EMPLOYMENT TRIBUNALS

Claimant: **Mr R Booty and Mr A Webber**

Respondent: **Total Solutions (SE) Limited**

Heard at: **Southampton Employment Tribunal** **On: Friday, 26th October 2018**

Before: **Employment Judge Mr. M. Salter**

Representation:
Claimant: Mr.Taplin, family member of Mr. Booty
Respondent: Did not attend and was not represented

JUDGMENT

Although the Claimants had a contract with the Respondents, the contract was neither one of employment nor of that of an employer and worker as defined in the Employment Rights Act 1996. As a result the Employment Tribunal has no jurisdiction to hear their complaints.

REASONS

INTRODUCTION

1. These are my written reasons for a judgment given orally at the final hearing on Friday, 26th October 2018. These reasons have been prepared at the request of the Claimants who, whilst being present and represented at the hearing, later made an application for the reasons to be provided in writing.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February

2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there.

BACKGROUND

The Claimant's case as formulated in their ET1s

3. The Claimants' complaints, as formulated in their Form ET1s, presented to the tribunal is in short, that they were employees or, if not, workers, of the Respondent, and so were entitled to receive payment for various costs they incurred both for work undertaken and for other matters including costs they incurred after their engagement ended e.g. mileage to travel to collect tools that were left in the Respondent's van and for skip hire.

The Respondent's Response

4. The Respondent denied that wither claimant was an employee or a worker but, the Respondent maintained, they were self-employed individuals

THE FINAL HEARING

General

5. The matter came before me for Final Hearing. The hearing had a two-hour time estimate.

6. The Claimants were represented by Mr. Taplin, a family member of Mr. Booty. No-one attended on behalf of the Respondent. Before the hearing started the Tribunal Service called the Respondent and a Mr. Hunt informed the Tribunal that no-one was to attend on behalf of the Respondent.

Particular Points that were Discussed

Litigant in person

7. I explained to the Claimants that whilst I would do my best to ensure that they were not disadvantaged by not being represented by a lawyer I was not able to run their case for them and would not tell them what evidence they needed to call.

DOCUMENTS AND EVIDENCE

Bundle

8. To assist me in determining the matter I have before me today a collection of papers consisting of some documents collated into week and containing

emails, excel spreadsheet, copies of text messages and Works instructions prepared by the Claimants. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

9. The claimants made oral submissions which I have considered with care but do not rehearse here in full. In essence, in the course of the hearing, it was submitted that: they had obtained advice from the CAB and using their program and that on the HMRC website they were employees of the Respondent meeting all the relevant criteria.

MATERIAL FACTS

General Points

10. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by Mr. Booty and Mr. Webber in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

11. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

12. Is a relatively new company providing building services. It came into being after its owner, Mr. Kevin Hunt, had a disagreement with a person he was in business with previously, resulting in Mr. Hunt leaving that company (Total Build) and setting up the Respondent Total Solution SE Ltd ("the Respondent").

13. I am told that a sizable proportion of the Respondent's clients are landlords and the Respondent provides property maintenance services to these landlords.

The Claimants

14. Both Claimant's worked for Total Build. They both accept that they were self-employed when at Total Build. They had tax docked under the CIS Scheme and had Unique Tax Reference Numbers ("UTR's"), in the words of Mr. Booty: "it was a day's work for a day's money".

15. When the Respondent was established both Claimants were approached by Mr. Hunt and they started to work for the Respondent. Neither of them was issued with any form of contract and they told me, and I accept, very little changed over the day-to-day way they operated.

16. They worked for the Respondent from 5th February 2018 until 10th March 2018 when their engagement was ended by the Respondent owing to a disagreement.

17. During the time they worked for the Respondents the Claimant had work every day and, tell me, that the expectation was that they would work five days a week with the option, if they wished, of working a sixth.

18. In advance of each job the Claimant's would receive an email from the Respondents informing them of their work for the next day. This was in the form of a "Work's Instructions" form which I have seen a number of in the bundle.

19. Often these Works Instructions would include particular instructions, for example a time before which the Claimants would not be able to obtain entry to a premises because the tenants would still be there. Sometimes the

work instructions identified if certain tools were required (see below about the provision of tools).

20. If the Claimant's had any questions or concerns over how to proceed with a job they would contact Mr. Hunt. From the evidence I have before me however the Claimants were able to determine how they actually did the work, subject to these limitations.

21. Expenses were paid by the Respondent, either by way of them providing the method of payment (e.g. a credit card was used to fill the van that was hired by the Respondent with fuel) or by the Claimant's claiming the expense back from the Respondent, for instance I have seen text messages that show Mr. Webber paid for the hire of the van but received payment of this from the Respondent.

22. This was from Enterprise vehicle rental and was not branded with the Respondent's logo or name. when a dispute arose as to the van with Enterprise it was the Respondent who sought redress and not the claimants.

23. The Claimants were not required to wear uniforms of to be identified with the Respondent.

24. The Respondent did however, provide the Claimants with specialist tools if the particular work they did on a given day required them. It did not provide them with general tools however.

