



## EMPLOYMENT TRIBUNALS

**Claimant:** John Davies

**Respondent:** Diane Tucker (t/a ABC Nursery)

**Heard at:** Reading **On:** 12 February 2021

**Before:** Employment Judge Shastri-Hurst

### Representation

Claimant: Ms Duane (counsel)

Respondent: Mr Williams (solicitor advocate)

### COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote / paper hearing on the papers which has been consented to/not objected to by the parties. The form of remote hearing was V (video hearing by CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 320 pages, the contents of which I have recorded. The order made is described at the end of these reasons.”

## JUDGMENT

1. The Claimant was an employee of the Respondent from 4 January 2011 to 23 November 2019.
2. The Claimant’s claim under the Working Time Regulations 1998 regarding untaken but accrued holiday pay is well founded.
3. The Respondent is ordered to pay to the Claimant the sum of £340.38 for accrued but untaken holiday leave at the time of the termination of the working arrangement between the parties.
4. The sum at paragraph 3 is awarded as a gross figure: any liability for tax on that figure will be the responsibility of the Claimant.

# REASONS

1. The Claimant was engaged to provide some level of work for the Respondent, the owner and director of the ABC Nursery, for some twenty years until 23 November 2018, as a general maintenance man. Following the termination of the working relationship, the Claimant now brings claims of ordinary unfair dismissal, breach of contract (notice pay) and holiday pay against the Respondent.
2. This matter was listed today as an open preliminary hearing, in order to deal with issues as set down by Employment Judge Anstis following a preliminary hearing on 29 May 2020, those issues revolving around the matter of the Claimant's employment status:
  - 2.1. Was the Claimant an employee or a worker (or neither) in respect of the Respondent?
  - 2.2. If he was an employee, what was the start date of his employment?
  - 2.3. What were his weekly earnings from the Respondent?
  - 2.4. What (if any) holiday pay is due to him?
3. The Claimant undertook the ACAS Early Conciliation Process between 17 December 2018 and 16 January 2019, following which he presented the ET1 claim form on 15 February 2019.
4. The Respondent contests the claims, primarily on the basis that the Claimant was neither an employee or a worker for the Respondent, but was at all times during their working relationship a self-employed contractor.
5. Before me, the Claimant was represented by Ms Duane, and Mr Williams represented the Respondent. To assist me in my decision making, I had sight of a bundle of 320 pages, as well as witness statements on behalf of the Claimant from the Claimant himself, his wife Jennifer Davies, Leona Thompson (a former employee of the Respondent), and Steven Adams (the Claimant's brother-in-law). For the Respondent, I had statements from the Respondent, her husband Gerald Tucker, and her two sons Mark and Paul Tucker. Ms Duane also provided a helpful skeleton argument. All eight witnesses attended to give evidence and be cross-examined.
6. I note that Mr Williams for the Respondent chose not to ask any questions of Mrs Davies, Ms Thompson or Mr Adams. Regarding the Claimant's cross examination, it was fairly short, given the length of the statements on behalf of the Respondent, and the size of the bundle. It was put to the Claimant that:
  - 6.1. He was never an employee of the Respondent;
  - 6.2. He was a relative, the work was ad hoc, with the Claimant getting cash in hand;
  - 6.3. He had always paid his own tax and national insurance;
  - 6.4. In a meeting on 20 February 2021, he made a declaration to an HMRC representative that he was self-employed;
  - 6.5. He was not dismissed by the Respondent because he was never an employee.

7. The Claimant disagreed with all but the third proposition. The length of cross-

examination may well reflect the length of the Claimant's statement, which was only one and a half pages long.

8. All of the Respondent's witnesses were cross-examined. The cross-examination of Gerald Tucker was also brief; the only issue he was asked about was the arrangements in relation to the Claimant's holiday pay, which again appeared brief given the length and detail of his statement.
9. The disparity in detail between both parties' witness statements was notable (the Respondent's statement alone was 33 pages).

## **ISSUES**

10. The parties helpfully agreed a list of issues some time ago, in relation to the preliminary issues, as well as the issues that will need to be considered by a tribunal at a final merits hearing.
11. I will set out here the issues relevant to the matters that I have to determine today, as stipulated by Employment Judge Anstis (p67).
  - 11.1. Was the Claimant an employee or worker (or neither) in respect of the Respondent?
  - 11.2. If he was an employee, what was the start date of his employment?
  - 11.3. What were his weekly earnings from the Respondent?
  - 11.4. What (if any) holiday pay is due to him?
12. If the Claimant is an employee under s230(1) of the **Employment Rights Act 1998 ("ERA")**, all his claims survive.
13. If he is found to be a worker under s230(3) **ERA**, only his holiday pay claim survives, and can be dealt with as part of this preliminary hearing.
14. If he is found to be neither an employee or a worker, none of his claims survive.

## **LEGAL FRAMEWORK**

15. The **ERA** defines "employee", "contract of employment" and "worker" at s230 as follows:
  - (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked up) 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.

## **Employee**

16. Case-law has led to numerous tests being invoked over the years, in order to identify an employee: in short, there is no single test. The answer instead has become known as the “multiple test”, which takes into account all relevant factors for consideration. The starting point for this test comes from **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433**:

A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wages 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.

17. Following this case, an “irreducible minimum” of criteria has arisen: if the following three factors are not present, then no contract of service exists:

- 17.1. Control;
- 17.2. Personal performance; and,
- 17.3. Mutuality of obligation and control.

#### Control

18. Control can be direct or indirect, and does not require an employee to carry out the work under the employer’s actual supervision. As said by Lord Phillips in **Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and ors [2013] IRLR 219**, in today’s world, it is not

...realistic to look for a right to direct how an employee should perform his duties...Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.

19. The issue of control is a question of whether a putative employer holds enough control over the putative employee. The case of **White and anor v Troutbeck SA [2013] IRLR 949** focused on claimants who had agreed to manage and maintain the Respondent’s small farm estate, the Respondent’s being absent on a day-to-day basis. The EAT held that the relevant issue for the control test is whether there was a contractual right of control over the claimants. In **Troutbeck**, there was found to be sufficient control, as it was for the respondent to decide what maintenance was required, and to give instructions to the claimants regarding the house and grounds. The Court of Appeal approved the EAT’s decision.

#### Mutuality of obligation

20. This can be stated as the obligation for an employer to provide work, and pay an associated salary, met with an employee’s obligation to undertake that work. It must be a two-way street: an obligation on one party will not be sufficient. For example, in **Bebbington v Palmer t/a Sturrey News EAT 0371/09**, it was found that a paperboy was not an employee: if his services were not needed on any given day, the respondent could cancel him for that day and would not

have to pay him. Likewise, if the claimant chose not to do his paper round on a given day, it did not matter, as alternative arrangements could be made.

21. It is not right to search of a definite agreement in terms of hours and days – **Dakin v Brighton Marina Residential Management Co Ltd EAT 0380/12**. The correct question to ask is whether the relationship history demonstrated that there was an agreement whereby the claimant would do at least some work, and the reciprocal obligation for the employer to pay for that work.

#### Personal performance

22. This issue is relevant also to the matter of worker status, and requires that a claimant is required to do the work him-/herself, rather than having the ability to send someone in his/her stead. This issue tends to revolve around the existence of the ability to substitute the claimant's performance for that of someone else, and any fettering of that ability.
23. **MacFarlane and anor v Glasgow City Council [2001] IRLR 7** went back to the wording of **Ready Mixed** in finding that where substitution could only be (a) when the claimant was unable (rather than unwilling) to attend and (b) from a pool of alternative persons pre-approved by a respondent, this still pointed towards an employment relationship.
24. Ultimately, all the above three factors come down to matters of fact and degree.

