Appeal No. UKEAT/0074/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

PLASTERING CONTRACTORS STANMORE LTD	APPELLANT
MR P HOLDEN	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ANTHONY BERTIN (Solicitor) Yewgate Legal Ltd t/a Employment Relations Yewgate Barn Old Road Elham Canterbury CT4 6UH
For the Respondent	MISS KEIRA GORE (of Counsel) Instructed by: OH Parsons & Partners 3rd Floor Sovereign House 212-224 Shaftesbury Avenue London WC2H 8PR

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

The Claimant worked almost exclusively for the Respondent for many years unloading pallets of plasterboard and doing general work on site. He was a self-employed sub-contractor with a CIS card. There was no obligation on him to accept work when offered and no obligation on the Respondent to offer him work. It was argued that there was no mutuality sufficient to found worker status, and there were subsidiary arguments as to control, right to use a substitute and degree of integration in the workforce. Held – appeal dismissed. The necessary mutuality existed while the Claimant was working for the Respondent: **James v Redcats (Brands) Limited** [2007] IRLR 296 considered and applied. There was no error of law in respect of Employment Judge's approach to the questions of control, substitute and degree of integration. **Cotswold Developments Construction Limited v Williams** [2006] IRLR 181, **Byrne Brothers (Formwork) Ltd v Baird & Ors** [2002] IRLR 96 and **Clyde and Co LLP and another v Bates van Winkelhof** [2014] UKSC 32 considered and applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Plastering Contractors Stanmore Ltd (hereafter "PCS") against a Judgment of Employment Judge Bedeau, dated 5 November 2013, in respect of a claim for holiday pay made by Mr Patrick Holden. The Employment Judge held that Mr Holden was a worker for the purposes of the **Working Time Regulations 1998** and the **Employment Rights Act 1996**. PCS argues, on this appeal, that the Employment Judge erred in law in holding that Mr Holden was a worker.

The Background Facts

2. PCS offers a plastering service to the construction industry. Mr Holden began to work for it on 7 April 1997 as a general labourer. From April 1997 until February 2001 he was an employee, but with effect from 7 February 2001 it was agreed, in exchange for a payment of £200, that he would become a labour-only subcontractor. From that time onwards he registered and was paid under the construction industry scheme, that is to say PCS deducted 20% from his gross remuneration and accounted for it to the tax authority, HMRC, and he engaged an accountant for submission of accounts to HMRC so that the correct tax could be calculated.

3. Mr Holden was placed by PCS on its database of labour-only subcontractors. If the services of a skilled worker or labourer were required at a particular site, either the Contracts Manager or a supervisor would contact him to provide him with work. As the Employment Judge found, Mr Holden worked on many sites, being regarded as hard-working and experienced. He loaded and unloaded pallets of plasterboard and engaged in general labouring work such as breaking up screed, clearing up sites and transporting equipment and materials between sites.

4. When he was working Mr Holden might be paid either by price, particularly for loading or unloading pallets of plasterboard, or by time. If he was paid by price, he would start at 8am and leave when he had finished the work. If he was paid by time, he would work between 8am and 4pm for a daily rate. He did not submit invoices to PCS. The supervisor recorded his hours of work, and PCS's office arranged payment. The rates of pay were not the subject of any negotiation. They were set by PCS. Mr Holden was provided with safety clothing, a visible vest, hat and gloves, but provided his own safety boots. If he had to transport equipment between sites, he was provided with a vehicle.

5. The Employment Judge specifically found that PCS was not obliged to provide Mr Holden with work and Mr Holden was not obliged to accept it. Thus, on PCS's side, there were occasions when it could not provide him with work and did not pay him. The Employment Judge mentioned a particular period of two weeks when Mr Holden found work with another company for this reason. Likewise, on Mr Holden's side, there were occasional days when he turned down work so that he could take his wife to the hospital or the doctor.

6. By and large, however, Mr Holden worked for the Respondent. Once his day was over, he did not work for others except that at weekends, towards the end of his time with PCS, he did some landscape gardening work to supplement his income. The Employment Judge specifically found that Mr Holden did not advertise himself to the world as a labourer. He said that Mr Holden worked "almost exclusively" for 16 years for PCS.

7. The Employment Judge set out, from figures provided by PCS, the totals of Mr Holden's gross income year by year. PCS's figures show he was indeed working for them most of the time. There were occasional weeks, including weeks at what appeared to be Christmas and

New Year breaks, when he did not do any work, and there were other weeks when he appears to have had only a few days of work. The years from 2011 to 2013 were leaner than earlier years.

8. Mr Holden last worked for PCS in May 2013. The Employment Judge put it as follows:

> **"7.17 The claimant was getting increasingly frustrated at having to spend more time at home waiting for a call to tell him that there was work available. Without giving notice to the respondent he decided to leave to take up similar work with another company on 31 May 2013."**

9. If Mr Holden accepted work, then he turned up himself. The Employment Judge said the following in his findings of fact:

> **"7.14 Mr Murton said in evidence and I do find as fact that had it been the case that the claimant sent some else as a substitute, the respondent, through the site supervisor had to be sure that that person was able to work as efficiently as the claimant, had a CIS card and would be required to undergo an induction in relation to health and safety matters on site."**

The Employment Judge's Reasons

10. Mr Holden and PCS were legally represented at the hearing. Mr Holden's case was that he was a worker for the purpose of the **Working Time Regulations 1998** and the **Employment Rights Act 1996**, that he was entitled to holiday pay and that the failure to pay holiday pay to him amounted to a series of deductions from wages which he was entitled to claim by virtue of section 23(2) of the 1996 Act. The case of PCS was that Mr Holden was not a worker, and in any event that he was only entitled to payment for leave in the last holiday year. The Employment Judge reserved judgment.

11. After setting out findings of fact, on which I have already drawn, and summarizing the submissions on each side, the Employment Judge set out his statement of the law, referring in particular on the question of worker status to the appropriate statutory provisions and to **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, **James v Redcats (Brands) Ltd** [2007] IRLR 296, **Byrne Brothers (Formwork) Ltd v Baird** [2002] IRLR 96

and **Macfarlane & Anr v Glasgow City Council** [2001] IRLR 7. He set out his essential conclusions in a series of paragraphs beginning at paragraph 25 of his Reasons. (Something has gone awry in the numbering of these paragraphs in the Employment Judge's Reasons, and I have renumbered them for convenience).

> **"25. The onus is upon the claimant to establish that he is a worker. It is not the claimant's case that he was an employee of the respondent.**
>
> **26. Did the claimant undertake to perform work personally to the respondent? I am satisfied that there was an oral agreement between him and the respondent to provide labour in return for payment. He worked on his own and did not operate as a business advertising his services to the world at large. The respondent was not his client and he provided, personally, his services as a labourer to the respondent. His hours were recorded and submitted to the respondent's office for payment. In practice he did not provide a substitute even on the days when he had to take his wife to the hospital or in connection with her medical appointments. Even if a substitute was provided that person was required to have a construction industry card and must undergo health and safety training. I am satisfied that the respondent would not have automatically accepted a substitute as it was looking for someone with the claimant's level of experience and efficiency.**
>
> **27. Whilst I accept that the respondent was not obligated to provide the claimant work and the claimant was not obligated to accept it, having regard to the fact that he had been working with the respondent for 16 years, the respondent regularly offered him work and expected him to turn up for work when during working hours. In reality he did not turn down work offered to him during his time with the respondent. He worked in the same way as when he was considered an employee of the respondent between 1997 to 2001.**
>
> **28. He was required to be on site at 8.00am and finished at 2.30pm when engaged in price work or 4.00pm when engaged in day work.**
>
> **29. He wore safety clothing provided by the respondent such as a safety hat, high visibility jacket and gloves at its expense. He provided his own footwear.**
>
> **30. From the schedules of payment he had been consistently engaged in work with the respondent for 16 years. I accept that there was the odd day or two when he did not work. He worked, almost exclusively for the respondent. He worked with minimum supervision. He knew the staff, wore the respondent's work clothes and drove its vehicles. I concluded that he had been integrated into the workforce. The respondent knew that when work was offered to him it would be accepted and it expected him to do the work on time.**
>
> **31. I accept that he was not paid for the days he did not work. He was not subject to the respondent's grievance and disciplinary policy and paid his own income tax and had his own accountant and industry card.**
>
> **32. Weighing up the factors on either side of the argument, on balance, I do conclude that the claimant was a worker having regard to section 230(3) Employment Rights Act 1996 and regulation 2(1) Working Time Regulations 1998."**

Submissions

12. On behalf of PCS, Mr Anthony Bertin's principal submission is that, on the Employment Judge's findings, there was no mutuality of obligation sufficient to render Mr Holden a worker. The express finding in paragraph 27 of the Employment Judge's Reasons that PCS was not obliged to provide him with work and Mr Holden was not obliged to accept it is inconsistent

with any such mutuality of obligation. On this submission, Miss Gore replies that the necessary mutuality of obligation subsisted while the Claimant was working (see **James v Redcat (Brands) Ltd** at paragraphs 83 et seq).

13. Mr Bertin next criticises the Employment Judge for failing to make a clear finding as to whether Mr Holden had or had not a right to send a substitute, a right which would or might be inconsistent with a contract to do work personally. To this submission, Miss Gore replies that an obligation to work personally is not inconsistent with a limited right to send a substitute (see **Byrne Brothers** at paragraphs 1 and 13-14). The Employment Judge directed himself correctly in law and reached a permissible conclusion on the evidence.

14. Mr Bertin also sought to read across from **Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Assurance** [1968] 2 QB 497 a requirement that the worker must to be to a sufficient degree under the control of the person engaging him. He submitted that, since some of the work was piecework, which Mr Holden could do at its own pace, this requirement was not satisfied. Miss Gore replies that the Employment Judge cannot be criticised for failing to address the question of control further than he did and that he made the necessary findings in his reasons.

15. Mr Bertin also criticised the Employment Judge for failing to make a finding as to the degree of Mr Holden's integration into the business. He placed reliance upon **Clyde and Co LLP and another v Bates van Winkelhof** [2014] UKSC 32, a recent decision of the Supreme Court not available to the Employment Judge. Miss Gore replies that the Employment Judge made factual findings relevant to the degree of Mr Holden's integration in the business and

applied the correct legal test, particularly in reaching conclusions set out in paragraph 30 of his Reasons.

Statutory Provisions

16. For the purposes of the **Working Time Regulations 1998**, "worker" is defined as follows by Regulation 3(1):

> **"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**

17. Part II of the **Working Time Regulations** confers rights upon a worker. These include entitlement to maximum weekly working time, daily rest, weekly rest, annual leave and payment in respect of annual leave.

18. The definition of "worker" in the **Employment Rights Act 1996** is to similar effect (see section 230(3)). Several rights within the 1996 Act depend upon the establishment of worker status including the right to make a claim that there has been unlawful deduction from wages (see section 23). Other rights, such as the right to claim unfair dismissal or redundancy pay, depend upon the establishment of employee status.

Discussion and Conclusions

19. As Lady Hale put it recently in **Bates van Winkelhof** (paragraph 31) employment law distinguishes between three types of people: those employed under a contract of employment, those self-employed people who are in business on their own account and undertake work for

their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. This intermediate class is often called "limb (b)".

20. There are three elements to the limb (b) definition. These were set out by Elias P in **James**:

> **"First, there must be a contract to perform work or services. Second, there must be an obligation to perform that work personally. Third, the individual will not be a worker...if the provision of services is performed in the course of running a profession or business undertaking and the other party is a client or customer. In practice the last two are interrelated concepts..."**

21. Against this background, I turn to the question of mutuality. This concept of mutuality does not appear in the statutory definition and it is apt to give rise to confusion.

22. The first question which an Employment Tribunal must consider when it applies the statutory definition is whether there was a contract between the putative worker and employer at all.

23. It is important to keep in mind that there may either be an overarching contract, sometimes called an umbrella contract, under which a worker is engaged; or there may be a series of shorter contracts for specific assessments or periods. When considering whether a person is an employee, this distinction can be of great importance. The rights conferred on employees commonly require minimum periods of service. But the distinction between the two types of contract, though real, will often be of less significance when considering whether a person is a limb (b) worker. For the rights conferred on a limb (b) worker do not generally require minimum periods of engagement.

24. The concept of mutuality is generally relevant in considering whether there is a contract at all; in other words, whether there is the necessary minimum of obligation on each side to

constitute a legally binding agreement. Its importance differs depending on whether the contract alleged is an umbrella contract or a series of shorter contracts for specific assignments or periods. For there to be an umbrella contract, there will need to be some obligation on each side to provide and undertake work over and above individual assignments or periods. If there is no such obligation on each side, a lawyer will say that the necessary mutuality is lacking. But if what is under consideration is a series of shorter contracts for specific assignments or periods, the necessary obligation on each side will exist while that assignment or period is being worked.

25. I have put into my own words what has really already been explained by Elias P in **James**:

> **"78. As the EAT observed recently in the case of** *James v Greenwich Council* **UKEAT/0006/06 para. 54, typically the focus on mutuality of obligation arises in circumstances where a worker is employed intermittently by an employer and the question arises whether there is a contractual relationship in the period when the worker is not actually working. This is important for establishing continuity of employment (although sometimes s.212 of the Employment Rights Act 1996 will assist in that regard). The only obligations which in practice are likely to arise are some duty on the employer to offer work and some duty on the worker to accept work if offered. If there are no mutual obligations of any kind, there can be no contract. That is a simple principle of contract law, not unique to contracts of employment.**
>
> **...**
>
> **82 In my view,** *Mingeley* **has no relevance to this case. It cannot be doubted that whenever Mrs James is actually working she is doing so pursuant to a contract and she is providing a service for which she is entitled to be paid. If she were not paid for work done, she would obviously have a claim in contract. Mr Rose said that this would mean that each assignment would have to be treated as a separate contract. That would seem to be right, but there is no reason why each assignment should not be so treated. The only issue is whether she is entitled to receive the minimum wage for the work she does, and that depends on whether the nature of that contract makes her a worker or home worker within the statutory definitions.**
>
> **83 Since when working she is plainly providing a service, the two potentially relevant questions are whether she is obliged to perform the service personally; and whether she is doing so in the course of a business. The fact that there is no contract in place when she is not working - or that if there is, it is not one which constitutes her a worker - tells us nothing about her status when she is working. At that point there is a contract in place. If the lack of any mutual obligations between engagements precluded a finding that an individual was a worker when carrying out work pursuant to an engagement, it would severely undermine the protection which the minimum wage legislation is designed to confer.**
>
> **84. Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work. If casual and seasonal workers were to be denied worker status when actually working because of their lack of any such status when not working, that would remove the**

protection of minimum wage and other basic protections from the groups of workers most in need of it.

...

93. Accordingly, in my view the fact that there is a lack of any mutual obligations when no work is being performed is of little, if any, significance when determining the status of the individual when work is performed. At most it is merely one of the characteristics of the relationship which may be taken into account when considering the contract in context. It does not preclude a finding that the individual was a worker, or indeed an employee, when actually at work."

26. In **James** the Employment Appeal Tribunal was primarily concerned with the minimum wage legislation. The reasoning is, however, apposite to the **Working Time Regulations**. Rights under these regulations, including the right to annual leave, are intended to benefit workers whose employment is short-term or casual as well as workers under a long-term contract (see **R (BECTU) v Secretary of State for Trade and Industry** [2001] ICR 1152 at paragraphs 46-51).

