EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Guimaraes	**AND**	Bounce Back

Heard at: London Central **On**: 30 June 2017

Before: Employment Judge Glennie

Representation
For the Claimant: In person
For the Respondent: Ms O Dobbie, Counsel

JUDGMENT ON REMISSION FROM EMPLOYMENT APPEAL TRIBUNAL

The judgment of the Tribunal is that the Claimant was not an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

REASONS

1. By a judgment with reasons sent to the parties on 22 January 2016 I decided, among other matters, that the Claimant was a worker engaged by the Respondent (which was not disputed) but that he was not at any time during the relationship between them an employee within the meaning of section 230 of the Employment Rights Act 1996. The Claimant successfully appealed to the Employment Appeal Tribunal on that point, which was remitted to me for fresh consideration in the light of the EAT's judgment (HHJ Eady QC, UKEAT/0236/16/JOJ).

2. In the final paragraph of her judgment HHJ Eady suggested that one course might be to put over the issue of employment status over to the full merits hearing. At a telephone preliminary hearing on 24 April 2017 both parties stated that they preferred to have the issue determined by me, rather than having it put over as suggested. Their reasons for their preference are given in my note of that PH. In the event, I agreed to determine the issue, and on 30 June 2017 I heard and read further submissions from the parties. I did not hear any additional evidence on that occasion.

3. It seemed to me that the EAT's judgment, and the guidance given by HHJ Eady, required me to give fresh consideration to two aspects of the matter, namely:

3.1 Particular aspects of my findings of fact, being as follows:

3.1.1 In paragraph 47.1 of my earlier reasons I stated that the Claimant was not paid when he did not work: in paragraph 22 of her judgment, HHJ Eady pointed out that I had not made clear in respect of what period I was making that finding.

3.1.2 In paragraph 47.2 I stated that there was no provision for holiday pay, having held in paragraph 40.5 that the Claimant did not receive any paid holiday. In paragraph 24 of her judgment, HHJ Eady pointed out that it was common ground that the Claimant had been paid for holiday taken at least from 2012 onwards.

3.1.3 In paragraph 28 of her judgment, HHJ Eady pointed out that I had failed to resolve the question as to why the Claimant was not being paid on a PAYE basis.

3.2 The correct application of the test of whether a contract was a contract of employment.

4. I will deal first with my further consideration of the factual questions. In doing so, I have re-read the findings that I expressed in paragraphs 40.1 to 40.12 of my earlier reasons. I will not set these out again in these reasons, but they remain applicable, except to the extent that I shall revise them in accordance with the EAT's guidance.

5. I approached the question whether the Claimant was paid when he did not work separately from that as to holiday pay. In submissions at the reconsideration hearing Ms Dobbie for the Respondent accepted that from 2012 onwards the Claimant was largely paid the same monthly sum regardless of the days or hours that he actually worked. As recorded in paragraph 40.3 of my earlier reasons, the Claimant stated in his oral evidence that it could be that a week or a day's pay would not be paid if he did not work.

6. I repeat my observation in paragraph 40.1 of the previous reasons about the lack of clarity in the evidence. However, I have concluded on balance of probabilities that the Claimant's concession that it "could be" that he was not paid when he did not work should be understood as applying to the period 2007 to 2011 (as that was not the practice from 2012 onwards) and as meaning that the general practice during that period was that he would not be paid if he did not work.

7. As regards holiday pay, the parties were agreed that the Claimant was paid the same monthly amount even when he took holiday, at least from 2012 onwards. The Claimant's case was that he received no holiday pay between 2007 and 2011 (see paragraph 19.4 of my earlier reasons), and it was inherent in the Respondent's case that this was the case.

8. I therefore made a similar finding to that in respect of the general point about whether the Claimant was paid when he did not work. I found on balance of probabilities that in practice the Claimant was not paid when he took holiday during the period 2007 to 2011, but was so paid from 2012 to 2014.

9. Turning to the question why the Claimant was not being paid on a PAYE basis, I reminded myself of the findings in paragraphs 40.7 to 40.11 of my earlier reasons. I made the following further findings:

9.1 At no stage did either party believe that there was no need for either of them to account for tax on the Claimant's earnings. The Respondent never raised any such contention: although the Claimant said in evidence that before 2011 or 2012 he did not know what his employment status was, I did not understand this to mean that before then he did not think that he had to pay tax. As stated in my previous reasons, I did not find him to be a naïve individual.

9.2 At pages 706 to 712 of the bundle there were records of the Claimant having rendered invoices in respect of his monthly payments during 2008 and 2009. In paragraphs 250 to 260 of his witness statement the Claimant asserted that in 2012/2013 he was bullied to produce invoices, and that the purpose of this was to create the impression that he was self-employed not just at that point, but in earlier years also. I understood him to be saying that he did not give way to this pressure and so did not provide invoices. In paragraph 33 of the grounds of resistance (page 71) the Respondent accepted that the Claimant was asked to provide invoices at this stage, but refused to do so.

9.3 From about 2012 onwards the Claimant was responsible for submitting financial information, including payroll information for employees and invoices from others, to the accountants. The information included the amount that he himself was to be paid each month. His evidence was that he had raised the PAYE issue with Ms Findlater on several occasions before he put the question of employment/self employment in writing in February 2014 (page

513), and that he was waiting for her to rectify the position. Ms Findlater denied that the issue was raised with her in this way.

9.4 I found on balance of probabilities that the Claimant had not raised PAYE with Ms Findlater before February 2014. In his email of 19 February 2014 at page 513 the Claimant referred to various matters in the past, but did not mention having raised concerns about his tax position. He suggested that Ms Findlater's motive for ignoring his requests was that she did not want the failure to deduct tax in previous years to come to HMRC's attention: but that is assuming that she would have recognised that it should have been deducted in the first place. In fact it was Ms Findlater who first raised the tax issue in writing, in her email of 19 February 2014 at page 514. This seemed to me to be inconsistent with a wish to cover up the matter.

9.5 The Respondent had engaged employees who paid tax under PAYE as well as freelancers who did not.

9.6 The monthly payments to the Claimant were in round numbers of pounds (e.g. in 2013/14 he received £2,200 per month and on page 706 for a period in 2008 he received payments of £260.00, £1,140.00, £1,400, £760.00, £640.00, £1,400.00 and £1,250). Although it is, of course, possible for a calculation of net pay after deduction of tax and national insurance to result in a round number of pounds, it could not realistically do so on so many occasions. I found that the Claimant cannot have believed, and did not believe, that he had some other gross rate of pay from which tax and NI were being notionally deducted (but, as he maintained, retained by the Respondent).

10. My conclusion about why the Claimant did not pay tax under PAYE is as follows. I find that in the earlier years of the working relationship between the parties, neither believed that the Claimant should be taxed under the PAYE system. Ms Findlater was aware of that system, and at least roughly how it worked and when it applied, at all material times. I accept that the Claimant may not have been aware of it when he first arrived in the UK, but he is an intelligent and observant man and I find that he must have become aware of the PAYE system, at least in outline, possibly while pursuing his MSc in Social Sciences in London from September 2006 (see his CV at page 259 of the bundle), but in any event by about 6 months into his work with the Respondent. I do not consider it plausible that he could have remained ignorant of it after that period in a working environment.

11. The date 2012 or 2011/12 features in a number of my findings. It was then that the Claimant became responsible for submitting financial information to the accountants; then that the Claimant began to be paid the same regardless of his attendance, and that he began to be paid when on holiday; and then that, on his evidence, he realised that he was in truth an employee.

12. I do not consider that it is a correct description of the Claimant's state of mind to say that he "realised" that he was an employee, or that his belief about this issue changed in 2011 or 2012. I find on balance of probabilities that the question of employment status first came to the Claimant's mind in about February 2014, when he raised it in his email of 19 February to Ms Findlater. I have already given my finding that the Claimant did not raise the issue with Ms Findlater before that date, and I find that the most likely reason why he did not raise the point before that date was that it had not occurred to him before then. Nor do I find that when the point came to the Claimant's attention he "realised" the situation in the sense of appreciating it as a matter of fact. If that had been the case, he would not have let the issue drop at that point (see paragraph 40.10 of my earlier reasons). I find that it would be more accurate to say that in about February 2014 it occurred to the Claimant that he might be an employee, or that it might be arguable that he was.

13. As to the period after February 2014, I find that the reason why the Claimant was not paying tax under the PAYE system was much the same as before: Ms Findlater did not consider that he should be, and he did not consider it necessary, or a matter of priority, that he should. The first written assertion specifically that he should have been taxed under PAYE was in the Claimant's resignation email of 3 November 2014 (page 633). I find that this was the first specific mention of any sort of this.

14. I therefore turn to the test for a contract of employment. I agreed with Ms Dobbie's submission that, as I had found that the requirements of the first two questions posed in the **Ready Mixed Concrete** test were fulfilled, the issue fell to be resolved on the third, namely, were the other provisions of the contract consistent with its being a contract of service?

15. I repeat the matters set out in paragraphs 35 to 37 of my previous reasons. To these I add the following guidance in earlier authorities, highlighted by HHJ Eady:

11.1 In **Express and Echo Publications v Tanton [1999] ICR 693** Peter Gibson LJ observed that the Tribunal should first establish the terms of the agreement as a matter of fact, and then, in the absence of any terms that are inherently inconsistent with the existence of a contract of employment, should determine whether the contract is a contract of service or a contract for services, having regard to all the terms.

11.2 In **Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171** Nolan LJ cited with approval the following words of Mummery LJ:

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. The object is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted,

> by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole. It is a matter of the evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

16. There was little, if any, evidence of express agreement about the terms of the relationship between the parties. My findings as to the terms of the contract between them therefore depend on how that contract operated in practice, as set out in paragraph 40 of my earlier reasons and paragraphs 9 and 10 of these reasons.

17. One matter that I had to bear in mind was that it might be the case that the contract was of a particular nature at one time, but then changed as the relationship evolved. The obvious point at which such a change might have occurred was around 2011/12, as this date or period featured in a number of the findings I have made above.

18. I therefore first considered the position before that point, during the period 2007 to 2011. During this period, I found the overall picture of how the contract operated (and therefore of its terms) to be such that this was not a contract of employment. As HHJ Eady has stated, none of the individual factors concerning pay and tax is in itself necessarily inconsistent with a contract of employment. The overall picture, however, is one of an informal relationship involving wide-ranging tasks, some of which were carried out for Ricochet, some for the Bounce Back organisation, and some for Ms Findlater personally. There were no payroll documents or payslips, but rather the documentation that was generated consisted of invoices sent by the Claimant. The agreement, as evidenced by the way it was performed, involved payment for work done rather than a fixed salary; did not provide for holiday pay; and left the Claimant responsible for payment of tax and NI. In the context of an informal relationship of the sort that I have described, these factors tend to point to a contract for services, rather than a contract of employment, and I find that the overall picture shows the former rather than the latter.

19. I then asked myself whether the position was different from 2012 onwards. It is true that, during this period, the Claimant's pay did not in practice depend on his attendance at work, and that he was paid when he was on holiday, matters that in some situations might point towards a contract of employment. I find, however, that in this case they do not do so. What changed in 2012 was not the parties' understanding of the contract between them, but the practical point that the Claimant took charge of matters that included the payments to him. A change in practice might have indicated a change in the contract if someone on the Respondent's behalf other than the Claimant himself had made that change, but the change was in my judgment of little significance given that it was the Claimant who made it. I found that this did not reflect an agreed variation of the terms of the contract, but rather the Claimant's unilateral decision that he would be paid in this way.

20. Equally, the findings that I have made above mean that neither party's understanding of, or belief about, the Claimant's tax position changed at this point. The Claimant knew that he was receiving round-figure payments (e.g. £2,200 per month in 2013 and 2014) and that these could not realistically represent a gross salary less tax and NI. He did not query the tax position with Ms Findlater: she raised it with him in February 2014 when he asserted that he was not self-employed.

21. It follows that I consider that the contract remained the same during the period 2012 to 2014 as it was before that time.

22. I have therefore concluded that at no stage in the relationship between the parties was the contract a contract of employment within section 230 of the Employment Rights Act 1996. My finding that the Claimant was a worker engaged by the Respondent remains undisturbed. The complaints that will proceed at the full merits hearing will therefore be as previously determined.

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Employment Judge Glennie
22 September 2017