#### Consistency

25. There are other factors that may be relevant to the weighing up of factors in answering the issue of employee status. As in **Ready Mixed**, it must be the case that any other relevant factors do not point away from the indications of a contract of service.
26. In other words, even where the irreducible minimum exists, if there are contraindications in other terms of the contract between the parties, this can be enough to place the working relationship into a different status to employment.
27. Other relevant factors may include:
- 27.1. Method of payment (lump sum payments versus regular wage);
  - 27.2. The existence of benefits, such as holiday pay/sick pay;
  - 27.3. Tax and national insurance arrangements;
  - 27.4. Integration into the organisation;
  - 27.5. Intention of the parties (although this may be relevant, the substance of the arrangement will carry more weight);
  - 27.6. Custom and practice.

#### **Worker**

28. The Claimant is claiming that he fell within s230(3)(b) ERA. To fall within limb b, a claimant must show:
- 28.1. There was a contract (whether written or oral, express or implied);
  - 28.2. That they undertook work to personally perform work or service for the company. This was found in the case of **Pimlico Plumbers Ltd**

**and anor v Smith [2018] ICR 1511 SC** to be the sole test, whilst stating that it is still helpful to assess other factors such as the ability for a claimant to substitute someone else into their role, in deciding what the dominant feature of the contract is;

- 28.3. That the company is not a client or customer of a profession or business undertaking carried on by the claimant. An example of that type of set up is a barrister who contracts to work for a client, but would not be classed as a worker of that client.
29. Overall, there needs also to be a mutuality of obligation between the parties. As above, this means that there was an obligation for a company to provide work and for a claimant to do that work.
30. The question as to whether someone is a worker is primarily a question of fact for the tribunal. As the determination depends on the value attached to the individual facts of the case, it is a matter of degree, and therefore of fact – **O’Kelly and ors v Trusthouse Forte plc 1983 ICR 728**.
31. There are various factors which can be placed into the melting pot when considering such a decision, for example (the following being a non-exhaustive list):
  - 31.1. How a claimant was paid;
  - 31.2. Whether they were paid for time they were not at work;
  - 31.3. How much control the company had over a claimant’s work;
  - 31.4. How integrated a claimant was within the company. For example, whether a claimant was provided with any equipment by the company.

### **Holiday pay**

32. Pursuant to the **Working Time Regulations 1998**, workers are entitled to be paid for holiday leave accrued but untaken at the time of termination of their employment – regulation 14.
33. The Claimant’s schedule of loss, in which he states that he had 5.9 days’ accrued but untaken holiday leave was unchallenged. If the Claimant is a worker, he will therefore be entitled to receive payment for 5.9 days or work at his normal rate of a week’s pay.

### **FINDINGS OF FACT**

34. I restrict myself to only making findings as they are relevant to the limited issues set out above being the subject of this preliminary hearing.

### **Family involvement**

35. This case is a deeply unfortunate family affair. The Claimant and Respondent are brother and sister.
36. The Respondent is the director of the ABC Nursery (“the Nursery”), the registered address being 11 Sandfield Road. Her daughter, Natasha Tucker, is the Nursery manager.

37. Gerald Tucker, the Respondent's husband, is joint owner with the Respondent of five properties, as well as the Nursery.
38. Paul Tucker, the Respondent's son, is the sole director of a company, Kidactive, and has been since 2008. Kidactive provides term-time breakfast club, after school care and school holiday clubs. The registered office of Kidactive from 2009/2010 has been 11 Sandfield Road too, out of which premises Kidactive operates.
39. Mark Tucker, the Respondent's son, is an employee of the Respondent, primarily fulfilling the role of administrator, including payroll and accountancy functions.