25. Mr. Booty and Mr. Webber undertook the work themselves, there was never any discussion between them and the Respondent about them being able to send a substitute as a replacement for them. Mr. Booty did appear to be uncertain on this however: at one point saying he never asked to send a replacement and then, a little bit later, saying that he had, in fact, asked to send a replacement when he was unwell and had a conversation with Mr. Hunt about him being replaced and was told that there would not be a replacement. Both MR. Booty and Mr. Webber considered that the Respondent was requiring them to undertake the work and so would not permit a substitute.

26. When seeking payment for each job he undertook Mr. Booty submitted an invoice that contained his UTR, his National Insurance Number and his bank account details. He did this on a weekly basis. Mr. Webber tells me, and I have not seen any invoices to this effect, so accept his evidence on this, that he did the same, albeit he did not set out his UTR number on his invoices.

27. Both Claimants had CIS deductions applied to the payments they received from the Respondent and would, it is anticipated, have presented their own tax returns. Mr. booty's invoices contain the CIS deductions a part of the amount he claims from the Respondent.

THE LAW

Statute

28. So far as is relevant, S230 ERA states:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting 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;
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> and any reference to a worker's contract shall be construed accordingly.

29. Section 230(1) of the Employment Rights Act 1996 defines "employee" as an individual who entered into or works under a contract of employment. Sub- section (2) defines "Contract of Employment" as a contract of service or apprenticeship, whether expressed or implied, and whether oral or in writing.

30. There is extensive case law on the question of who is an employee. As early as 1968 the case of Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance constructed what has become known as the multiple test. This has been developed over the years and the concept of an "irreducible minimum" has been introduced. This approach was endorsed by the House of Lords in the case Carmichael v National Power plc [2000] IRLR 43.

31. In the case of Montgomery v Johnson Underwood Ltd [2001] IRLR 269 the Court of Appeal held that mutuality of obligation and control are the irreducible minimum legal requirements for the existence of a contract of employment. The Court of Appeal confirmed that the guidance in Ready-Mixed Concrete, as approved in Carmichael, was the best guide to be followed by Tribunals.

32. That guidance requires three conditions to be fulfilled. Firstly, that the individual agrees that, in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer; "mutuality of obligation". Secondly, the individual agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree, "to make that other master". Thirdly, the other provisions of the contract are to be consistent with its being a contract of service.

33. The Tribunal must consider the whole picture to see whether a contract of employment emerges, although mutuality of obligation and control must be identified to a sufficient extent in order for a contract of employment to exist.

34. In Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 Elias J said 'The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.'

CONCLUSIONS ON THE ISSUES

General

35. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues

36. I have decided that the claimants were neither employees nor workers of the Respondent. My reasons are as follows.

37. Clearly there was a contract between the parties. The question for me is what the form of that contract is. I will look first at whether it is possible for the contract to be one of service i.e. an employer/employee contract. I have done this by looking at the details of the relationship between the Claimants and Respondent and then taking a step back and looking at the overall picture.

38. There being no express contract there are no terms for me I have had to look at how the parties conducted themselves over the relatively short period of their engagement. I must look behind the label at the reality of the situation.

Mutuality of obligation

39. I consider that this requirement is made out: during the duration of the contract the Respondent was under an obligation to offer work and the Claimant was obliged to do this amount of work. I have been told that this was for five days a week, with the option of a sixth day. Over the shirt period of their engagement the Claimants were in the enviable position of being supplied with work

Personal Service

40. I have less confidence, however in the requirement of personal service. Mr. Booty's evidence was contradictory on this point and it presented me with some doubts. On the balance of probabilities I am not satisfied there was an obligation of personal service requiring the Claimants to attend personally.

41. This finding is also fatal to the claimant's claim to be workers within the meaning of s230(3) as set out above.

Control

42. I have to look to see whether the ultimate authority over how the Claimant goes about carrying out their duties resides with the Respondent. This is not a question of day-to-day detailed control by the Respondent of the Claimant but rather whether the employer had a contractual right to direct the individual in relevant respects. Here I find they did have some control over aspects of the Claimants for instance, hours and working location.

43. However, this does not appear to me to be a "dependant work relationship" where the Claimant had little autonomy but was, it seemed to me an arm's length one in which the Claimants were able to undertake the work as they saw fit, subject to the direction from the Respondent as to where to attend, and at what time. I find this level of control is entirely appropriate when dealing, as the Respondent was, with tenanted properties and was likely an instruction the Respondent received from its clients (who may have been the landlords or a managing company).

Conclusion on Issues

44. I do not find, therefore that the irreducible core of a contract of employment has been made out, the contract between the Claimants and Respondent cannot, therefore, be one of employment.

45. If I were wrong on this, and there was an irreducible minimum, then I would have found the other factors in the relationship were not supportive of an employer/employee relationship nor one of worker/employer but indicated to me that they Claimants were in business on their own behalf and were self-employed individuals conducting their own business: they were paid in accordance with the CIS scheme, they were paid gross and submitted invoices on a weekly basis, being paid a flat fee for each day they stood to gain if they finished the work quickly, they were paid gross and were expected to account for their tax.

46. Further they accepted they were self-employed whilst at Name and that "nothing really changed" when they moved to the Respondent.

CONCLUSION

47. Although there was a contract in place between the Claimants and Respondent it was not one over which the employment tribunal has any jurisdiction to consider complaints arising from its alleged breach. The Claimants' claims, therefore fail.

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Employment Judge M. Salter

Monday, 17th December 2018