27. I should add that there is a secondary sense in which the term "mutuality" is sometimes used. Here, it relates to the question, not whether there was a contract at all but whether the contract was to work personally. It is sometimes said, for example, that if the contract did not require the putative worker to provide his own labour and allowed him to send a substitute, the necessary mutuality did not exist to establish the type of contract required for a limb (b) worker. I have seen the expression used in this way, but I do not myself find it helpful. Once a contract is established to exist, there is no doubt that there are mutual obligations. The focus will then be on the nature of those obligations rather than the existence of any mutuality.

28. Against that background I turn to the reasoning of the Employment Judge in this case. His reasoning does not draw clear distinction between the existence of an umbrella contract and the existence of a series of contracts for specific assignments or periods. His reasoning is, however, inconsistent with the former because he found there was no obligation to provide

work or accept it; and entirely consistent with the latter. The only way his findings and reasoning can be read, in my opinion, is as accepting that, when Mr Holden was working for PCS, he did so for each period or assignment pursuant to a contract to perform work personally. Since he was working for PCS for the vast majority of the time in question, he was under contract and the necessary mutuality existed in all those periods. I see no error of law in this respect in the Employment Judge's reasons once it is understood that his finding implicitly relates to a series of contracts rather than a single umbrella contract.

29. I can then deal briefly with Mr Bertin's other submissions. The question whether there was a right to provide a substitute relates principally to the question whether the contracts between Mr Holden and PCS were contracts whereby he undertook to do the work personally. The Employment Judge quoted appositely from the relevant cases including **Byrne Brothers** and **James**. A limited power of substitution is not inconsistent with the existence of an obligation to work personally. In this case there was no express provision at all about substitutes and in practice substitution did not occur. It is plain from the Employment Judge's finding in paragraph 7.14 that, if any right existed to provide a substitute, which speaking for myself I doubt, that right was very limited indeed. I see no error of law in the Employment Judge's conclusion expressed in paragraph 26 of his Reasons.

30. With regard to the question of control, I do not think the Employment Judge was required to deal with the question of control in any more detail than he did. No doubt the existence of a right to control can be relevant to the question of a putative worker is carrying on a business of which the putative employer is the client. In this case Mr Holden worked as a labourer within a workforce controlled by a supervisor. It is fanciful to suppose that there was no right of control, although no doubt in practice an experienced worker like Mr Holden required very

little supervision. The Employment Judge found in terms that Mr Holden worked "under the instructions of the site supervisor" at paragraph 7.3 of his reasons.

31. This brings me finally to the question of the extent to which Mr Holden was integrated into the business of PCS. This relates to the question whether the worker is carrying on a business of which the employer is the client.

32. In **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, Langstaff J suggested at paragraph 53 that:

> **"... focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."**

This was approved by the Supreme Court as being is in most cases a helpful approach to apply, although it must not be allowed to supplant the word of the statutes (see **Bates van Winkelhof** at paragraph 39).

33. In this case the Employment Judge applied the statutory test. I do not think he can be faulted for doing so. He also had the integration test in mind (see paragraph 30 of his Reasons). Mr Holden did not actively market his services as an independent person to the world in general. He was recruited by PCS to work as a member of the workforce of PCS under a supervisor at a particular site or to transfer goods between sites. I see no error of law in the Employment Judge's reasoning.

34. I have, I believe, dealt with the points which Mr Bertin has made. (In the Notice of Appeal there were other points of a factual nature which Mr Bertin did not pursue). I conclude that the Employment Judge committed no error of law. The appeal will be dismissed.

35. The Employment Judge, having reached its conclusion on worker status, left over subsequent questions for the parties to arrange a Remedy Hearing if they could not settle the claim. The matter will be remitted for the parties to arrange a further hearing in the event they cannot settle their differences. I think they will be wise, prior to such a hearing, to list out carefully the remaining issues to ensure that the matters are properly covered in the evidence which they call.