### **The Claimant's work for the Tucker family over the years**

40. The Claimant's evidence is that he started working for the Respondent on or around 23 November 1998. I note that 23 November happens to be the date on which the working relationship ended twenty years later, on 23 November 2018. To me, this suggests that the Claimant was unable to remember the exact date of the beginning of the working relationship, and therefore he (or his representative) has opted for 23 November 1998 as his start date, in order to make any calculations arising from this claim somewhat more straight forward.
41. Both Gerald Tucker and the Respondent gave evidence that any working relationship between the Claimant and her family commenced in 1999. Given the detail within both these statements as to the work that the Claimant did year on year, I accept that the working relationship began in 1999.
42. The Claimant's home is in Swansea. He would routinely travel to Oxford to stay with the Respondent and her husband from late Sunday/early Monday through to Friday, going home only for the weekends.
43. The Respondent's position is that the Claimant did maintenance work across the five properties owned by her and her husband, as well as the Nursery. This varied work covered a span of time from 1999 to 2018. Gerald Tucker would supply the requisite materials for these works.
44. Of relevance to the Nursery, Gerald Tucker in his statement specifically highlights the following time periods (these matters were not challenged):
- 44.1. 2001 – 2002: the initial building project for the Nursery – para 22 of GT's statement;
  - 44.2. Late 2005 – early 2006: replacement of the concrete driveway at the Nursery – para 28 of GT's statement;
  - 44.3. Late 2007 – late 2010: substantial renovations on the Nursery – paras 35/40/43 of GT's statement;
  - 44.4. 2010 – 2018: general maintenance on the Nursery, and other of the Tuckers' properties – para 44 of GT's statement;
  - 44.5. Early 2011 – 2018: from this time the Claimant spent more and more time at the Nursery and fell into a routine – para 49 of GT's statement.
45. The above evidence is also reflected in the Respondent's witness statement.
46. The Respondent accepted in cross-examination that the Claimant worked for

her five days a week, that he was a key holder who would open in the morning and perform general maintenance. Although I note that no specific time period (in terms of years) was placed on this question and answer.

### **KidActive work**

47. It is the Tuckers' case that the Claimant, in around 2010/2011, also began working for KidActive.
48. Paul Tucker told me that the Claimant would (until around summer 2018) work for him/KidActive daily, doing the school run for children registered with KidActive at the beginning and end of the day. I accept that the vehicle used for these school runs was parked at the Nursery and, given the close family and geographic ties between KidActive and the Nursery, the lines became blurred. However, on balance, I accept that the Claimant's task of driving was undertaken on behalf of KidActive.

### **Contractual arrangement**

49. There is no written contract of any sort between the parties, or indeed the Claimant, Gerald Tucker or Paul Tucker.
50. It was agreed between the parties that, at the beginning of their working relationship, there was a conversation between the Claimant and the Respondent and Gerald Tucker, in which the following was agreed:
- 50.1. The Claimant would be paid cash in hand weekly;
  - 50.2. The Claimant would have 20 days' holiday a year plus bank holiday (2 weeks would be taken off at Christmas);
51. The Claimant would ask to take holiday over certain dates and the Respondent would approve those requests, recording them in a diary in which employee holidays and absences were recorded. The Claimant was paid for his holiday leave.
52. When I asked the Claimant about sick pay arrangements, he told me he had never taken time off work on sickness absence.
53. There is some dispute over the precise hours worked; however it is agreed that the Claimant worked five days a week, leaving earlier on a Friday to get home to Swansea.
54. The Claimant's evidence was that he was not permitted to send anyone as a substitute for him. This is supported by Mrs Davies' and Ms Thompson's evidence. Ms Thompson states in her (unchallenged) statement that when the Claimant was away from work, it was Gerald Tucker that would continue with any work as necessary.
55. The Respondent, or Natasha Tucker (her daughter-in-law) would inform the Claimant of what work needed doing (for example, if they needed a new storage unit to be built). The details of the work would be sorted out between the Claimant and Gerald Tucker: the Claimant was not responsible for sourcing the required materials, this was down to Paul Tucker.



56. It was common ground that, once the Claimant had undertaken to do a specific piece of work, he would always do it. He would never not attend to complete an agreed piece of work.

## **Pay**

57. The Claimant was paid every week cash in hand. By the time the working relationship came to an end, the Claimant claims he was being paid £461.54 (gross) per week. He was responsible for his own tax and national insurance deductions.

58. Considering the amount of pay, I note the following pieces of evidence:

- 58.1. At p74, I have in the bundle a cheque for £500, from the Nursery's cheque book, enclosed in a letter on the Nursery' headed note paper for the Claimant's last weekly pay;
- 58.2. I am told by the Tuckers that £200 per week was paid to the Claimant by Gerald Tucker on behalf of Paul Tucker and KidActive in latter years;
- 58.3. On p170, there is a text from the Claimant to Paul Tucker, after 23 November 2018, in which he states "I want my money that is owing sorted...". It strikes me that, if the Claimant believed that all of his weekly pay related to the Respondent, it would be odd to be seeking any payment from Paul Tucker;
- 58.4. On 12 December 2018, Paul Tucker transferred £200 to the Respondent's bank account, the reference being "TUCKER P, J DAVIES PAY NOV 18 VIA MOBILE - LVP";
- 58.5. The Respondent in her statement states that the Claimant's pay from her and her husband went from £10,000 up to 2009/2010, to £13,000 from 2009/2010 to 2015, then £15,000 from 2015 to 2018;
- 58.6. I note that the sum of £13,000 for "subcontractor" is recorded in the HMRC documents that I am told are from 2012 – p223.
- 58.7. There is a dispute between the witnesses: Gerald Tucker states that the Claimant was to be paid for 50 weeks each year. The Claimant told me that he was "paid for the year".
- 58.8. I note that £15,000, if divided by 50 weeks, equates to £300 per week;
- 58.9. On balance, it would appear that £461.54 would be an awkward figure to pay weekly in cash. There is no evidence in the bundle that I have been taken to in support of this figure being the correct weekly salary;

59. I accept on balance that, as at 23 November 2018, the Claimant received £500 per week, but that this was effectively split between work he did for KidActive (£200) and work he did for the Respondent (£300).

## **2012 HMRC investigation/tax position**

60. I am told that there was an HMRC investigation into the Respondent's business in 2012, of which Mark Tucker was primarily in charge. Mark Tucker's evidence was that the question of the Claimant's employment status was discussed with HMRC, the Claimant, and himself. In the bundle, pages 222-223 are said to be "HMRC documents".

61. Pages 222 & 223 are two pages taken entirely out of context. They have no identifying features on them, as to authorship, date, purpose etc. On p222, the relevant comment is as follows:

Subcontractor:

We note your comments and confirm that as discussed at the meeting with yourself and Mrs Tucker 20 February 2-12 that John Davies declares his income on his Self Assessment Tax Return.

62. The relevant section of p223 states:

Subcontractor (£13,000):

This deduction represents payments to Mrs Tucker's brother (John Davies) in return for maintenance work at the Nursery. It is a moot point as to whether this is a subcontractor type of payment or simply wages. In either case I believe tax should have been deducted as source, but I am referring this to a colleague who deals with PAYE matters for her opinion and will let you know what arises in due course.

### **Other subcontractors**

63. In the bundle, I have seen documents that show that when the Respondent (or Natasha Tucker) wanted ad hoc projects done by contractors, they put in place written agreements – see for example p137.

### **Events in 2018**

64. In December 2018, the Claimant raised a grievance with the Nursery and was invited to a grievance meeting accordingly. I note that the grievance invitation at p75 is on the Nursery's headed note paper.

65. The Claimant was known to the families who frequented the nursery, and a photo of him appeared on the wall in the entrance hall to the nursery, along with pictures of other employees of the Nursery.

66. The working relationship ended on 23 November 2018. It is not appropriate or necessary for me to delve into the facts or reasons for that termination: that would be to tread on the toes of any tribunal in the future.

## **CONCLUSIONS**

### **Mutuality of obligations**

67. I remind myself of **Dakin**, in which it was held that it is not necessary to establish an agreement between two parties for a set number of hours to be worked. The question is whether there was an agreement that some work would be done by one party, for which he would be paid by the other.

