EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Foster	AND	(1) Oakleaf Joinery Limited (2) Oakleaf Building Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 27 November 2020

EMPLOYMENT JUDGE Bax

Representation

For the Claimant: Mr J Duffy (Counsel)
For the Respondent: Mr N Henry (Consultant)

RESERVED JUDGMENT

1. The claim that the First Respondent unlawfully deducted wages is well founded.
2. The claim that the Second Respondent unlawfully deducted wages is well founded.
3. The claim of unfair dismissal against the Second Respondent is dismissed.
4. The claim that the Second Respondent failed to give the Claimant access to relevant records for the purpose of the National Minimum Wage was well founded.
5. Directions for further submissions in relation to the accrued but untaken holiday pay claims and as to remedy were given under a separate order.

REASONS

1. In this case the Claimant, Mr Foster, brings a claim of automatically unfair dismissal for asserting his rights to the National Minimum Wage, unlawful

deductions from wages, accrued but unpaid holiday, and an award for the Second Respondent failing to allow access to pay records under s. 11 of the National Minimum Wage Act 1998

Procedural background

2. The Claimant notified ACAS of the disputes against both Respondents on 11 July 2019 and the certificates were issued on 11 August 2019.

3. The Claimant presented his claim on 11 September 2019. The Claimant alleged that he commenced Employment with the First Respondent ("OJL") on 16 October 2018 and that his employment transferred to the Second Respondent ("OBL") in late February 2019 until his dismissal on 5 July 2019. Both Respondents filed responses; OJL denied that the Claimant was an employee. Both Respondents denied that there was a TUPE transfer and OBL said that the Claimant's employment with it commenced on 20 May 2019.

4. On 12 May 2020, Employment Judge O'Rourke conducted a Telephone Case Management Preliminary Hearing and identified the issues in the claim as the employment status of the Claimant, whether there was a TUPE transfer between OJL and OBL, whether either Respondent failed to pay the Claimant the National Minimum Wage, whether the Claimant took action with a view to enforcing or otherwise securing the benefit or right to be paid the national minimum wage and if so was the reason or the principal reason for his dismissal that he had done so, whether the Claimant was paid for all his accrued but untaken holiday on termination of his employment and whether an award should be made for the Respondent's failure to respond to the Claimant's production notice to produce relevant records required by s. 10 of the National Minimum Wage Act 1998. The claim was listed for a final hearing to be heard on a single day.

5. At the start of the hearing the issues were further discussed. It was agreed that if there was not a TUPE transfer between the Respondents and that OJL had unlawfully deducted wages, that the claim had been potentially presented out of time. In such a circumstance it would therefore be necessary to determine whether it was reasonably practicable for him to have presented the claim in time. It was also agreed that the Claimant had less than 2 years' service and would need to show that the Tribunal had jurisdiction to hear the claim of unfair dismissal.

6. On 26 November 2020, Mr Short e-mailed the Tribunal and said that he would not be in attendance at the final hearing, due to having an abscess. Employment Judge O'Rourke ordered that the hearing would proceed in his absence, but that account would be taken of any written submissions or

documentation provided. Mr Short did not provide any written submission, witness statement or other evidence.

7. Due to the number of issues to be determined, it was agreed with the parties that it would not be possible to provide a decision that day. Both parties sought to provide written submissions. Directions were given for the exchange of written submissions and it was agreed that I would provide a reserved Judgment on liability.

The evidence

8. I heard from the Claimant and I heard from Mr Anthony for OBL.

9. I was also provided with a bundle of documents of 181 pages and reference to square brackets within these reasons is a reference to a page in the bundle of documents

10. There was a degree of conflict on the evidence.

The facts

11. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after reading the factual and legal submissions made by and on behalf of the respective parties.

12. The Claimant was born on 17 July 1999.

13. OJL, the First Respondent, was a joinery company. The directors were Mr Short and Mr Anthony each of whom held 50% of the shares.

14. OBL, the Second Respondent, is a building company, which did not undertake any joinery work. Mr Anthony was the sole shareholder of OBL. OBL builds ‘high end’ bespoke homes and subcontracted the work it was unable to do, such as joinery work.

15. Mr Short was a joiner and historically was a regular contractor used by OBL. In 2017 Mr Short and Mr Anthony came to arrangement whereby the Second Respondent would fund the purchase of machinery for Mr Short to enable him to operate as a commercial joiner in return for Mr Anthony having 50% of the shares in the company, OJL. Mr Short had complete control of OJL, and Mr Anthony was not involved in the day to day running of it.

16. Once OJL started trading, OBL would regularly subcontract joinery work to it. OJL never made sufficient money to pay a dividend. OBL’s offices were

at an industrial unit at Creech Business Park Taunton and it had a storage facility below. When OJL started trading the storage facility was converted into a workshop and it ran its business from there.

17. The Claimant completed a carpentry course in the summer of 2018 and the started looking for employment. His grandfather put him in contact with Mr Short. The Claimant and Mr Short had a discussion during which Mr Short, on behalf of OJL, offered to employ the Claimant, which the Claimant accepted. OJL, in its response, asserted that it was agreed that the Claimant would only be given some work experience. OJL did not file any evidence in this respect and I accepted the evidence of the Claimant.

18. The Claimant started work for OJL on 16 August 2018 and was 19 years old at the time. The Claimant said in his witness that he worked 40 hours per week, however a text message he sent to Mr Anthony on 14 April 2019 said he worked 37 hours per week. The Claimant accepted in cross-examination that he worked 37 hours per week. The Claimant worked 37 hours per week.

19. The Claimant undertook joinery and carpentry work with Mr Short. Mr Short instructed him to use various machines, as part of the manufacture of components. The Claimant accompanied Mr Short to sites and assisted him with the work undertaken on them. Mr Short instructed the Claimant as to the work he should undertake. The Claimant did not have the right to send a substitute to do the work. At some stage the Claimant was provided with a set of power tools by OJL.

20. For the first couple of weeks the Claimant worked 37 hours per week, but there had not been any discussion about his rate of pay. After a few weeks, Mr Short asked the Claimant what he thought he was worth, and the Claimant suggested £80 per day. Mr Short told the Claimant he would be paid £80 per week. This equated to £2.16 per hour. The Claimant was not provided with a contract governing his relationship with OJL. No evidence was adduced by the Respondent as to the arrangement and I accepted the evidence of the Claimant. The Claimant was paid by OJL, as shown by his bank statements.

21. Shortly after starting work for OJL, the Claimant accompanied Mr Short to a site at Pisbury, in order to measure up for the creation of some windows and doors. The site was a joint development between OBL and Kalbrook Homes Limited. The joinery work was subcontracted to OJL. OJL invoiced Kalbrook Homes Limited for the work it had done and was paid by Kalbrook Homes Limited. When the Claimant and Mr Short arrived at the site, they met Mr Anthony who conducted a health and safety induction for the site. The same induction was carried out for any visitor or contractor to the site. The Claimant then worked with Mr Short to manufacture the windows and

doors. After they had been manufactured the Claimant assisted Mr Short, in December 2018, with fitting the windows and doors to the property. During the Pisbury development, OBL contracted OJL to do a small amount of carpentry work at that site. Other than the Claimant attending the site with Mr Short to measure up, fit the windows and doors and undertake a small amount of carpentry work, there was no evidence that the Claimant attended the site for any other purpose and his attendance at the site was limited. It was likely that most of the Claimant's time, when involved with this development, was taken up with the manufacture of the components in the workshop.

22. In early 2019, OBL won a contract to undertake work on a church, which included a significant amount of joinery work involving the making of doors and panels and then fitting them. OBL entered into a contract with OJL for OBL to undertake the joinery work.

23. On about Friday 15 February 2019, Mr Short had an accident in which he cut off part of his thumb. That afternoon, the Claimant went with Mr Anthony to 'The Blue Ball', a site operated by OBL, and fitted a fire surround and boxed in some pipes.

24. During the weekend of 16 February 2019, Mr Anthony and Mr Short discussed how the joinery work at the church would be completed in time for Easter. It was agreed that Mr Van Diepen of Timber Structures Limited would complete the work for OJL, but using the OJL workshop and that the Claimant would assist him. I accepted Mr Anthony's evidence that Mr Short was still running the OJL business by telephone, and that he had arranged for Mr Van Diepen to complete the job for OJL.

25. Mr Short was unable to attend work for 3 weeks, during which time the Claimant was involved in the manufacture of the doors and panels for the church. Mr Short then returned to work and oversaw and assisted the Claimant and Mr Van Diepen with the completion of the work.

26. After Mr Short's accident OJL was in a poor financial situation and his every day running of the workshop ceased, therefore OBL agreed to pay OJL's bills for the Church project. OBL paid Timber Structures Limited's invoices directly so that the job was finished. OBL also paid the Claimant's pay due from OJL.

27. On 18 February 2019, the Claimant was paid £80 by OBL, however for the following 2 weeks he was paid by OJL. From 8 March 2019 onwards the Claimant was paid by OBL.

28. Whilst the work on the church was being completed, Mr Short decided that he no longer wanted to carry on in business.

29. The work on the church was competed on 12 April 2019. From 15 February 2019 to 12 April 2019, the Claimant was only working for OJL. After that time OJL did not undertake any further joinery work and ceased trading. The Claimant stopped working for OJL on 12 April 2019 and he was paid his wages on that day. Before and after that time, OBL did not undertake any joinery work. After 12 April 2019 OBL continued to subcontract any joinery work necessary for its development projects.

30. Mr Anthony asked the supplier of the joinery machinery how much they would pay to buy it back. Mr Anthony was given a price which was a fraction of what he considered the value was. It was then decided that the machinery would be given to Mr Chris Davies of Shoreditch Joinery on 13 May 2019, which was by then the first choice joinery sub-contractor for OBL. Mr Anthony's unchallenged evidence was that he was trying to do something with the assets of OJL. Although the purchase of the joinery machinery was funded by OBL it was purchased by OJL and was an asset of that company. There was no evidence that ownership of the equipment transferred from OJL to OBL. On the balance of probabilities, the equipment did not pass through the hands of OBL and ownership was directly passed to Shoreditch Joinery.

31. From 12 April 2019, the Claimant did not undertake any further joinery work.

32. Mr Anthony's evidence was that on about 12 April 2019, the Claimant asked if he could work for OBL. The Claimant denied this and said that there was no such conversation and he was not told what was happening. The Claimant had noticed that his employer's name on his bank statements had changed in February but thought nothing about it. Mr Anthony's oral evidence was that he had told the Claimant that Mr Short would not be coming back and that he would give him a full-time job the next time OBL got work. Mr Anthony's witness statement referred to offering the Claimant the opportunity to join him or one of his subcontractors in the interim to see how he liked it. In oral evidence, Mr Anthony said that he kept his word that 'the Claimant would start on the books from the start of the new job and that he was on the books for 7 weeks'. It was likely that when the work on the church finished on 12 April 2019, Mr Anthony told the Claimant that Mr Short would not be coming back. I accepted the Claimant's evidence that he did not ask to join OBL. Mr Anthony told the Claimant that OBL was not currently working on a project, but that it was due to start a new project in May. Mr Anthony, on behalf of OBL, offered the Claimant the opportunity to undertake other work on his house and with his subcontractors in the interim, which the Claimant accepted. The Claimant would continue to be paid £80 per week, but by OBL.

33. At 1900 on 12 April 2019, the Claimant asked Mr Anthony by text what was happening the following Monday. The Claimant was told that he would either be with Mr Anthony or Nick, a subcontractor. On 14 April 2019, Mr Anthony told the Claimant that he would be with him.

34. After making the arrangements the Claimant sent a text message to Mr Anthony on 14 April 2019 and asked if they could speak about his pay. He said that "on starting he was really grateful to be offered the opportunity in a role, I love, working hard 37 hours a week the same as everyone else but am only on the equivalent of £1.88 per hour." Mr Anthony told him that his pay would go up on starting the next job.

35. Shortly prior to this, the Claimant joined a trade union and had been advised that he was being paid incorrectly. The Claimant did not make a claim at this stage and accepted in evidence that there was nothing stopping him from doing so.

36. Between 14 April 2019 and 20 May 2019, Mr Anthony instructed the Claimant where and with whom he should work, as demonstrated by the text messages in the bundle. From 15 April 2019, the Claimant undertook work on Mr Anthony's house for a few weeks and also at the Blue Ball public house. The Claimant was undertaking general building work. OBL paid the Claimant £80 per week during this period. The Claimant wore an OBL uniform.

37. On 23 April 2019, the Claimant asked by text where he was meant to be the following day and was told that he had a day off.

38. OBL started work on its new project on 20 May 2019 and from that time both parties considered that the Claimant was an employee, and he was required to work 40 hours per week.

39. From 3 June 2019, the Claimant's attendance at work deteriorated as evidenced by his time sheets and acceptance during cross examination. During that week he did not attend work on the Wednesday or Thursday. During the week commencing 10 June 2019, the Claimant was absent for 2 days. The Claimant only undertook an hour of work on 21 June 2019. In the week commencing 24 June 2019, he was absent for 2 days. In the week commencing 1 July 2019, the Claimant was absent on the Tuesday and Wednesday. The Claimant's mother had difficulties with her mental health and due to family bereavement, her mental health deteriorated. The Claimant had difficulties at home and was looking after his younger siblings. This meant he was sometimes late for work or took time off at short notice for which he was not paid.

40. On 2 July 2019, the Clamant did not attend work. Mr Anthony asked the Claimant, by text, if he would be in the following day. Mr Anthony was angry that the Claimant had not attended. The Claimant then had a conversation with Mr Anthony and explained the difficulties with his mother. Despite being angry, Mr Anthony encouraged the Claimant to speak to his mother. It was agreed that he would not have to attend work the following day. The Claimant was reminded again about the need to be punctual and to attend work.

41. The Claimant in his witness statement said that during the conversation on 2 July 2019 he recalled speaking to Mr Anthony about back pay he was owed, due to not being paid the minimum wage. In cross-examination it was suggested to the Claimant that the first he mentioned it was in a text on 5 July 2019. The Claimant disagreed and said that he had raised it in April. In his text message of 5 July 2019 at 1851, the Claimant referred to a conversation on the previous Tuesday, however Mr Anthony's text message of 6 July 2019 [p129] said that no pay issues had been raised until the night before, after the Claimant said he was going to work elsewhere. Mr Anthony was not cross-examined in relation to that part of the conversation and in the absence of him being challenged, I did not accept that the Claimant raised the issue of back pay on 2 July 2019.

42. On 3 July 2019, the Claimant was given a contract of employment, which incorrectly recorded his starting date as being that day. The leave year was stated to run from 1 January to 31 December each year. The Claimant's pay was £6.15 per hour.

43. The Claimant approached Mr Anthony about the possibility of taking 3 weeks off work so that he could work with a contractor in Geneva. The Claimant said that it occurred on 4 July and Mr Anthony said it was on 5 July. In the text message from Mr Anthony on 6 July 2019, he referred to the Claimant informing him the previous night that he was going to work elsewhere [p130]. The Claimant's response [p132] said that he had discussed a temporary opportunity and asked whether it would give rise to dismissing him, but did not dispute when the conversation occurred. In Mr Anthony's e-mail dated 8 July 2019 [p133], he said that they had a telephone conversation at 1718 on 5 July 2019 about working in Geneva. The Claimant's reply [p135] did not dispute the date or time. It was therefore more likely that Mr Anthony's recollection was correct and that the Claimant raised whether he could take off 3 weeks, from the following Monday, at 1718 on Friday 5 July 2019.

44. There was a dispute as to when the Claimant handed in his time sheet for the week commencing 1 July 2019. I accepted Mr Anthony's evidence that it was not provided to him until after the conversations on the telephone on 5 July 2019.

45. The Claimant telephoned Mr Anthony at about 1718 on 5 July 2019 and asked him about taking time off so he could work in Geneva for 3 weeks from the following Monday. At this time Mr Anthony was out with his family. Mr Anthony's evidence was that he sacked the Claimant during that telephone call. The Claimant disputed this and said that he was told that he could not have the time off. The Claimant in his witness statement said that he also asked Mr Anthony about backpay during the conversation and that Mr Anthony was dismissive, this was not put to Mr Anthony. In any event the Claimant did not refer to this element of the conversation in his text messages on 5 July 2019 or 6 July 2019. I did not accept that back pay was raised in that conversation. I will provide my conclusion as to whether the Claimant was told he was sacked during this conversation after referring to the other evidence.

46. At 1851 on 5 July 2019, the Claimant sent a text message [p127] in which he said, "just ahead of work on Monday" and referred to the minimum wage and back pay. Mr Anthony sent a text message at 1910, telling the Claimant that if he wanted to discuss it further, he should call Monday. The Claimant sent a text message at 1928, in which he said he was confused as he had now been told not to come back to work.

47. The Claimant's evidence was that after receiving the text message at 1910, he received a telephone call from Mr Anthony advising him that his employment had been terminated for poor attendance and requesting 3 weeks off to work in Geneva. The Claimant sent a text message the next day [p128] referring to telephone calls and being told that he was dismissed he should return his PPE.

48. The text messages sent between the parties on 5 July 2019 are inconsistent with the Claimant having been dismissed during the conversation at 1718. The Claimant's reply at 1928 suggests that he had not been told he was dismissed before sending his previous text message. It was therefore unlikely that the Claimant was dismissed during the telephone conversation at 1718. This is supported by the contents of the text message at 0833 on 6 July 2019 and the reference to calls [p128].

49. During the telephone conversation at 1718, Mr Anthony was angry with the Claimant about his request for time off and told him that it was refused. The Claimant then sent his text message at 1851. Mr Anthony then telephoned the Claimant and was still angry about the request for time off and was also angry about the Claimant's poor attendance. I accepted the Claimant's evidence that he was told he was dismissed for poor attendance and requesting 3 weeks off work to work in Geneva. Mr Anthony followed the conversation up by telling the Claimant to call him on Monday if he wanted to discuss it further. I accepted that the Claimant had not been attending

work regularly, as evidenced by the timesheets, and that he had asked for time off to work for someone else at short notice.

50. The correspondence from Mr Anthony which followed said that the Claimant had been dismissed for poor attendance and requesting 3 weeks off to work for someone else. The Claimant's correspondence suggested that the principal reason for his dismissal was that he had raised the pay issue.

51. The principal reason for the Claimant's dismissal was a factual issue which required determination. Mr Anthony's evidence was that the reason he dismissed the Claimant was because of poor attendance and that he had asked to work for someone else for 3 weeks. The Claimant said that the principal reason was that he had sought back pay so that he had been paid in accordance with the minimum wage. The reasons given to the Claimant by Mr Anthony in the second telephone conversation were true. The Claimant had 10 days of absence in a 7-week period and then sought three weeks off to work for someone else. The time scale between the telephone conversation at 1718 and the dismissal between 1851 and 1910 was short and during that time Mr Anthony was out with his family and was unable to properly speak to the Claimant. I accepted Mr Anthony's evidence that his reason for dismissing the Claimant was the Claimant's attendance and his seeking to take 3 weeks off work to work for somebody else.

52. On 11 July 2019 the Claimant sent the OBL a production notice under the NMWR [p138]. OBL did not respond to it.

53. The Claimant did not take any holiday from 15 April 2019.

The law

Employment status

54. S. 230 of the Employment Rights Act 1996 provides

"230 Employees, workers etc
(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
and any reference to a worker's contract shall be construed accordingly.
(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
(5) In this Act "employment"—
(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
(b) in relation to a worker, means employment under his contract;
and "employed" shall be construed accordingly."

55. The test for employment status was confirmed in paragraphs 18 to 19 of Lord Clarke's judgment in Autoclenz Ltd v Belcher [2011 ICR 1157 in the Supreme Court:

"*18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "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 … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be".*

19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must … be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."

Transfer of an undertaking

56. The relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations").

57. Regulation 3(1) provides that the Regulations apply to – (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; (b) a service provision change, that is a situation in which – (i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor"); (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

58. Regulation 3(2) provides that "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

59. Reg. 3(2A) provides that “References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.”

60. Reg. 3(3) provides that the conditions referred to in reg. 3(1)(b) are: (a) immediately before the service provision change—
(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

61. Regulation 4(1) provides that: Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the

transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

62. Regulation 4(2) provides that: Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer – (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to the organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

63. Regulation 4(3) provides that: Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)…

64. In Spijkers v Gebroeders Benedik Abattoir CV 24/85 [1986] 2 CMLR 296 the Court made it clear that it is important to consider the following matters: (a) the type of undertaking or business concern; (b) whether assets, tangible or intangible, are transferred; (c) whether employees are taken over; (d) whether customers are transferred; and (e) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended. These are single factors in an overall assessment which should not be considered in isolation. In addition, the facts characterising the transaction in question should be considered to determine whether the undertaking has continued and retained its identity in different hands (ECM (Vehicle Delivery Service) Ltd).

65. In Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT the EAT set out the following principles in relation to an economic entity:

    (a) there needs to be a stable economic entity, which is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective. There will not be such an entity if its activity is limited to performing one specific works contract. It has been held that the reference to 'one specific works contract' is to be restricted to a contract for building works;
    (b) in order to be such an undertaking, it must be sufficiently structured and autonomous but will not necessarily have significant tangible or intangible assets;
    (c) in certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on

manpower;

(d) an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity; and

(e) an activity is not of itself an entity; the identity of an entity emerges from other factors, such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.

And in relation to whether it had retained its identity:

(a) the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed;

(b) in a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity;

(c) in considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation;

(d) among the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they were suspended;

(e) in determining whether or not there has been a transfer, account has to be taken, among other things, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;

(f) where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets;

(g) even where assets are owned and are required to run the undertaking the fact that they do not pass does not preclude a transfer;

(h) where maintenance work is first carried out by a cleaning firm and then by the owner of the premises concerned, the mere fact does not justify

the conclusion that there has been a transfer;

(i) more broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor;

(j) the absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but is certainly not conclusive as there is no need for any such direct contractual relationship;

(k) when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer; and

(l) the fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one subcontractor and the start by the successor.

