EMPLOYMENT TRIBUNALS

Claimants: Mr K Wood
Mr J Mackie
Mr J Pownall

Respondent: I & B Brickwork Solutions

Heard at: Manchester **On:** 28 March 2018

Before: Employment Judge Howard

REPRESENTATION:

Claimants: In person
Respondent: Mr D Jones, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimants' claims for unlawful deduction from pay, being unpaid accrued holiday between the dates of 3 April 2017 and 4 October 2017, succeed.

2. A hearing to determine remedy will be held, directions in respect of which are given at paragraphs 35- 38, below.

REASONS

1. I heard evidence from all three claimants and, for the respondent, from Mr Dale Halliwell. The claimants had not prepared witness statements, relying on the contents of their claim form, and it was agreed that their evidence would consist of affirming the contents of the claim form and answering questions from me. I was provided with a bundle of documents compiled by the respondent together with further documents from the claimants which the respondent agreed could be submitted.

The Issues

2. The claimants are skilled bricklayers. The respondent provides bricklaying services to construction companies.

3. It was not disputed that the respondent entered a contractual relationship with the claimants. The issue in dispute was the employment status of the claimants. The respondent maintained that the claimants provided their bricklaying services on a genuinely self-employed basis; the claimants maintained that they were workers, and hence entitled to holiday pay.

4. The question for me to determine was whether the claimants were 'workers' as defined by Regulation 2 of The Working Time Regulations 1998. If so, the respondent accepted that the claimants were entitled to accrued holiday pay during the period of their engagement, although the amounts claimed were disputed.

5. As Mr Halliwell explained, the respondent engages approximately 70 bricklayers at any given time and deploys them to housebuilding assignments. Mr Wood had heard that Mr Halliwell was looking for bricklayers and he telephoned Mr Halliwell and they met at the Bellway Homes site to discuss terms. The respondent had a contract with Bellway Homes to provide bricklaying for a significant number of houses on the Agecroft site.

6. The three claimants offered themselves as a team of bricklayers and Mr Halliwell engaged them as a team of three. It was anticipated on both sides that the work would last for some 18 - 24 months. It was attractive to the claimants as they all lived close to the site and because of the anticipated length of the project.

7. In their meeting Mr Wood and Mr Halliwell agreed how the 3 bricklayers would be paid. A fixed amount was agreed as payment for completion of each different specification of house, together with an additional sum of £200 per plot for 'patching'; i.e. any remedial work once the house had been built. This amount was based on the bricklaying been done over five 'lifts'. A 'lift' is the level at which the bricks are being laid; the first lift is at ground level; the second lift begins at the first stage of scaffolding; the third lift begins at the second stage of scaffolding and so on until the final lift reaches roof height.

8. Save for the list of prices agreed for the houses on the Agecroft site, the terms of the contractual agreement between the claimants and the respondent were not written down.

9. It was agreed that the claimants would be paid individually and weekly by the respondent. Towards the end of each week, Mr Mackie would email Mr Halliwell specifying the amount that each of them should be paid based on the progress towards completion of each house, by lift. Mr Halliwell would go on site and check that the amount requested tallied with the stage of the build at the rate agreed and would authorise payment to each of the claimants.

10. The claimants were given no written record or payslips of the weekly amounts paid to them. They would check their bank statements to keep track of payments.

11. It was open to Mr Halliwell to refuse to pay the amounts requested as demonstrated by emails contained within the bundle, for example on 24 July 2007:

> *"You can only take £450 off plot 19 so you're left with £200 patch money on the plot. Plot 20 only has £348 left before this draw so the max you take off is £148."*

12. The claimants and the respondent subscribed to the CIS ("Construction Industry Scheme") whereby the respondent deducted money from the claimants' payments as tax and national insurance at the rate of 20% and the claimants remained accountable directly to HMRC for any shortfall thereafter. The scheme requires that all building contractors register for it. Subcontractors or anyone providing a service or services to the subcontractor does not have to register, but the contractor is required to deduct tax and national insurance at the higher rate of 40% if they do not register. There is, therefore, a significant incentive for any bricklayer to register for the scheme and all three claimants were registered.