68. It is important to consider the working relationship at different times of the night on twenty year working relationship between the parties. As an overview, it was agreed that the Claimant worked five days a week across the Tuckers' various properties, one of which was the Nursery, from the time of his engagement, which I have found to be 1999.

### 1999 - 2010

69. From 1999 to 2010, I find that the Claimant worked across all the Tuckers' family properties. Given the detail of Gerald Tucker's evidence, which was not

challenged, and the fact that he appears to have “project managed” the Tuckers’ properties, I accept that the Claimant’s time over this period was spent much more ad hoc at different properties (including the Nursery), depending on where the need was.

70. The Claimant was paid weekly for this work. It is however unclear to me which entity paid the Claimant weekly.

71. I am therefore not satisfied that the requisite mutuality of obligation existed between the Claimant and the Respondent during this period.

#### 2011 - 2018

72. From 2011, I find that the Claimant worked primarily at the Nursery. It was Gerald Tucker’s and the Respondent’s (unchallenged) evidence that, from 2011, the Claimant was a regular feature at the Nursery and worked much more from that base.

73. I accept that, from around the same time, the Claimant also did some work for KidActive, such as performing the school run. However, this does not detract from the regular nature of the work he was providing for the Respondent for the majority of each of those five days a week.

74. In return for all his work for the Tucker family, the Claimant was paid weekly. As this was all cash in hand, the only documentary evidence I have regarding which entity this pay came from is at p74. I have made findings about that cheque above.

75. I am satisfied that, in this period of the Claimant’s working relationship with the Tuckers, he was paid £200 for the work done with KidActive, and the balance of his weekly pay was for work done solely for the Respondent. This would explain why the last payment the Claimant received of £500 was on a Nursery cheque, £200 of which was reimbursed to the Nursery by Paul Tucker.

76. I am therefore satisfied that, from 2011, there was mutuality of obligations between the Claimant and the Respondent.

#### **Control**

77. In terms of work that the Claimant undertook whenever he worked at the Nursery, I am satisfied that the Respondent had the requisite level of control. The Respondent would decide what work she needed doing, whether that was putting up shelves or constructing another piece of furniture, and that is the work that the Claimant would do. I find that the fact that Respondent’s husband may have acted as messenger on occasion, or may have provided the specifications of the work that the Respondent wanted/needed completing does not detract from the control the Respondent exerted.

78. In that way, the Respondent directed the Claimant as to the work he was to do. As in **Troutbeck**, it was for the Respondent to determine what maintenance and other work was required to be completed at the Nursery.

79. Therefore, when the Claimant was working at the Nursery, I find that there was sufficient levels of control exerted by the Respondent.

## **Personal performance**

80. I accept that the Claimant may, on some occasions, have said he was not able to perform a specific task for the Respondent or her family. However, in 2011 to 2018, this did not detract from the fact that the Claimant attended the Nursery to work 5 days a week.
81. It was common ground between the parties that, once the Claimant had agreed to do a specific piece of work, he would always complete it.
82. The Claimant never sent someone to work in his place. The Claimant never failed to attend work simply because he didn't want to. I accept that, had he failed to attend the Nursery to work on any given day, he would not have been allowed to send a substitute. I am also satisfied that the Claimant could not have failed to attend the Nursery simply because he didn't feel like it. From 2011 onwards, the Claimant was expected to attend the Nursery to work 5 days a week.
83. I therefore find that he did provide personal service for the Respondent from 2011.

## **Contraindications pointing away from employee status**

### Tax arrangement

84. The Respondent relies on the tax status of the Claimant as a contraindication of employment status, particularly the HMRC investigation of 2012.
85. I find that the documents in relation to the investigation at pp222/223 do not support the Respondent's case. The wording is equivocal as best, and I note the advice at p223 that the initial view of HMRC was that tax should have been deducted at source in any event.
86. It was Mark Tucker's evidence that the Claimant confirmed to the HMRC investigator in 2012 that he was indeed self-employed. This was denied by the Claimant. I do not need to make a finding on this point as, even taking the Respondent's case at its highest, this was a statement made by the Claimant over 6 years prior to the termination of the working relationship. Opinions can change, and any such view expressed by the Claimant so long prior to his claim cannot be determinative, or even particularly indicative.
87. It is common ground that the Claimant was paid gross and paid his own tax and national insurance.

