



# EMPLOYMENT TRIBUNALS

**Claimant:** Cherif Layadi

**Respondent:** Shoe Embassy London Ltd

**Heard at:** London South **On:** 12 February 2020

**Before:** Employment Judge Housego

## Representation

**Claimant:** In person

**Respondent:** Ms P Hall, of Peninsular Business Services Ltd

## JUDGMENT

1. The respondent made unlawful deductions from the wages of the claimant.
2. The respondent is ordered to pay to the claimant the sum of £11,172.

## REASONS

1. The claimant worked for the respondent as its senior manager, overseeing shop managers. He reported to the owner of the respondent, Tomas Savicius. The respondent owns a chain of shoe shops.
2. He brings claims for unpaid salary, for holiday pay, and for deductions made from his pay.
3. I declined the application of the respondent for an adjournment, based on the inability of Tomas Savicius to attend and give evidence. He is the owner of the respondent. He has suffered such severe back pain that his GP has certified he is not able to attend. His witness statement refers to many of the documents, and for the most part is paralleled by that of Richard Plasek, who is the external accountant for the company and who practices under the style of Helrik & Louw. I concluded that while the financial impact of any award would fall, indirectly, on Mr Savicius, so that he wished to be able to attend, it would not be unfair to the respondent to conduct the hearing in his absence, and so refused the request. The case has already been postponed once and further (necessarily lengthy, given listing difficulties) adjournment would also be damaging.

4. I heard oral evidence from the claimant and from Richard Plasek, who is an accountant with his own practice, and who works closely with Tomas Savicius in the respondent's business.
5. On 14 September 2016 the claimant started as an employee on a fixed salary of £30,000 a year with a bonus, with the job title of "*Cluster manager*". His contract was signed by Mr Plasek. In February 2017 he was made "*Head of Retail*" and his salary increased to £37,000. In September 2017 his total remuneration was increased to £45,000 a year, some by PAYE, most through a company C&M Consultancy Ltd (10945867).
6. This case was remarkable for the dearth of relevant evidence. For example, the respondent asserted that the claimant had several employees working for his consultancy company several of whom had worked in the respondent's business, but provided no evidence of this, and had not said this before it was said in oral evidence by Mr Plasek. The respondent asserted that the claimant had provided the partnership agreement between his company and the respondent, and it was in the bundle starting at page 200. However the bundle provided to the claimant by the respondent stopped at page 197 (as did its index). The claimant said that Mr Plasek's firm of accountants had formed the limited company that entered into the consultancy agreement. Mr Plasek said that the claimant had formed it himself, and that he currently traded with a different company, both formed at the same time in September 2017. Neither party provided any evidence about the formation of the company. The claimant denied any knowledge of the company he said Mr Plasek had formed for him. The respondent said that the claimant had recently been active at Companies House for that company, and that as recently as 19 December 2019 dormant accounts had been filed for it by the claimant: but this was in oral evidence for the first time, and the claimant denied all knowledge of filing those accounts (which were indeed filed).
7. There was dispute about a Lexus car said by the claimant to be a company car: no V5 or other document was produced about it. A photograph of the V5 was then produced to me, showing the claimant as registered keeper, but at an address not his own. This was, Mr Plasek said, a property he owned and let out, and had been used to get a lower insurance premium on the car than the claimant could obtain, or alternatively he was living in a hotel at the time and could get no insurance at all. The car was said by Mr Plasek to have been owned by Tomas Savicius before the appellant had it, not by the respondent. The claimant and Mr Plasek both denied any knowledge of where the vehicle is now. Quite why Mr Plasek, who said that he had no financial interest in the respondent, should have the respondent's manager using an address he owned for personal purposes was unexplained. Nor was it explained why it was Mr Plasek who signed the offer letter of 02 February 2017 offering the claimant the role of Head of Retail at £37,000 a year. None of this featured in any witness statement or document. The claimant said that after the Lexus he had another company car, a Mercedes. Mr Plasek said this was his own car, and the claimant had never had it. The claimant said that he had photographs of it, and emails about a broken windscreen. None of this featured before emerging in the hearing, and I declined to allow these contentions to be advanced.
8. The appellant asserted that there was a company policy not to pay people when they left and provided some complaint emails, but not the replies to them. The respondent asserted that the claimant's absence in September 2018 was supported by a medical certificate which the surgery said they had not issued, with an email (165) to say that they had not issued it, but gave no reason to disbelieve the claimant's assertion that the surgery had told him they would not comment to a third party on anything about him without his authority, which he

had not given. I have to decide the claim on the basis of the evidence provided to me, however unsatisfactory.

9. In September 2017 there was a change in the remuneration of the claimant. His income would rise to £45,000 a year, of which £8,160 a year was to be PAYE and the balance invoiced by his company C&M Consultancy Ltd (co number 10945867). In fact he was paid £800 monthly by PAYE not the £680 which would be £8,160 yearly.
10. The "*Partnership Agreement*" stated that it was formed in August 2017. There were invoices sent and paid at £2,950 a month, gross, which is £35,400. The difference between the 12 times £2,950 (£35,400) and £45,000 is £9,600, which tallies with neither £800 a month nor £8,160 a year.
11. The claimant says that the respondent told him they were doing this and he had no choice, and the reason was the saving in NI contributions of about £1,000 a year. The respondent says that this was a proposal by the claimant to which they acceded.
12. The claimant was reimbursed for expenses he incurred in his duties. These were processed by an administrative assistant, who checked them and forwarded them to Tomas Savicius to sign off, and the administrative assistant then paid the claimant. The claimant says that he provided all the information and the amount deducted was an invention, and another example of the respondent getting back at people. He says they make a policy of so doing. He provided some complaint emails but not the respondent's replies, and Mr Plasek also said that one of the complainants was the claimant's business partner. None of this is material for findings of fact when bare assertion made for the first time at the hearing. The respondent says that the claimant bullied a young junior accounts person to approve the payments, and they were approved for payment with many queries, and the deductions were for payments that were not properly evidenced.
13. One of the expenses reimbursed was the excess on a car insurance policy. The car was driven by the claimant, and he was the registered keeper. It was a 2006 Lexus originally owned by Tomas Savicius. The address given on the V5 was one he had never lived at. In January 2018 the claimant was clear that this was his company car, as he emailed on 11 January 2018 (54) objecting to paying the insurance policy excess. On 13 May 2017 he was involved in a crash when driving this car. He says that a car overtook him as he approached the brow of a hill, and then stopped abruptly because of stationary traffic not visible when he was overtaken, and he ran into the back of the other car. The insurance excess was £3,000 and with additional costs the claimant claimed £3828 as an expense (doc 68 dated 15 June 2017 from the broker states the amount). This was paid to him on 18 June 2018. The respondent says that the claimant had only a provisional licence and was unaccompanied at the time of the accident, which was why the insurance company did not pay up, apparently at all. The claimant agrees that he has a provisional driving licence, but says that he also an international driving licence issued in Algeria (where he is from) which he says was validated in Italy and in France and was valid throughout the EU.
14. He also said that he was accompanied at the time, by Olga Bira, a colleague. The respondent says this is not true and he had given 2 names to the insurance company, the other being James Lean, and the difference was so great that it is plain he was not truthful about being accompanied. It says that Olga Bira was the claimant's ex wife. She has written emails for him (eg 119, 13 September 2018). There is evidence from the insurance company in the form of emails saying that the claim was invalidated by driving unaccompanied (doc 93, 20 September 2017), but no evidence about the car, where it is now, who repaired it, at what

cost, who paid that cost, whether the claimant held an international driving licence valid in the UK and so on.

15. It is impossible to make findings of fact about this with any confidence, given the absence of any information or credible account from either side, other than that Tomas Savicius made the car available to the claimant, who was registered as keeper of it, and that while he was driving it he was involved in a crash. The respondent arranged for an address of the claimant to be given to the insurance company at which he had never lived (that much was accepted by the respondent), either to reduce his premium or to enable him to get insurance which otherwise he could not. The validity of that insurance is doubtful given the requirement of utmost good faith in insurance contracts. Nor was it clear whether the claimant, the respondent or Mr Savicius was the insurer.
16. The claimant says that he took no holiday in calendar year 2018, amended in oral evidence to 10 days in September 2018, during a period when he was not paid and was not at work. It is agreed that the calendar year was the holiday year, and that the entitlement was 28 days a year.
17. The claimant does not claim notice pay, accepting that his resignation was with immediate effect.
18. The first question is whether the claimant was an employee on £45,000 a year, or whether he was genuinely a consultant billing a fixed £2950 a month, and at the same time an employee on £8,120 a year.
19. Although prompted by me to do so, neither party fully addressed the issues set out in Autoclenz v Belcher [2011] UKSC 41 which were helpfully set out in Nayak v. Lucent Advisors (UK) Ltd & Anor (Jurisdictional Points - Worker, employee or neither) [2017] UKEAT 0154\_17\_0412 as follows:

*"Firstly, there must be a contract between the employer and the employee.*

*Secondly, that contract must contain mutual obligations which are related to work.*

*Thirdly, the employee must be subject to the control of the employer, at least insofar as there is room for such control. It may need to be emphasised that it is the power to control which is essential - the demonstrated exercise of that control is not.*

*Fourthly, the employee must be obliged to perform the work personally to the employer.*

*Finally and fifthly, the contract must not contain terms which are inconsistent with it being a contract of employment. There will of course be contracts under which work or services are performed by one party to the contract for the benefit of the other, which do not create a relationship either of employee or of worker.*

*With regards to control, there must always be some room for the exercise of the power of control, but what matters is the authority and not the demonstrated exercise of it."*

20. The claimant's contract of employment was a full time contract, at £8160 a year. He was paid £800 a month through PAYE, which is £9,600, not £8,126. This

does not indicate that there was a genuine employment. Nor could he be full time as well as a consultant. The job description for the employment was the full Head of Retail description. He was in effect running the operation of the respondent's shops, including recruitment and dismissals.

21. On the other hand there was an email of 12 September 2017 from the claimant to Mr Savicius (41) stating "*I intend to do other work under C&M consultancy*". firm.
22. To other evidence I can give no weight. The partnership deed appears to have been prepared by the claimant and emailed by him to Mr Savicius. However this was said only at the hearing, and the document bundle provided to me contained the title page of the document: but the last 25 or so pages of the bundle, which included this page, were omitted from the bundle they sent to the claimant. The email to which it was attached was from the claimant's work email address, to which he no longer has access. It does not appear to have been disclosed before the hearing and it also was in that part of the bundle not given to the claimant. Mr Plasek said that the claimant brought others into the respondent to do work under the consultancy agreement: which had never been stated before he gave his oral evidence. Nor does that accord with the claimant being paid £37,000 before the change, and a total of £45,000 after it. Mr Plasek said that the claimant actually did do consultancy work for others and employed 5 or 6 other people, and he named a person whom he said was the claimant's business partner, none of which had been said before oral evidence was being given.
23. Mr Plasek referred to a LinkedIn page showing the claimant's business. The report into his grievances (doc 141) states that there is a LinkedIn profile for the claimant and C&M Consultancy, and reproduces a screen shot of what might be such a page, but it is not legible. There was no evidence as to who formed the company, and the Companies House website showed only a company formation company set it up: either claimant or Mr Plasek could have bought the company from them. Whoever did so could be material to credibility, but it is consistent with the claimant's account that he was forced to do so whoever actually commissioned the company.
24. There is another company, Bash London Ltd (10945855), incorporated on 05 September 2017, of which the claimant is the sole director. Dormant company accounts were filed for that company on 03 December 2019 in the name of the claimant. He denies all knowledge of that. C&M Consultancy Ltd was incorporated on the same day as Bash London Ltd. It filed micro accounts on 12 June 2019, made up to 30 September 2018, which is consistent with the claimant's evidence that he retained an accountant to deal with the money paid to the company by the respondent. The respondent points to the same date of incorporation as being evidence that it was the claimant who must have formed both companies. There is no way of forming any evidence based conclusion on these competing assertions.
25. What is left is the agreed fact that the pay was to rise from £37,000 to £45,000, and that this was to be a full time employment. The claimant's role had considerable autonomy, but he was responsible to Mr Savicius to meet the targets set for him. He was controlled by Mr Savicius in the necessary sense. There is no evidence on which it could be concluded that anyone else could, or did, any of the duties of the claimant for the respondent. There would be little left of the increase, if any, if the claimant was to pay others. There was a contract of employment. There is nothing in the arrangement to indicate that it was not a contract of employment. There is no evidence that the claimant did anything other than work full time for the respondent.
26. For the reasons given I find that this was a contract of employment at £45,000 a

- year, imposed by the respondent on the claimant.
27. The claimant sought £15,000 for pay not paid to him, for the 4 months August 2018 to the end of December 2018. In the hearing he sought to make this 5 months, saying that he was paid mid month for the previous month, so that the payment received in August 2018 was for July 2018. It is too late to make such an application when giving evidence. It is common ground that there was no payment of salary for the months September to December 2018, inclusive, as the respondent deducted £7,494.81 from the pay due to the claimant, so that there was a negative balance reducing at £800 a month from August 2018 to January 2019.
  28. The amount not paid, and so an unlawful deduction contrary to S13 of the Employment Rights Act 1996, is therefore £15,000 (1/3<sup>rd</sup> of £45,000 for the 4 month period).
  29. The claimant said that he had a company car, but this is not consistent with the V5 being in his name and with an address he gave, nor with him having to pay the excess himself: if it was a company car it would be the company which paid it and would then seek repayment from the claimant. Therefore he should not have been paid £3,828 as an expense of his employment.
  30. The remaining deductions are said to be an accumulation of queries going back to 08 January 2018 about expenses paid for which there was either no adequate documentation provided, or which were outside policy as over £200 a month. The fact that the £3,828 was paid is supportive of the respondent's case that the claimant was assertive enough to get things paid even when they should not have been, but it was the owner of the respondent who personally approved the payments. It is now far too late to seek to recover money not properly evidenced.
  31. The claimant has succeeded in pay for the period of 4 months to the end of December 2018. He stated that he had holiday in September 2018 but was not paid. The award of pay rectifies that. He would have had bank holidays until August. He could have taken any remaining holiday while not at work after July 2018. I give no credence to the table purporting to show that the claimant took 33 days holiday as it is unevidenced. But it is for the claimant to prove his case, and in respect of holiday pay he has not done so.
  32. Accordingly I order the respondent to pay to the claimant £15,000 less £3828, which is £11,172.
  33. The difficulties with the evidence in this case could not have been resolved had Mr Savicius attended and given evidence.

Employment Judge Housego

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Date 13 Feb 2020