13. As Mr Wood explained in evidence, and I accepted, it is exceedingly rare for building contractors or subcontractors to employ bricklayers and so, in reality, bricklayers must adopt this model if they wish to find and to stay in work.

14. The claimants provided their own hand tools. Materials were provided on site by the respondent. As Mr Halliwell explained, with the exception of the bricks which were supplied by Bellway Homes, the respondent was required by Bellway Homes to supply the necessary materials; e.g. cavity wall ties, damp mesh, DPC and weep holes; directly to the site. Mr Halliwell provided the claimants with items such as trestles, beanbags, Acros and 'strong buoys', and the claimants wore high visibility vests with the I & B logo on them.

15. The claimants would collect materials from a central store point on site or have them delivered over to them. Sometimes Mr Halliwell would help when he was on site, by bringing materials over for the claimants, and by borrowing a power saw for them to use.

16. Mr Halliwell provided the claimants with the architect's plans for each house ('plot') and the claimants would lay the bricks in accordance with that plan.

17. The claimants were required to comply with the health and safety rules of the site. They had to sign in and out, wear hard hats and have an on-site induction which was carried out by Mr Halliwell. Thereafter Mr Halliwell would hold 'toolbox talks' with the claimants on an ad hoc basis to communicate any health and safety issues that had arisen on site generally.

18. It was the responsibility of Bellway Homes to comply with all health and safety and building regulations for their houses, and a site manager would regularly inspect the bricklaying work to ensure compliance. It was the respondent's responsibility to ensure that the bricklaying was being carried out to the standard and in accordance with the timescales agreed between the respondent and Bellway Homes and Mr Halliwell would come on site, between one and three times a week, to check the

work. I accepted Mr Wood's and Mr Mackie's evidence that Mr Halliwell would check the quality and quantity of the work before approving the amounts of pay requested.

19 The respondent held public liability insurance covering the claimants and was required by Bellway Homes to carry out a 'risk assessment method statement' of the claimants' work.

20. The site was open between Monday and Friday 7.30am to 4.30pm. The claimants were not required to work any specific hours as they were paid in accordance with their productivity rather than hourly; however, I accepted their evidence that they worked the maximum hours they could to get through the work as quickly as possible. I accepted Mr Wood's evidence that when the weather was so bad that they could not lay bricks outside, they would undertake other tasks such as clearing up inside and patching.

21. It was the respondent's contention that the claimants had the right to substitute their labour. However, there was no evidence whatsoever of this forming part of the agreement between the claimants and the respondent, either documentary or orally. Mr Wood, on behalf of all three claimants, adamantly denied that a right of substitution was ever discussed, envisaged or agreed. As he explained, a primary attraction of accepting the work at the Agecroft site, was that it was very close to their homes and that it was a big building contract which could last up to two years. He explained that there would be no benefit whatsoever to them to substitute their labour and work elsewhere in these circumstances and at no point did they do so.

22. I accepted the claimants' evidence and found that the claimants had no right under the terms of their agreement with the respondent to substitute their labour. The claimants were required to provide their bricklaying services personally to the respondent.

23. There was dispute between the parties as to the degree of control which Mr Halliwell had over the claimants. The respondent's position was that it merely provided bricklayers but had no control over the quality, quantity, progress, direction or other aspect of their work. The claimants' evidence was that it was open to Mr Halliwell to move them from one plot to another and to instruct them to carry out remedial work as required. Mr Halliwell's evidence was that the claimants could refuse to move to another plot, to which Mr Mackie countered that were they to refuse such an instruction, they would be removed off site and offered no further work. There was some evidence that the claimants did exercise some choice over which plot to move to and there was an occasion when the claimants had initially refused a request by Mr Halliwell. However, that refusal had been short-lived and the claimants had complied and I was satisfied that Mr Halliwell had, and exercised, authority to direct the claimants as to which plot to work on and when.