66. A stable economic entity need not have any significant tangible or intangible assets. In labour intensive sectors, assets are often reduced to a basic level and the activity may be essentially based on the labour force. (Jouini and Others v Princess Personal Service GmbH [2008] ICR 128).

67. In Farmer v Danzas (UK) Ltd UKEAT/0858/93, the integration of a new business into the transferee's own business did not prevent TUPE from applying.

68. In Klarenberg v Ferrotron Technologies GmbH: [2009] IRLR 301, the ECJ held that the Directive may also apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the functional link between the various elements of production transferred is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity.

69. The definition of an organised grouping of employees can include a single employee (see Schmidt v Spar-und Leihkasse Der Früheren ämter Bordesholm Kiel and Cronshagen: [1995] ICR 237, ECJ, in that case, a single cleaner).

70. For organised grouping of employees, Lord Justice Jackson gave the following test in Rynda (UK) Ltd v Rhijnsburger [2015] IRLR 394:

"If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to

identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities."

Automatically unfair dismissal

71. Section 104A of the Employment Rights Act 1996 ("ERA") provides:

[(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
(a) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or
(b) the employer was prosecuted for an offence under section 31 of the National Minimum Wage Act 1998 as a result of action taken by or on behalf of the employee for the purpose of enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or
(c) the employee qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage.
(2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—
(a) whether or not the employee has the right, or
(b) whether or not the right has been infringed,
but, for that subsection to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.
(3) The following are the rights to which this section applies—
(a) any right conferred by, or by virtue of, any provision of the National Minimum Wage Act 1998 for which the remedy for its infringement is by way of a complaint to an employment tribunal; and
(b) any right conferred by section 17 of the National Minimum Wage Act 1998 (worker receiving less than national minimum wage entitled to additional remuneration).]

72. I considered the test in Kuzel-v-Roche [2008] IRLR 530 in relation to protected disclosures;
(a) whether the Claimant had shown that there was a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;
(b) if so, had the employer showed its reason for dismissal;
(c) if not, it is open to the tribunal to find that the reason was as asserted by the employee, but that reason does not have to be accepted. It may be open to the Tribunal to find that, on a consideration of all the

evidence in the particular case, the true reason for dismissal was not one advanced by either side.

73. However, since it was agreed that the Claimant lacked the requisite service to bring an ordinary unfair dismissal claim under s. 108 ERA, the burden was on him to prove the reason for his dismissal under s.104A, on the balance of probabilities; it is a greater burden than the requirements to merely prove a prima facie case if he had a two-year service under Kuzel-v-Roche [2008] IRLR 530; Ross-v-Eddie Stobart [2013] UKEAT/0068/13/RN.

Unlawful deductions from wages

74. Section 13 of the Employment Rights Act 1996 provides:

"(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) … (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. (4) …"

75. The National Minimum Wage Regulations 2015 ("NMW Regs") came into effect on 6 April 2015 and govern the appropriate rates and pay reference periods for the national minimum wage ("NMW").

76. Regulation 21 explains the meaning of salaried hours work which is work done where paragraphs (2) to (5) of Regulation 21 apply. Under NMW Reg 21(2) the first condition is that the worker is entitled under their contract to be paid an annual salary or an annual salary and performance bonus. Under NMW Reg 21(3) the second condition is that the worker is entitled under their contract to be paid that salary or salary and performance bonus in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"). Under NMW Reg 21(4) the third condition is that the worker is not entitled under the contract to a payment in respect of the basic hours other than an annual salary or an annual salary and performance bonus. Under NMW Reg 21(5) the fourth condition is that the worker is entitled under their contract to be paid, where practicable the regardless of the number of hours actually worked in a particular week or month – (a) in equal weekly or monthly instalments, or (b) in monthly instalments are varied but have the result that the worker is entitled to be paid an equal amount in each quarter.

77. Under NMW Reg 22(2) where the pay reference period is a week, the hours of salaried hours work in that period are the basic hours divided by 52, and under NMW Reg 22(3) where the pay reference period is a month, the hours of salaried hours working that period or the basic hours divided by 12.

78. Under NMW Reg 4A (as amended) an 18 to 20 year old should have been paid at the rate of £5.90 per hour between 1 April 2018 and 31 March 2019, and at the rate of £6.15 per hour between 1 April 2019 and 31 March 2020. A 21-year-old should have been paid at the rate of £8.20 per hour between 1 April 2020 and 31 March 2021.

Time limits for claiming unlawful deductions from wages

79. Section 23 of the ERA provides

> 23 Complaints to [employment tribunals]
>
> (1) A worker may present a complaint to an [employment tribunal]—
> (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)), …
> (2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
> (3) Where a complaint is brought under this section in respect of—
> (a) a series of deductions or payments, or
> (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
> [(3A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2).]
> …
> (4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the

complaint if it is presented within such further period as the tribunal considers reasonable.

80. With effect from 6 May 2014, a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing Employment Tribunal proceedings.

81. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section. Where the EC process applies, the limitation date should always be extended first by S.207B(3) or its equivalent, and then extended further under S.207B(4) or its equivalent where the date as extended by S.207B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim — Luton Borough Council v Haque [2018] ICR 1388, EAT. In other words, it is necessary to first work out the primary limitation period and then add the EC period. Then ask, is that date before or after 1 month after day B (issue of certificate). If it is before, the limitation date is one month after day B, if it is afterwards it is that date.

Access to minimum wage records

82. S. 10 of the National Minimum Wage Act 1998 (“NMWA”) provides:

“10 Worker's right of access to records

(1) A worker may, in accordance with the following provisions of this section, —
(a) require his employer to produce any relevant records; and

(b) inspect and examine those records and copy any part of them.
(2) The rights conferred by subsection (1) above are exercisable only if the worker believes on reasonable grounds that he is or may be being, or has or may have been, remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage.
(3) The rights conferred by subsection (1) above are exercisable only for the purpose of establishing whether or not the worker is being, or has been, remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage.
(4) The rights conferred by subsection (1) above are exercisable—
(a) by the worker alone; or
(b) by the worker accompanied by such other person as the worker may think fit.
(5) The rights conferred by subsection (1) above are exercisable only if the worker gives notice (a "production notice") to his employer requesting the production of any relevant records relating to such period as may be described in the notice.
(6) If the worker intends to exercise the right conferred by subsection (4)(b) above, the production notice must contain a statement of that intention.
(7) Where a production notice is given, the employer shall give the worker reasonable notice of the place and time at which the relevant records will be produced.
(8) The place at which the relevant records are produced must be—
(a) the worker's place of work; or
(b) any other place at which it is reasonable, in all the circumstances, for the worker to attend to inspect the relevant records; or
(c) such other place as may be agreed between the worker and the employer.
(9) The relevant records must be produced—
(a) before the end of the period of fourteen days following the date of receipt of the production notice; or
(b) at such later time as may be agreed during that period between the worker and the employer.
(10) In this section—
"records" means records which the worker's employer is required to keep and, at the time of receipt of the production notice, preserve in accordance with section 9 above;
"relevant records" means such parts of, or such extracts from, any records as are relevant to establishing whether or not the worker has, for any pay reference period to which the records relate, been remunerated by the employer at a rate which is at least equal to the national minimum wage."

83. S. 11 NMWA provides:

"11 Failure of employer to allow access to records

(1) A complaint may be presented to an employment tribunal by a worker on the ground that the employer—
(a) failed to produce some or all of the relevant records in accordance with subsections (8) and (9) of section 10 above; or
(b) failed to allow the worker to exercise some or all of the rights conferred by subsection (1)(b) or (4)(b) of that section.

(2) Where an employment tribunal finds a complaint under this section well-founded, the tribunal shall—
(a) make a declaration to that effect; and
(b) make an award that the employer pay to the worker a sum equal to 80 times the hourly amount of the national minimum wage (as in force when the award is made).
(3) An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal before the expiry of the period of three months following—
(a) the end of the period of fourteen days mentioned in paragraph (a) of subsection (9) of section 10 above; or
(b) in a case where a later day was agreed under paragraph (b) of that subsection, that later day.
(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the expiry of the period of three months mentioned in subsection (3) above, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
[(4A) Where the complaint is presented to an employment tribunal in England and Wales or Scotland, section 11A applies for the purposes of subsection (3).]
(5) Expressions used in this section and in section 10 above have the same meaning in this section as they have in that section."

Holiday Pay

84. Regulation 13 provides:

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]
(2) . . .
(3) A worker's leave year, for the purposes of this regulation, begins—
(a) on such date during the calendar year as may be provided for in a relevant agreement; or
(b) where there are no provisions of a relevant agreement which apply—
(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.
(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture [in Wales or Scotland]) except where, in the case of a worker partly employed in agriculture [in Wales or Scotland], a relevant agreement so provides.
(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under [paragraph (1)] equal to the proportion of that leave year remaining on the date on which his employment begins.
(6) . . .
(7) . . .
(8) . . .
(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—
(a) it may only be taken in the leave year in respect of which it is due, and
(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."

85. Regulation 13A provides:

[(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).
(2) The period of additional leave to which a worker is entitled under paragraph (1) is—
(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;
(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;
(c) in any leave year beginning on 1st April 2008, 0.8 weeks;
(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;
(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.
(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.
(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.
(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—
(a) the worker's employment is terminated; or
(b) the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or
(c) the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.
…

86. Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3). In the absence of any relevant agreement which provides for payment of accrued leave, then the sum is calculated according to the formula (A x B) – C. For the purposes of this formula A is the period of leave to which the worker is entitled under Regulations 13 and 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.

87. Section 221 ERA provides:

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.
(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.
(3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of

remuneration payable by the employer to the employee in respect of 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.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5) …

Conclusions

Employment status with OJL

Did the Claimant agree with OJL to provide his own work and skill in return for remuneration?

88. The Claimant agreed with OJL to personally work for it and was paid £80 per week in return. The Claimant did not agree that the work he undertook would be work experience.

Did the Claimant agree with OLJ, expressly or impliedly, to be subject to a sufficient degree of control for the relationship to be one of master and servant?

89. The Claimant worked under the instruction and direction of Mr Short and OJL. He undertook joinery work with Mr Short and used the various machines in the workshop to manufacture components. The Claimant was provided with tools by OJL. At all times he worked for OJL, the Claimant was not permitted to work for other employers and he could not send a substitute. There was no evidence that the Claimant could choose not to undertake the work. During the initial conversation between the Claimant and Mr Short he was told that he would be employed. The Claimant agreed that he would be under the direction and instruction of Mr Short and OJL. OJL had a high degree of control over the work carried out by the Claimant and the Claimant agreed to be subject to that control. The relationship was one of master and servant.

Was there a mutuality of obligation?

90. The Claimant agreed to work 37 hours per week and OJL agreed to provide him with work and pay him £80 per week. There was therefore a mutuality of obligations between the parties.

Were the other provisions of the contract consistent with its being a contract of service?

91. The Claimant did not have a right to send a substitute. He was expected to work 37 hours per week for OJL and undertake the tasks set for him by Mr Short. The Claimant undertook a full week's work for OJL during each week of the relationship. The Claimant was provided with tools to use which was consistent with a contract of service. The Claimant was paid on a weekly basis. The Claimant worked for OJL from 16 August 2018 to 12 April 2019 and such a time period was inconsistent with the Claimant merely undertaking work experience. These provisions were consistent with a contract of service.

Was the Claimant an employee?

92. For the reasons already set out and applying the tests as set out above, the Claimant was an employee of OJL within the meaning of s. 230 ERA.

What was the period of employment with OJL?

93. The Claimant was employed by OJL from 16 August 2018 to 12 April 2019. After Mr Short had his accident, the Claimant carried on working on the church project. OJL had engaged Timber Structures Limited to complete the task and the Claimant assisted Mr Van Diepen. When Mr Short returned to work, he oversaw the joinery work including that of the Claimant. The Claimant's employment with OJL ended when Mr Anthony told him that Mr Short would not be returning and offered him work with OBL. The Claimant started working for OBL on 15 April 2019.

Was there a TUPE transfer between OJL and OBL?

Was there an economic entity before 12 April 2019?

94. OJL carried out joinery work and in order to do so had its own equipment, machinery, and workshop. Mr Short and the Claimant worked for OJL in the manufacture of components and to fit them. The work was undertaken for other entities including OBL in return for payment. OBL was a commercial enterprise engaged in joinery work and it was an economic entity

Did that entity transfer to R2?

95. OBL did not at any stage undertake joinery work. Joinery work was very specialist and when OBL required such work to be undertaken it engaged a subcontractor to do it. After OJL completed the project at the church, it no longer carried out any joinery work. After 12 April 2019, OBL did not undertake any joinery work. Further, the Claimant, after starting work on 15 April 2019, did not undertake any joinery work for OBL. The assets of OJL, namely the machinery, were given to Shoreditch Joinery on 13 May 2019 and did not pass through the hands of OBL. There was no evidence that the

machinery was used by OBL.

96. Although a stable economic entity need not have tangible assets and workers themselves can be considered an economic entity, the Claimant did not undertake joinery work for OBL, but only general building work.

97. Accordingly, the economic entity was a business providing joinery services. OBL did not undertake any joinery work and there was not a transfer of the economic entity to it.

Did the economic entity retain its identity and was the Claimant assigned to the organised grouping of resources or employees subject to the relevant transfer?

98. On the basis that an economic entity did not transfer to OBL it was unnecessary to consider these elements of the test.

Was there a service provision change to OBL?

99. The Claimant submitted that, in the alternative, there was service provision change, on the basis that when Mr Short ceased to be the contractor to OBL that the Claimant's services were taken over by either Mr Van Diepen or OBL. The services carried out by OJL on behalf of OBL were joinery services, specifically the manufacture of specialist wooden components such as doors, window frames and panelling. After manufacture, OJL would then fit the components into the building project. The Claimant carried out this work with Mr Short and between February and April 2019 with Mr Van Diepen and Mr Short. Those activities were not carried on by OBL at any stage. It was notable that the Claimant did not undertake any joinery work after 12 April 2019. Subsequently, Shoreditch Joinery undertook subcontracted joinery work for OBL, however Shoreditch Joinery was a separate entity to OBL. Accordingly there was not a service provision change to OBL.

Conclusion

100. There was not a TUPE transfer of the Claimant's employment from OJL to OBL.

Unlawful deductions from Wages by OJL

Was the claim presented in time?

101. The Claimant's employment with OJL ended on 12 April 2019 and he was paid that day. Accordingly, the Claimant should have presented his claim on or before 11 July 2019. The Claimant notified ACAS of the dispute on 11 July 2019 and the certificate was issued on 11 August 2019. The Claimant notified ACAS of the dispute on 11 July 2019 and the certificate

was issued on 11 August 2019. Applying the principles in Luton BC v Haque the claim should have been presented by 11 September 2019, i.e. the date on which the claim was presented. Accordingly, the claim was presented in time.

Was the Claimant paid the wages that he should have been?

102. The Claimant was paid £80 per week for undertaking 37 hours of work a week, which equated to £2.16 per hour. The Claimant was an employee and was entitled to be paid the national minimum wage. For an 18 to 20 year old the Claimant should have been paid at the rate of £5.90 per hour from 16 August 2018 to 31 March 2019 or £218 per week and from 1 April 2019 to 12 April 2019 he should have been paid £6.15 per hour or £227.55 per week. Accordingly, between 16 August 2018 and 31 March 2019 the Claimant was paid £138 less per week than he should have been. Between 1 April 2019 and 12 April 2019, the Claimant was paid £147.55 less per week than he should have been. Accordingly, the claim that there had been an unlawful deduction from wages by OBL was well founded.

Employment status with OBL between 15 April 2019 and 20 May 2019

Did the Claimant agree with OBL to provide his own work and skill in return for remuneration?

103. The Claimant agreed with OBL to personally undertake work for it from 15 April 2019. The Claimant was to be paid the same as when he had worked for OJL, namely £80 per week. The Claimant therefore agreed to provide his own work in return for remuneration.

Did the Claimant agree with OBL, expressly or impliedly, to be subject to a sufficient degree of control for the relationship to be one of master and servant?

104. The Claimant was told when and where to work by Mr Anthony and was under his instruction and direction. The Claimant was not able to provide a substitute and had to wear an OBL uniform. The Claimant was not able to refuse to undertake the work. OBL had a high degree of control over the work the Claimant carried out and the Claimant agreed to be subject to that control.

Was there a mutuality of obligation?

105. OBL agreed to provide the Claimant with work and the Claimant agreed to perform it for 37 hours per week, in return for £80 per week. Accordingly, there was a mutuality of obligation between the parties.

Were the other provisions of the contract consistent with its being a contract of service?

106. The Claimant did not have a right to send a substitute or work for someone else. He was expected to work 37 hours per week for OBL and undertake the tasks set for him by Mr Anthony. The Claimant was provided with a uniform. Further he was paid a set amount each week, which was inconsistent with a casual relationship. Those factors were consistent with a contract of service.

Was the Claimant an employee?

107. OBL had a high degree of control over the Claimant's work, it was obliged to provide him with work and the Claimant was obliged to personally undertake it. The Claimant was paid on a weekly basis and had to wear OBL's uniform. For the reasons already set out and applying the tests set out above, the relationship was one of employer and employee within the meaning of s. 230 of the ERA.

Unlawful deductions from Wages by OBL

Was the Claimant paid all wages due to him under his contract with OBL between 15 April 2019 and 17 May 2019?

108. The Claimant worked 37 hours per week during this period and was paid £80 per week, which equated to £2.16 per hour. The Claimant was an employee and was entitled to be paid the national minimum wage. For an 18 to 20-year-old the Claimant should have been paid at the rate of £6.15 per hour or £227.55 per week. Accordingly, the Claimant was paid £147.55 less per week than he should have been. The Claimant's claim that there had been an unlawful deduction from wages was well founded.

Automatically unfair dismissal under s. 104A of the Employment Rights Act 1996

Did the Claimant take any action or propose to take such action with a view of enforcing or securing the benefit of the right to the national minimum wage?

109. On 5 July 2019, the Claimant said in his text message that he wanted to talk about his wages and wanted to talk about back pay. He stated he had been paid £1.88 per hour until it was corrected when he was paid the minimum wage. He said that he really wanted to have the minimum wage from when he started. The Respondent submitted that this was not issuing proceedings and fell short of alleging that the right had been infringed. I rejected that submission. The Claimant pointed out that he had been paid less than the minimum wage and that he wanted back pay. This was done with a view to being paid properly and therefore with a view to securing the

benefit of the national minimum wage legislation. Accordingly, the Claimant had proposed taking the appropriate action.

What was the sole or principal reason for the Claimants dismissal?

110. The Claimant did not have 2 years' service and the burden was on him to show that the Tribunal had jurisdiction to hear the claim. I found that the reason for the dismissal was that the Claimant's attendance had been poor, and he had requested 3 weeks off work, so that he could work for someone else. Mr Anthony was angry about the Claimant's attendance and that he had sought to take a significant amount of time off to work for someone else. The Claimant was told the reason for his dismissal immediately after having sent the text message at 1851. The reasons the Claimant was given were, on the balance of probability, true, as evidenced by his timesheets and his acceptance that he had asked for the time off and had poor attendance. Mr Anthony was out with his family at the time of the conversations and was angry about the Claimant's request for time off and his poor attendance. Whilst out with his family, Mr Anthony did not have a proper opportunity to speak to the Claimant. Mr Anthony made no reference to the amount the Claimant was paid. Although the text message may have had some influence on Mr Anthony's decision, his principal reason was that the Claimant had not been attending work and had been seeking time off to work elsewhere, as demonstrated by what he told the Claimant at the time.

111. Accordingly, the sole or principal reason for the Claimant's dismissal was his poor attendance and seeking to take time off to work for someone else, not that he had proposed to secure the benefit of the national minimum wage.

112. The Claimant did not have two years' service and accordingly his claim of unfair dismissal was dismissed.

Holiday pay

To how much holiday was the Claimant entitled to during the leave year in which his employment ended?

113. The Claimant's leave year with OBL ran from 1 January to 31 December each year. The relevant period to consider was 15 April 2019 to 5 July 2019. The Claimant was an employee between 15 April 2019 and 20 May 2019 during which time he would have accrued holiday. The holiday pay in the Claimant's last wages payment did not include that period, it therefore appeared that this was not included in that calculation.

114. The Claimant worked for OJL between 16 August 2018 and 12 April 2019 and was not paid for accrued but untaken holiday. The Claimant did

not agree any provisions with OJL as to the leave year and therefore it ran from the anniversary of the start of his employment, i.e. 16 August to 15 August.

115. The parties did not make submissions on the basis of the findings of fact made in the case in relation to both Respondents and therefore directions were given separately as to further submissions and listing the hearing of a remedy hearing.

Workers right to access records

Did the claimant serve a production notice on OBL and did the Respondent respond?

116. The Claimant sent a production notice to the Respondent on 11 July 2019 and the Respondent did not respond. This was not disputed.

Did the Claimant have reasonable grounds to believe that he had been remunerated at less than national minimum wage for any pay reference period by his employer?

117. The Respondent submitted that the Claimant did not have a reasonable belief. I rejected that submission. The Claimant was working 37 hours per week from 15 April 2019 to 17 May 2019 and was being paid at less than the minimum wage. He had joined a union in April 2019 and was informed that he was being paid less than he should have been. The Claimant raised the issue of pay at the start of his employment with OBL and still considered that he had been paid less than he should have been at the end of his employment. On the basis of the amount of work the Claimant was doing, he believed that he had not been in accordance with the National Minimum Wage and that belief was reasonable.

118. Accordingly, OBL failed to provide the Claimant with or access to the relevant records and the complaint was well founded.

119. Under s. 11(2) of the NMWA the Tribunal shall make an award of 80 times the hourly amount of the national minimum wage in force at the time when the award is made. At the time the award was made the Claimant was 21 years old and the relevant rate of pay for a 21-year-old was £8.20 per hour. Accordingly, the award that must be made was £656.

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Employment Judge Bax
Dated 17 December 2020

Judgment sent to Parties on
23rd December 2020
By Mr J McCormick

For the Tribunal office