### Method of payment

88. The Claimant was paid weekly, and therefore received a regular wage.

### Holiday and sick pay

89. The Claimant received holiday pay. His (unchallenged) evidence was that he never took any sick leave.

Integration

90. Certainly from 2011, when the Claimant was more permanently based at the Nursery, I find that he was integrated into the organisation. The parents and children in attendance at the Nursery recognised him and spoke to him.

Intention of the parties

91. Although Mark Tucker laboured the point in his witness statement regarding the label placed on the Claimant's working status for the purposes of HMRC, the intention between the parties at the time of the working relationship is far from clear. I say this as the Respondent and her husband were content to have the Claimant working for them five days a week, paying him weekly, for nearly two decades.

92. In the situation where the parties' intentions are equivocal, it is much safer to look at the substance of the arrangement.

Custom and Practice

93. Certainly from 2011, the Claimant would attend the Nursery daily, and open up. He would have his lunch and chat to the other staff. He was known by the parents. He was paid weekly by the Nursery. He was permitted to raise a grievance under the Respondent's grievance procedure, post-termination.

Overall

94. Taking the above factors into account, I consider that, on balance, the evidence points more towards an employment relationship than away from it.

**Was the Claimant an employee or worker of the Respondent (or neither)?**

95. Given my findings and conclusions above, I find that the Claimant was an employee of the Respondent from 2011 until the termination of their working relationship on 23 November 2018.

96. I am not satisfied that the requisite irreducible minimum was in existence between the Claimant and the Respondent prior to that date.

97. It follows that the Claimant is entitled to pursue all his current claims through to a final hearing.

**If the Claimant was an employee of the Respondent, what was his start date?**

98. As above, I am satisfied that the irreducible minimum existed only from 2011. I note that Gerald Tucker's evidence that it was from "early 2011" that the Claimant's presence at the Respondent was more regular.

99. The first working day of 2011 was Tuesday 4 January 2011: I therefore find that this was the Claimant's start date of his employment with the Respondent.

**What was the Claimant's weekly pay from the Respondent?**

100. At the time of the termination of the parties' relationship in 2018, I find that

the Respondent paid the Claimant £300 gross a week on 50 weeks of the year for the work he did for the Respondent.

101. However, just because he was paid a rounded figure on 50 occasions, does not mean that he was only being paid for 50 out of 52 weeks a year. If this were the case, it would mean that the Claimant had two weeks unpaid holiday during the year. However, it was the clear evidence of witnesses for the Respondent that the Claimant was entitled to be paid for the 28 days a year he had as holiday. I therefore find that the Claimant was paid for the full working year, in 50 instalments.

102. At the time of the termination of the employment relationship, the Claimant's annual salary was  $\text{£}300 \times 50 = \text{£}15,000$  (gross).

103. This equates to a weekly salary of  $\text{£}288.46$  (gross).

**What, if any holiday pay is due to the Claimant?**

104. Given my finding that the Claimant is an employee, he is entitled to holiday pay accrued and untaken at the point of termination of the working relationship under regulation 14 of the **Working Time Regulations 1998**.

105. Given that the Respondent did not attack the Claimant's schedule of loss in terms of the particulars of holiday accrued but untaken, I accept the detail in the schedule on that point – p59.

106. I find that the Claimant, as at 23 November 2018, had accrued but untaken holiday of 5.9 days. Given the Claimant worked 5 days a week, this equates to 1.18 weeks.

107. The Claimant is therefore entitled to  $1.18 \times \text{£}288.46 = \text{£}340.38$  (gross) outstanding holiday pay.

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Employment Judge Shastri-Hurst

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Date 22 March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE