EMPLOYMENT TRIBUNALS

Claimant: Mr Pawel Dzienis

Respondent: Payco Services Limited

HELD AT: Manchester **ON:** 7 February 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr P Jeffcoate, Consultant

JUDGMENT having been sent to the parties on 15 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brings a claim for payment of holiday pay under the Working Time Regulations 1998.

2. The claimant was an agency worker; his agency being 24/7 who are not a party to these proceedings. He was described as a self-employed subcontractor, however he now believes that he was an employee or at least a worker and entitled to holiday pay.

3. The respondents resist this and state he was engaged by Payco Services Limited on a self-employed basis and that he does not qualify as a worker. The claimant relied on the fact that HMRC described him as an employee but the respondents argued that this was in order to comply with Section 44 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) which came into force in April 2014. (See below.)

Issues

4. The issues in the case were therefore whether the claimant was genuinely a self-employed subcontractor or whether he came within the definition of worker for the purposes of the Working Time Regulations 1998 also entitling him to be paid for the minimum holidays allowable under the Working Time Regulations 1998.

Witnesses

5. For the claimant the claimant gave evidence and for the respondent Mr Steve Thomas the director of Payco Services Limited also gave evidence. There was an agreed bundle.

The tribunal's findings of fact are as follows:

6. The respondent provides a service for various agency organisations providing commercial opportunities for subcontractors, freelancers and other self-employed professionals. The claimant was engaged by the respondent Payco on a self-employed basis signing a contract on 16 January 2016 to confirm his agreement to the terms of the contract. Although the contract was in the name of Payco Tech Limited I accept this was a mistake which is a company which had ceased trading in April 2015 and the correct name of the respondent was Payco Services Limited.

7. The claimant has signed a contract whose provisions included at clause 6:

> "you will provide services to Payco as agreed and the scope and extent of the services will be agreed verbally between us from time to time or will be confirmed in written assignment schedules generated by Payco and Payco's client. 7. Subject to Clause 11 you will ensure that the services are provided to the standard expected by Payco and Payco's client as well as complying with any standards specified in any schedule that is generated from time to time".

8. Clause 11 said:

> "Payco will not supervise direct or control the manner in which you provide the services you have the discretion as to the methods used to provide the services […] 17. You will provide the services yourself or by utilising substitutes, employees or hired assistants. Your staff may be rejected by Payco only if in the reasonable opinion of Payco your staff do not possess the necessary skills or qualifications to carry out the services. […] 19. There shall be no contractual or financial relationship between Payco and your staff, you are solely responsible for arranging payments to any staff that you engage to provide the services."

9. Additional guidance concerning your right to substitution was a further information leaflet that the respondents provided to the claimant. This states that:

> "it should be read in addition to a contract for services and although it does not form part of the contract between us it does form part of the guidance as to how

part of our agreement works in practise. In your contract of service it states that as follows …"

Clause 11 is then quoted. The leaflet goes on to say :

"this means what it says that it is part of the contract between us that should you for any reason be unable or unwilling to provide services at any time you can send someone else to provide the services instead and you pay them whatever you agree for the work they complete. However we believe it is important that we clarify this point in this additional information document, including:

- Why is this clause in your contract and what does it allow you to do?
- What constitutes similar experience and qualifications?
- How do we deal with security and health and safety requirements before a substitute can start?
- Who needs to be notified of the attendance of the substitute?"

The first question, "why does the contract allow you to send a substitute?" basically stated that: "we choose to outsource the work that needs to be done for our clients where we do not have the skills within the company to do it. Our concern is that the work gets done not how or by whom just that it gets done and we expect you to look at it the same way. To clarify we work with recruitment agencies on one side of their business. Recruitment agencies and businesses mutually fulfil two roles they help companies find and employ full time staff but they also work with companies to meet temporary fluctuations in their labour requirements and outsource this requirement. This is where we get involved as recruitment agencies will often in turn outsource that requirement to us. The nature of the contract is the competitions of required work rather than who does it.

So what does this clause allow you to do?

The way we work means that we do not have any exclusive call on your services however we have a client who needs to make sure the job that needs doing gets done and so we need to provide consistency in our services to our client. We've can do this in more than one way. The contract states you can send a substitute and pay them and therefore this is what we will expect you to do and is very clearly our preferred option. However the continuance of the contract is our biggest concern so if you are unable to be responsible for payment can you let us know that you've assigned another subcontractor to the job and we can make arrangements to pay them. Where you are helping us and we have arranged accordingly we may be able to pay them a proportion of the fees and still pay you the balance. Finally although contractually we want you to take care of things we don't have the right to require you to work. If you are unable or unwilling to continue the contract and cannot find a suitable substitute or cannot reassign the contract it is important that you inform us so we can make alternative arrangements.

What constitutes similar experience and qualifications?

It's very important that you understand the type of person that the contract allows you to send. We use this contract for services to cover engagement with subcontractors from many different industries fields and skillsets. The wording needs to cover all of these and therefore purposefully does not go into specific skills and qualifications. Equally we do not want to try and provide an exhaustive list here. However you will have been offered the contract because you can do the work so simply if you organise someone else to do the work then they need to be able to do what you can do. If you are in any doubt call us and we will be more than happy to help as the continuation of any contract is always our overriding concern.

Security, health and safety and who needs to be notified of the attendance of a substitute?

The contract requires that you inform us that you are sending a substitute as this allows us to inform our client. It may though be dealt with directly on your work site and as we are still happy to pay you then our prior knowledge is not always essential. However it's very important to consider any particular security and or health and safety regulations in place in any given site or workplace. Although such regulations do not alter the right to substitute they may alter the logistics of the situation. If this is the case please let us know as soon as possible with a view to working with us to ensure that you can utilise your contractual rights without jeopardising the continuation of the contract."

10. The respondents provided advice regarding the employment status position for example a leaflet headed up "getting used to the self-employed umbrella". This said:

> "as stated you work for the umbrella company on the umbrella company contracts with whichever agency finds you work at any given time. If you work directly for an agency then they would, were they able, agree a rate with you that allows them to meet their liabilities including, amongst other things, employees' national insurance. When you chose to work for us it is different as you are actually agreeing the rate and the agency will pay us. This will be the best rate they can pay as it is all they have to pay. We will always have to take our costs from the money we receive from the agency but we will keep our costs very low."

11. There was also a guide to the new tax rules. The section 44 of the ITEPA required that:

> "where a self-employed individual provides services via a series of sub-contracts then the income of that individual should be treated as employment income for tax purposes if there is a right of supervision, direction or control by any person in the subcontracting chain."

12. The respondent took the position that they did not supervise direct or control the claimant with the manner in which he carried out the services. However, their agency client and the end hirer had the discretion to do so. Accordingly, the claimant and others in his position could be caught by the provisions of Section 44 and he would be deemed to be an employee but only for tax purposes. To avoid the operation of Section 44 it required an organisation to prove a negative: i.e. that there was no supervision direction or control and a decision was made to comply with Section 44 as it was to be a commercial risk not to do so.

13. The respondent took a commercial view that they would pay the tax or at least deduct it in order that none of their clients would be suddenly presented with a large tax bill from HMRC because they had taken actions which made the worker eligible under Section 44.

14. The respondent pointed out that the effect of the tax rules was set out in the contract. Again, there was a leaflet which explained this and it had a series of FAQ's, one of which was "I'm genuinely self-employed, this only applies to full self-employment doesn't it?" the answer was:

> "this is tax NIC legislation only and there are no exemptions even for those who are genuinely self-employed for other purposes. The new rules apply where it cannot be show that there is no right of control by any person. Say for example 20 years' experienced sole trader with his own trading name, a van, tools, and equipment doing a job working for an agency. The agency's contract with the client states the client has the right to supervise the manner of the work. Even if this supervision is not used in practise the new rules apply and PAYE must be operated."

And, "if I have to PAYE doesn't that make me an employee?" Answer:

> "No, and it is important to remember that it is purely new legislation for tax and NIC purposes. One of the difficult parts of these new rules is that everybody has to get to grips with is that the legislation will tax self-employed individuals as if they were employees. You will remain self-employed for all other purposes unless your contract is altered."

The question "doesn't this new legislation make it virtually impossible for me to be self-employed?" Answer:

> "the new rules make it very difficult for anyone who is self-employed and getting their work through an agency, not least because most agency contracts normally have to include a clause saying that the client has control of the worker. However, where this is not the case and there is no control or right of control PAYE/NIC will not be due."

15. It was agreed also that there was a substitution clause in the contract, namely Clause 11 above, and that it had never been utilised by the claimant. The claimant advised in evidence that he had been sick at one point but was not required to provide a substitute. However the situation was that the company simply continued without his contribution. The claimant's work was with an organisation called Lite Craft, the work being obtained through 24/7 staffing.

The Law

16. The claimant brings an unlawful deduction of wages/Working Time Regulations 1998 claim and therefore only has to establish that he was a worker within the meaning of that legislation. Under Regulation 31 of the 1998 Regulations any person deemed as a worker is entitled to 5.6 weeks' paid holiday in each leave year and the way in

which this can be recovered is by bringing an unlawful deduction of wages claim at the tribunal.

17. Under the 1998 Regulations a worker is defined at Regulation 21 as:

> "worker means an individual who's 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's express whether oral or in writing) whereby the individual undertakes to do or perform personally any works 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 undertaken or carried on by the individual and any reference to a worker's contract shall be construed accordingly"

18. To fall under the second limb above a claimant must show:

> (1) the existence of a contract
> (2) that he or she undertakes to personally perform work or services for another party
> (3) that the other party is not a client or customer of a profession or business undertaking carried on by the individual"

Latterly the entitlement to be regarded as a worker has turned on the provision of personal services and there are numerous decisions setting out some guidance on when a personal service is to be regarded as required and directing the tribunal to consider whether a personal service clause could be a sham.

19. Whilst the claimant does not have to show that he was an employee it is instructive to note that in cases concerning whether someone is an employee or a worker the fact that they have agreed to pay their own tax on the basis that they're self-employed has not been regarded as a determinative characteristic.

20. In *O'Kelly and Others vs Trust House Forte PLC 1983* for example the Court of Appeal held the decision of the tribunal that the claimants were not employees. This was despite the Inland Revenue requiring the respondent company to operate PAYE in that case and the judgement made clear that the fact that the claimants were considered to be employees for tax purposes was not of itself indicative of the legal basis of the relationship of the parties for employment protection purposes.

21. In *Express and Echo Publications Limited vs Tanton* where Mr Tanton was found to be self-employed the basis was that he was not required by the terms of the agreement to perform his services personally and that as a matter of law this meant he could not be an employee. The Inland Revenue had taken the view that he was an employee and he had to pay tax and national insurance as if he were an employee.

22. The approach of the tribunal, as stated in *Express and Echo*, should be:

> (1) The tribunal shall establish what the terms of agreement between the parties were that is a question of fact.

(2) The tribunal shall then consider whether any of the terms of the contract are inherently inconsistent with the existence of a contract of employment. That is plainly a question of law and although this court as indeed the employment appeal tribunal before us has no power to interfere with findings of fact if there were a term of the contract inherently inconsistent with a contract of employment and that had not been recognised by the tribunal's chairman. That would be a point of law in which this court like the ETA before us would be entitled to interfere with the conclusion of the chairman.

(3) If there were no such inherently inconsistent terms the tribunal should determine whether the contract is a contract of service or a contract for services in regard to all of the terms. That is a mixed question of law and fact.

It's well established that a genuine right of substitution clearly negates any obligation to perform work personally and its inherently inconsistent with employee or worker status ; it does not matter whether any right to substitute is exercised in practise (Express and Echo).

Conclusions

23. I am satisfied that the operation of Section 44 requires payment in the circumstances proposed by the respondent i.e. that if any party to the sub-contracting or end user chain could be responsible for direction and control of the worker a tax payment should be made. In the situation of sub-contracting and agencies it is obviously a sensible commercial decision that somebody pays the tax in this case Payco as the recruiter of the claimant chose to make that payment on a commercial basis.

24. It is clear from case law however that taxation status is not determinative of employment status and this has always been the case and the respondent have cited a number of cases where individuals were paying tax for PAYE but yet were not deemed to be employees. Conversely there are cases where individuals who were paying tax on a self-employed basis have been deemed to be workers or even employees. In this case I accept that the tax situation is not determinative and that the fact that tax was paid for the purposes of Section 44 of ITERA was not determinative of the claimant's employment or worker status.

25. In respect of the terms of the agreement between the claimant and the respondent they are clearly set out in supplementary advice in a series of guidance briefing notes which advise on various points in more detail and in very clear language. The important clause in the contract was the substitution clause which was an in reality an unfettered clause. The substitution clause can be put in contract as a sham in order to ensure that an individual does not acquire worker status and therefore I have to decide whether it was a sham in this case. Although it was not used I have no evidence it was a sham. The claimant worked in a scenario where it was unlikely that the workplace would require a substitute neither did he undertake a job which stands out as one requiring substitution to be highly regulated such as for example a brain surgeon.

26. In addition guidance on what substitution meant was provided and I am reminded that case law says that just because a substitution clause is not used that does not mean it is a sham. I accept that it was possible to provide a substitute and the provision in the contract was not a sham.

27. Accordingly the claimant was not required to provide personal service and therefore cannot be regarded as a worker. As a result the claimant cannot claim holiday pay.

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Employment Judge Feeney

Date 12th June 2018

REASONS SENT TO THE PARTIES ON

15 June 2018

FOR THE TRIBUNAL OFFICE