24 I accepted the claimants' evidence that, whilst Mr Halliwell relied upon them to carry out their bricklaying task to the requisite level of professionalism and expertise, he exercised control over the plots on which they worked and tasks that required to be undertaken, and the claimants were paid subject to the approval of Mr Halliwell, having checked that the work was completed to the required standard.

25. In October 2017 work came to a standstill because of delays elsewhere on site. Mr Halliwell asked the claimants to work, in the interim, on a site in Stockport. The claimants did not wish to travel that far and so left the site and began working for another contractor elsewhere. Following their departure, they requested holiday pay from the respondent as they had taken no annual leave nor had been paid in lieu, and that request formed the basis of this claim.

The Law

26. Regulation 2 of The Working Time Regulations 1998 provides that a worker is:

"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 professional business undertaking carried on by the individual."

27. The existence of a contract is an absolute requirement as described by the Employment Appeal Tribunal in **Windle v Secretary of State for Justice [2015] ICR 156** which requires, expressly or impliedly, offer, acceptance, consideration and an intention on both sides to create legal relations. The fact that a contractual arrangement existed between the parties in this case was not in dispute.

28. One of the factors which can prove decisive is whether the claimant is in a subordinate position to the respondent or in truth in business on his own account. In **Clyde & Co v Bates van Winkelhof [2014] ICR 730,** which concerned a partner in a solicitors' limited liability partnership, the majority judgment of the Supreme Court delivered by Lady Hale cited a number of other "worker" cases in which the relevance of subordination was discussed. They included **Byrne Brothers (Formwork) Limited v Baird [2002] ICR 667** in which Mr Recorder Underhill QC as he then was said:

> **"The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the regulations is to extend protection to workers who are substantively and economically in the same position… ... It is sometimes said that the effect of the exception is that the Regulations do not extend to the "genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuinely" self-employment is to be defined."**

29. I reminded myself that ultimately my task is to look at all the relevant factors and form an impression looking at the picture, as a whole, of whether the contract in question is one in which the claimants were economically subordinate to the respondent's business or an agreement whereby the claimants carried on a business undertaking on their own account and entered into a contract with the respondent to provide work or services for it.

30. I am not bound by the label that the parties attach to their relationship as emphasised by the Supreme Court in **Autoclenz v Belcher [2011] UKSC 41**.

The Tribunal's Conclusions

31. The claimants had entered into a contract for services with the respondent to build houses to specifications provided by the respondent, on payment terms agreed and subject to the inspection and authorisation of the respondent.

32. The claimants were paid individually, on a weekly basis and the respondent deducted tax at source of 20% in compliance with the CSIS scheme. The claimants were required to provide their services personally; there was no right to substitute their labour and the claimants never sought to exercise any such right. The claimants were engaged exclusively on their contract with the respondent and hence were economically dependent upon it.

33. The claimants were not engaged in business on their own accord but providing services to the respondent and subject to the respondent's subordination; control and direction.

34. Accordingly, the claimants were workers and so entitled to holiday pay. There was no dispute that the claimants neither took annual leave nor were paid in lieu and their claims of unlawful deduction from pay, being for unpaid accrued holiday, succeed.

Directions

35. A hearing to determine remedy will be held over one day in the Manchester Employment Tribunal.

36. 21 days in advance of the hearing, the claimants shall send the respondent a calculation of the holiday accrued by each claimant, over what dates, amounts of holiday pay claimed and basis of the calculation (known as a 'schedule of loss').

37. If the respondent disagrees with those calculations, it shall send its own calculations (a 'counter schedule') to the claimants within 14 days of the listed hearing.

38. The respondent shall compile a bundle of documents for the remedy hearing which it shall agree with the claimants seven days in advance of the hearing.

Employment Judge Howard

Date 16th April 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

1 May 2018

FOR THE TRIBUNAL OFFICE