepted that his assertion to her solicitors that they had agreed she would work for no more than 10 hours per week was wrong and also that his evidence that the Commission Agreement was backdated from July 2023 was wrong. Even if it was a boilerplate from America, the respondent had amended sections and names and omitted items, such as the provision of a salary.

5.2 Ready-Mixed set down 3 conditions for a contract of employment: that the servant agreed to provide services or skills for wages or other remuneration, that they were subject to control by the employer in their performance to a sufficient degree and that the relationship was consistent with a contract of service. This was largely echoed by Lord Clark in the Supreme Court in Autoclenz. The claimant provided her personal skill in return for remuneration by commission with no right of substitution; she agreed expressly or impliedly to be subject to a high degree of control by Mr Churchill with all leads being supplied and detailed instructions how to perform the role. The first 400 leads were added to on a daily basis, the claimant joined lead generation and marketing team meetings as directed and there was day-to-day control: they touched base on almost daily, Mr Churchill checked on her progress and could see her emails and calls made and her notes added to CRM; the respondent had ultimate authority over her work. Mutuality of obligation was expressly set out in the Commission Agreement. The only possible bar to a contract of employment was the agreement for payment by commission but Keith Carter & Co v Trotter (EAT 388/95) showed this was not fatal to employee status.

5.3 Alternatively the definition of worker was fully met with by a contract for personal service whereby the claimant was clearly not working in a profession or business undertaking which the respondent was a client or customer of. She was therefore entitled to payment at the applicable National Minimum Wage rate but received no wages during her employment. As to hours, the agreement was that she would work the hours required to meet the business needs in accordance with the volume of work; Mr Churchill accepted this. The role was initially proposed to be part-time but it was clear from the outset that the volume of work required the claimant to work full time, 42 hours a week. Her evidence on this was unchallenged and the respondent could not elaborate on why he said she did not do those hours. There was a difference between hours worked and sales achieved with no suggestion from the respondent that the claimant was not engaging in contacting leads.

5.4 There had been a significant failure of disclosure by the respondent which could have provided CRM tracking call documentation to which the claimant had no access after the termination, although she clearly showed the volume of calls she was making. At least by 15 May 2023, she was working 42 hours a week.

5.5 Applying the National Minimum Wage Regulations, regulation 10(a) showed that a loan was not a payment; it was made on 9 June 2023 and was not linked to the claimant's dismissal. Mr Churchill accepted it was not payment for wages; it became a gift when he did not insist on repayment and so did not fall to be given credit for.

5.6 The respondent recognised that naïveté was no excuse or defence, urging his genuine belief that the claimant understood this was a part-time commission only agreement which was not a contract of employment. No salary was entailed since the claimant was relying on commission only and no salary was due since no sales were achieved. As a matter of goodwill, Mr Churchill had loaned the claimant £1500 when he realised she was in financial difficulties; he eventually gifted this to her.

He did everything he could to help the claimant and make sure that she could be successful in selling. He strongly disputed the 42 hours per week the claimant claimed and her WhatsApp message at (517) ",,,if we get a salary started…" confirmed there was never a salary in place. Throughout the time she cooperated with the respondent, their dialogue was consistently referenced to her searching for employment. The wages the claimant claimed were never agreed by him, which was why he was defending himself.

6. The Law

6.1 Employee and Worker Status

The definitions of "employee" and "worker" are at Section 230 of the Employment Rights Act 1996:

"(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" … 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."

6.2 The same definition of "worker" is at s. 54(3) of the National Minimum Wage Act 1998 and at Regulation 2 of the Working Time Regulations 1998.

6.3 Notice Pay/contract claim

The Tribunal's jurisdiction to consider the claimant's contractual claim (for notice pay and expenses) derives from section 3(2) of the Employment Tribunals Act 1996 and Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Section 86 ERA 1998 sets out:

"(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years……

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

6.4 Unlawful deduction from wages claim

Section 13 ERA states:

"(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."

6.5 The National Minimum Wage Act 1998 ('NMWA') states at section 1:

"(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2) A person qualifies for the national minimum wage if he is an individual who

(a) is a worker;

(b) is working, or ordinarily works, in the United Kingdom under his contract; and

(c) has ceased to be of compulsory school age.

(3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe."

and at section 28:

"(2) Where—

(a) a complaint is made—

(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages)…and

(b) the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above,

it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated

at a rate less than the national minimum wage unless the contrary is established."

6.6 Regulation 10 of the National Minimum Wage Regulations 2015 states:

"The following payments and benefits in kind do not form part of a worker's remuneration—

(a) payments by way of an advance under an agreement for a loan or by way of an advance of wages…"

6.7 The national living wage from 1 April 2023 for an adult over 21 was raised to £10.42 per hour by Regulation 2 of the National Minimum Wage (Amendment) Regulations 2023.

6.8 Holiday Pay/Compensation for accrued paid annual leave claim

Regulations 13 and 13A of the Working Time Regulations 1998(as amended) set out the entitlement to annual leave to 4 weeks' annual leave in each leave year and the additional entitlement to 1.6 weeks, making 5.6 weeks, with a maximum of 28 days. Regulation 14 sets out:

"(1) Paragraphs (1) to (4) of this regulation apply where–

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

(A × B) − C

where–

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date."

6.9 Regulation 16 provides that workers should be paid in respect of their annual leave entitlement, with Sections 221-224 ERA applying for the calculation of a

week's pay as if references to the employee were references to the worker. In particular. Section 224 sets out:

"(1)This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2)The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a)where the calculation date is the last day of a week, with that week, and

(b)otherwise, with the last complete week before the calculation date…".

6.10 There have been innumerable authorities from the higher courts over several decades as to the test for deciding whether an individual served under a contract of employment (also called a contract of service). Different terminology such as the "control test", the "organisation test" and the "mixed test" has been applied to the approach laid down in those authorities over the years. I have been guided in particular by the more modern Supreme Court judgments in Autoclenz Ltd v Belcher and ors 2011 ICR 1157 and Uber BV and ors v Aslam and ors 2021 ICR 657, but also the longstanding High Court authority of McKenna J. in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD (a National Insurance case, at a time when the now archaic terminology of "Master and Servant" was still current). More recently new authorities on worker status have given guidance to first instance courts and tribunals on their approach when applying the rather fuller statutory definition of "worker" (which includes someone who is an employee under a contract of employment).

6.11 Employment law now distinguishes between three categories: employees employed under a contract of employment (or service); self-employed people in business on their own account undertaking work for their own clients or customers; and the intermediate class of workers (who may be self-employed, at least for tax purposes) who provide their services as part of a profession or business undertaking carried on by someone else. A contract of employment does not arise unless there is a contract agreed which places an obligation on an individual to provide work or skill personally for the other party, in consideration of wages or some other remuneration and with some mutuality of obligation between the parties and the individual expressly or impliedly agreeing to be subject to the control of the other party to a 'sufficient' degree. Even where these elements are found, there is no presumption that a contract of employment arises but it may well do so. As McKenna J. put it, for it to be such a contract, the other provisions of the contract must be consistent with it being a contract of employment. The court or tribunal needs to assess all the circumstances of the case and find the facts, then to stand back and consider the overall picture or factual matrix, such as whether the terms of any written agreement were what was really agreed and how did the parties conduct themselves in practice, in order to ascertain what the true agreement between the parties was.

6.12 The status of employee under a contract of employment carries important employment protection rights such as the right after termination to bring a contractual claim and (not in issue here) the right not to be unfairly dismissed. Although these are statutory rights based upon the Section 230(1) and (2) definitions, the case law still provides important guidance.

7. Conclusions

7.1 The starting point here is rather different from the classic case where there is an issue about an individual being employed as employee under a contract of employment or as a worker or neither with a great disparity in bargaining power between a substantial employer and the subordinate and often vulnerable individual. Mr Churchill admitted to being wholly naive in his dealings with the claimant, as is evident particularly from the Commission Agreement and was fully confirmed by his oral evidence about his dealings with her; he remained bemused that his friendly former relationship with the claimant from their background in sales had led to multiple monetary claims from her.

7.2 Although I find he did not say this to her in clearly expressed terms, Mr Churchill invited the claimant to come and work for his new property investment business, on the basis that he could not pay her a salary but could offer a generous commission as payment by results. The claimant, then out of work and having a sales background, jumped at the opportunity which would have offered good rewards if she did achieve property sales. This was the basis of the true agreement between the parties. The written Commission Agreement which was prepared and signed off on 24 April 2023 (and certainly not backdated from July 2023) did not reflect their true intentions when they had made their agreement in early April 2023, except in the incomplete reference to commission payments as the basis of remuneration. It was not envisaged or intended by the parties that the claimant would become the respondent's employee subject to a contract of employment.

7.3 I conclude that the claimant's case that a contract of employment was always agreed has developed and taken wing after the termination of her time with the respondent. Applying the contractual principles from the authorities, notwithstanding the elements which after the event tend to support the existence of a contract of employment, I find that the nature of the relationship which the parties embarked upon on 13 April 2023 was inconsistent with a contract of employment. I accept that the commission only basis of remuneration does not in itself mean no contract of employment could be entered into. However, standing back and considering the whole picture, I conclude that this was not a contract of employment. The claimant worked from home on sales leads provided to her solely to earn commission on successful sales under a loose agreement reached informally at the outset between friendly parties; she agreed to work part-time originally while also seeking regular employment elsewhere, with a clear anticipation that she would make numerous sales and earn good commission payments. The hours she worked built up from early on because of both the number of leads she was provided with and the work she was prepared to put in to try to achieve sales.

7.4 The Commission Agreement was drawn up and signed several days into the working relationship. Notwithstanding the terminology of employee and employment and other provisions, it did not vary or shape the informal contractual relationship between the parties. Little attention was paid to it while the claimant worked for the respondent and it was not relied upon by the parties, for instance by the respondent when it promised payment for sales achieved in the pipeline up to 1 September 2023 at the rate of £5,000 per sale. I find that the claimant was not employed as an employee despite the labelling attached within the Commission Agreement by Mr Churchill.

7.5 Accordingly, the claim for pay in lieu of notice following a breach of contract of employment and likewise reimbursement of expenses as an employee is dismissed.

7.6 As to worker status, I reach an entirely different conclusion. Applying the statutory test in a structured way, I conclude that the claimant entered into and worked under a contract with the respondent whereby she agreed to personally perform work for it. In no way was the claimant carrying on ta profession or business undertaking with the respondent in the position of being her client or customer in such a business undertaking or profession. Thus applying the law to the facts as I find them, I find overwhelmingly that she fell within the intermediate category of worker with the right not to suffer unlawful deduction from wages and the entitlement to paid annual leave or compensation in lieu.

7.7 I find that the claimant had no normal hours of work, in the sense of contractually agreed, fixed or required hours to be worked as a worker. Calculation of the week's pay thus falls under section 224 ERA. Whilst recognising the claimant's argument that it was open to the respondent to challenge her assertion about hours worked by reference to CRM calls and records and emails, she provided no timesheets; the Appendix to her witness statement is plainly an after-prepared document, merely listing 7 hours a day for each of the 6 days in every week of the 13 weeks she worked.

7.8 Even at paragraph 39 of her witness statement, the claimant only stated it was "her belief" that she was working 7 hours over six days; in fact, she was not doing this in the early weeks as evidenced by the Voicemail transcript on 15 May 2023. Rather like the time-honoured approach of a "quantum meruit", I make an informed assessment of what working hours the claimant actually performed, averaged over 13 weeks (almost the same 12 week period set out at section 224). I conclude that she did work each of the 6 days for an average 6 hours per day, making 36 hours weekly on average over the 13 weeks. Thus, although the claimant did not satisfy me on the balance of probabilities of her 42-hour claim (despite the lack of challenge by the respondent or documentary evidence undermining her figure), she fully satisfied me that she completed an average 36 hours each week. She performed intensively over those weeks because she wanted to make sales just as much as the respondent earnestly desired that she do so.

7.9 Whilst in her in her own schedule of loss the claimant sought to give credit for the £1500 loan she received, in closing submissions her counsel backed away from this concession, raising a technical argument under regulation 10(a) that no credit should not be given. As a strict matter of law, alongside the National Minimum Wage Regulations, I conclude that since the respondent decided unilaterally to waive the requirement that the loan be repaid and made a gift of the sum to the claimant, then the sum should not be offset.

7.10 In terms of unlawful deduction from or non-payment of wages, the claimant correctly claimed the national living wage for an adult over 21 as the minimum hourly rate to be paid, £10.42 per hour; for a 36 hour week, that makes her weekly gross pay of £375.12. Thirteen weeks wages at that weekly rate is £4876.56 gross. I award that sum with no credit given in respect of the £1500 loan payment made but then waived.

7.11 In relation to paid annual leave, the methodology shown in the claimant's schedule of loss was not challenged by the respondent. In effect, having worked 13 weeks she earned ¼ of the 28 day annual entitlement, 7 days accrued leave. She took no holiday or paid leave whilst working for the respondent. She worked

across 6 days for weekly pay which should have been £375.12, a daily rate of £62.52. I award compensation under Regulation 14, WTR for 7 days in the total sum of £437.64 gross. The responsibility for payment of tax and National Insurance upon the arrears of wages and compensation rests upon the claimant once in her hands.

Employment Judge Parkin
Date: 4 October 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
7 October 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2411279/2023**

Name of case: **Miss A Goddard** v **Bluerock Developments Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 7 October 2024

the calculation day in this case is: 8 October 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.