



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D J Barrett-Plows  
**Respondent:** The Ceramic Tile Warehouse Ltd  
**Heard at:** Cardiff **On:** 28 September 2018  
**Before:** Employment Judge A Frazer (sitting alone)

**Representation:**

Claimant: In person  
Respondent: Mr D Lewis (Solicitor)

**JUDGMENT** having been sent to the parties on 6 October 2018 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

## REASONS

1. The hearing commenced and both parties agreed that the correct name of the Respondent was The Ceramic Tile Warehouse Ltd and not Mr Michael de Claire The Ceramic Tile Warehouse Ltd which has been on the correspondence between the parties, so insofar as that is the correct name of the Respondent, that has now been amended.
2. The Claimant was engaged by the Respondent as an Accounts Consultant from September 2015 until the beginning of February 2018. The main issue in dispute between the parties is whether the Claimant was employed or self-employed such that she is able to bring a claim for unfair dismissal. She contends that she was first engaged as a self-employed contractor but the relationship was in substance an employment relationship, whereas the Respondent contends that the intention of the parties was to engage her as a self-employed contractor and that was the nature of the relationship all along.

3. Under s.230 of the Employment Rights Act 1996 an employee is defined as an individual who has entered into or works under a contract of employment. A contract of employment is a contract of service or apprenticeship whether express or implied and if it is express, whether oral or in writing.
4. In the case of ***Readymix Concrete -v- Minister of Pensions and National Insurance [1968] 2QB 497*** Mr Justice McKenna set out the seminal test for whether someone is employed under a contract of employment. He provided that a contract of service existed if three conditions were fulfilled. Firstly, there was a requirement for personal service to be rendered by the employee, secondly, there needed to be the necessary element of control in a master and servant relationship and thirdly, the provisions of the contract however so found by the Employment Tribunal needed to be consistent with it being a contract of service and not a contract for services.
5. The findings of fact are as follows. The Claimant's daughter was married to Mr Joel de Claire who is one of the Directors of the Respondent. The Respondent is a small family run business and Michael de Claire was a Director of the business but is now an employee. His sons Joel, Jacob and Jonathan are all Directors. I heard evidence from Steven Porter who is also a Director. He is not family although he has worked for the Respondent for over 33 years.
6. The company's accounts were previously provided by a Mr. Bernard Wilson. He provided the accounting service to the Respondent from April 2009 until his retirement in September 2015. Around that time the Respondent was aware via Joel de Claire that the Claimant would be available for more work and so approached her to see if she wanted to work for the company. At that time the Claimant was engaged by Mobile Tyre Services in Barry. There is a consultant's agreement in the bundle that the Claimant states governed that engagement and that is a self-employed contractor's agreement.
7. The Claimant had hitherto provided services to Hek Jones Solicitors and there is an agreement between the Claimant and Hek Jones whereby she is described as a self-employed contractor. Hek Jones drew up the agreement for the Claimant and the Claimant then took the initiative to provide a similar sort of agreement for Mobile Tyres. The Claimant's work with Hek Jones ended in 2015.
8. The Claimant has produced to the Tribunal an agreement that she contends was the written agreement that was in place between the Respondent and herself during her time with them. This is at page 39 of

the core bundle. The Respondent however denies ever having had sight of that agreement.

9. The Claimant copy-typed this agreement from the Mobile Tyres agreement that she had retained and effectively inserted the relevant figure of £1,000 per month for pay. I note that that agreement is not signed by either party and a copy has not been produced by the Respondent as it is the Claimant's document. It also provides for 3 months' notice to be given by either party. Mr Michael de Claire states that he has never seen a copy of that agreement before proceedings and has never signed a copy. The copy before the Tribunal is completely unsigned and I would have anticipated that had it been a genuine written document that had been agreed and understood by both parties to have formed the basis for the working relationship, it would have been signed. In addition, given that is an agreement for an independent contractor relationship, and given that the Respondent's position is that the working relationship was one of self-employment, it would be likely for the Respondent to have retained that document and produced it in disclosure as evidence that the working relationship was one of self-employment. It has not done so.
10. I find therefore that it is likely that the Claimant produced that document at the time as a reflection of her understanding of the working relationship but that it was never shared with the Respondent. This was put to the Claimant under cross-examination and she accepted that she entered into a contract with the Respondent as a self-employed contractor. She said the relationship crystallised into an employment relationship over time.
11. I find that her evidence indicates that it was both parties' intentions at the time that the relationship was entered into that the Claimant was going to carry out services as an independent contractor. That was the way in which Mr Wilson had carried out his services and indeed it was the way in which the Claimant had carried out her services with other clients namely Mobile Tyres and Hek Jones Solicitors.
12. When the Claimant started with the company she sat with Mr Wilson during September so that she could understand what the company processes were. The method of working was drawn up by Mr Wilson and provided in a schedule of tasks. I find that this was akin to a practice of working which had been engaged by Mr Wilson himself and was not the adoption of any sort of formal company process policy or procedure. There was no formal job description given to the Claimant and the understanding between the parties was that as long as the Claimant completed her tasks for the Respondent the manner according to which she did so was a matter for her.

13. The Claimant's predecessor, Mr Wilson came to the Respondent company on a Tuesday and Thursday to perform his work. The Claimant indicates that she was required to work on a Tuesday and Thursday and that this was an example of the control in the relationship. She was required to attend work on certain days. From the evidence I heard there was no rationale behind the requirement for the Claimant to come into work on those days as opposed to any others. Mr Wilson had chosen to work on those days and it was more a question of the Claimant carrying on those days as a matter of convention. The Claimant did not have any set hours. Sometimes it might be the case that she would come in on another day, for example on a Saturday morning, to finish things off but there was no requirement for her to do her work within a set number of hours. It seems to me from the evidence that I heard that the key issue for her was to finish the tasks at hand and to provide the service required of her.
14. The Claimant retained a voicemail from January 2017 from Mr Porter which told her not to attend work on the Thursday when she was expected to come in because Mr Michael de Claire had not prepared the raw materials for her to do the accounts. She was told to come in the following Tuesday instead, as per the parties' expectations. An employee under the direction and control of an employer might reasonably be required to come in on their set days to undertake other tasks. Whilst there was an expectation by both parties that she would come in on the Tuesday and Thursday there was some flexibility in her changing those days if she so wished. I found that flexibility to be more consistent with self-employment than employment. The pattern of her finishing tasks and doing those within the hours that she chose was more consistent with a relationship of self-employment.
15. I heard evidence that the Claimant would have been able to carry out her function via remote access, which is what her predecessor had done. She denied that she was ever informed that this facility would be available to her. Indeed she said that she did not have her own laptop and all the necessary materials that she required to perform her tasks were at the Respondent's premises. The Respondent had offered Mr Wilson remote working and I consider that had the Claimant wanted to take up that method of working it would have been available to her. I heard quite a lot of evidence on this, but in the circumstances the working location was neither consistent nor inconsistent with a contract for services: these days there are many employees as well as self-employed contractors who work remotely and so I did not consider that that really took the matter much further.
16. The Claimant's evidence was that she did her own tax returns but she has not provided any HMRC disclosure to the Tribunal. However, she was paid a set rate of £1,000 per month without deductions at source. The

invoice for November 2015 is in the bundle. It is numbered 11 of 2015 and is, I note, for accounting services. The Claimant did not move onto the payroll at any point during her time with the Respondent and she was not auto-enrolled. The Claimant did not have a formal role designation to the outside world. There are emails in the bundle which show that she had stated that she was in the accounts department. In another email she had stated her name and then put the Respondent's company name underneath hers. That is consistent, I find, with her acting as an agent for the company or as an independent contractor. It would be more likely in an employment relationship, in my finding, that an employee would put their job title or role designation underneath and would have some sort of formal email signature.

17. At page 11 there is a matrix which employees have to fill in for their holidays, the Claimant's name is not on that sheet. The Claimant said that in evidence the sheet was prepared in contemplation of her dismissal as it was prepared in the January. However, as I will indicate in due course, I find that the decision to terminate did not come until the end of January and I accept that the matrix was a reflection of the company's understanding of who was an employee at that point in time.
18. The Claimant's evidence was that the normal practice was that she would look at the holiday chart and would normally take her holidays at the same time as Michael would take his. She stated that she requested her holidays as a matter of courtesy. I find that that is consistent with her being self-employed. She did not require permission as such and the employer did not have control such that it was able to decline her requests. She was not required to put her name down in a chart. I heard no evidence that the Claimant was subject to any capability or disciplinary procedures which other employees would be subject to.
19. In December 2017 the Claimant's daughter's marriage broke up to Mr Joel de Claire under sudden and acrimonious circumstances. He worked for the Respondent at the time, as did the Claimant. I heard that Court proceedings then ensued concerning his access to the child of the marriage and communications took place between himself and the Claimant's daughter through solicitors. Whilst the details of those proceedings or that relationship breakdown does not concern this Tribunal it was agreed that whilst Mr de Claire senior, Mr Michael de Claire, and the Claimant were professional with each other at work, I heard evidence that the sons, namely Joel and Jonathan were finding it hard to be in the proximity of the Claimant and the Claimant was not speaking to them. I find that this was likely given the acrimonious ending of the marriage, the Court proceedings and the issues regarding the Family Proceedings Court.

20. The Respondent's evidence was that they had noticed a lack of engagement from the Claimant during January. It was accepted that the Claimant had completed her tasks. Mr de Claire said that it was her attitude that was of concern at the time. Given the circumstances I consider that it was likely the situation was awkward to say the least and as the Claimant stated, there was an atmosphere in the office. I find that relations must have been strained: that must undoubtedly have been the case.
21. There was a conversation which took place between the Claimant, Mr Michael de Claire and Mr Porter on 1 February. Mr Porter's evidence was that he had enquired of the Claimant as to when she would be able to do the year-end accounts. She said that she did not have time owing to what was going on at home and then went out for a cigarette. I found Mr Porter's evidence on this to be compelling. He is not a family member, unlike the Claimant and Mr Michael de Claire. Whilst he might have had some incentive to protect his job and loyalties I found that his evidence was generally candid. He gave a detailed account of what had happened. He said that he was worried about the year-end accounts being done which was why he found it necessary to raise this as an issue.
22. Mr Michael de Claire indicated that if, as the Claimant has said, she would not be able to do the year-end accounts owing to what was going on at home, he may have to get someone else to do them. I find that the Claimant was not informed that she was no longer required at that point and nothing was said to her from which she could reasonably infer that her employment was being terminated. After the conversation which took place on 1 February, Mr Porter made some enquiries with another accountancy firm and they indicated they had capacity to undertake that task.
23. I also find however that given the context of the relations being strained in the workplace, there then ensued a discussion between Mr Michael de Claire and the other Directors regarding the future retention of the Claimant's services.
24. I find that on the balance of probabilities what had happened after discussion was that the Respondent decided via an agreement between the Directors and Mr Michael de Claire that the working relationship would no longer be tenable given the situation between the Claimant's daughter and Joel. This would have been likely if the Claimant and those Directors were finding it hard to be in close proximity of each other because of the extant dispute.
25. I find that the Claimant was not informed about that decision. It was agreed that Mr Porter would inform her of the decision to dispense with

her services on the Tuesday when she came in. I find that from the conversation on 1 February, Michael de Claire would have known that she was going to be terminated.

26. On Saturday 3 February Mr Michael de Claire was returning the Claimant's granddaughter from contact. The Claimant was surprised to see him as the Court Order had provided for Joel to return her. There ensued a verbal disagreement. I find that in all probability voices were raised and matters were strained on both sides. During that verbal disagreement, given that Mr de Claire knew that the Respondent intended to dispense with the Claimant's services, he said that he looked forward to not seeing her in the office. Effectively he let it slip. The Claimant inferred that he was dismissing her and she wrote to the Respondent on the following Monday confirming that she had been dismissed and requesting reasons for the dismissal. She also requested in that email notice pay of 2 weeks as per the statutory entitlement to be given to employees. Mr Porter then wrote to her the following day confirming that her services were no longer required. He confirmed in evidence that he did not give her a reason as he did not consider that he needed to. This was consistent with his understanding that the relationship was one of self-employment. The Respondent agreed to pay the Claimant the 2 weeks' notice requested as a good will gesture and not, I find, because it understood her to be an employee.
27. In conclusion therefore, I find that the Claimant was not an employee but was self-employed. In summary, both parties intended her to be taken on as an independent contractor. There was insufficient control and direction in the employment relationship. The Claimant was free to change her working hours or organise her working hours as she so chose. The Respondent's employment policies and procedures did not apply to her. She did not hold herself out as an employee. She invoiced the company for services and declared her income to HMRC. She was free to work for other companies (as she had indeed done so in the past as an independent contractor). She may have attended social events but that was a mutual factor and she was a member of the family. I do not find that the relationship at any point crystallised into an employment relationship, having commenced as one of independent contractor. The claim is therefore dismissed.
28. The Respondent pursues a costs application against the Claimant on the basis that she has conducted proceedings unreasonably in making a specific disclosure request and then refusing to allow the disclosure into the bundle. The other basis on which it is pursued is that she was unreasonable or it was misconceived of her to pursue a claim for unfair dismissal on the basis that effectively this was a clear-cut case of self-

employment. There was a self-employment agreement and both parties knew that that was in reality the nature of the relationship.

29. The Tribunal does not award costs readily. Either the claim has to have been misconceived or the claimant has to have pursued proceedings unreasonably. The Tribunal then has a discretion even if it finds that either of those criteria are fulfilled as to whether to then award costs. This is provided for under Rule 76 of the Employment Tribunal Rules of Procedure.
30. Having considered this, I note that the Claimant is not legally represented. I noted that at the start of the proceedings today that there was some confusion about the documents and it was apparent that the Claimant was not as au fait with bundles of documents and disclosure as perhaps somebody might be who had been legally represented. I am prepared to give her the benefit of the doubt on that in terms of her actions and taking into account that she has not been represented. So I do not find that she has conducted proceedings unreasonably on that point.
31. Having regard to whether or not the claim is misconceived, that is a question of the Tribunal standing back and looking at the accumulation of the detail when it comes to employment relationships. Whilst it may be apparent on the face of it that there was an independent contractor agreement it is only really when the Tribunal has heard all of the evidence and can look at the whole picture that it is able to say whether there are factors which are consistent or inconsistent with an employment relationship. That is a question of fact and a question of evidence for the Tribunal so I do not find that it can be said that the claim is misconceived from the start and I am not going to award costs on that basis.

Employment Judge A Frazer  
Dated: 2<sup>nd</sup> November 2018

REASONS SENT TO THE PARTIES ON

13 November 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS