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THE EMPLOYMENT TRIBUNALS

Claimant: **Ben Philcox**

Respondent: **Railscape Ltd**

Heard at: **East London Hearing Centre**

On: **5 December 2018**

Before: **Employment Judge Burgher**

Representation

Claimant: Ms K James (Partner of Claimant)

First Respondent: Mr S Rahman (Counsel)

JUDGMENT

1. The Claimant was not an employee of the Respondent. His claims for unfair dismissal and breach of contract are therefore dismissed.

2. The Claimant was a worker for the Respondent. His claim for accrued holiday succeeds.

3. A remedy hearing for the accrued holiday pay claim will take place on 18 February 2019 at 10am, if the matter is not otherwise resolved.

REASONS

Issues

1 At the outset of the hearing the Tribunal identified and refined the issues which are as follows:

1.1 Whether the Claimant was an employee of the Respondent.

1.2 Whether Claimant was a worker of the Respondent.

1.3 If the Claimant is an employee, whether he was unfairly dismissed. The Respondent maintained that if the Claimant was an employee he was dismissed by reason of conduct, namely inappropriate behaviour towards two other employees. If the Respondent established conduct as a reason, I would consider whether the dismissal was fair and reasonable in all the circumstances.

1.4 If the Claimant is an employee, whether he is entitled to notice pay arising from the termination of his contract.

1.5 If the Claimant is a worker, whether he is entitled to accrued holiday pay on termination of employment pursuant to the Working Time Regulations.

Evidence

2 The Claimant gave evidence on his own behalf. The Respondent called Mr Michael Hayes, Managing Director, Mr Giles Scott, Director of Branchline Ltd and Ms Rachel Chapman, Contract Manager of the Respondent. All witnesses gave evidence by signed written witness statements and were subject to cross examination and separate questions from the Tribunal. The Claimant stated that he was dyslexic and I ensured that the relevant parts of all written documents where read out before reference was made to them.

3 In addition to the oral evidence, the Claimant invited me to read a statement from Mr Simon Sands dated 4 August 2018 and a signed letter and note from Mr Tilmann Sonntag dated 15 August 2018. I read these documents and informed the Claimant that they would have limited evidential value in view of the fact that the people concerned were not in attendance at Tribunal to attest to the veracity of the documents. However, it transpired that Ms Chapman's evidence regarding how work was assigned and managed was consistent with the first three paragraphs of Mr Sonntag's letter and paragraphs 3 and 4 of Mr Sands' statement and as such I considered that the statements were supportive when determining the day to day operations between the parties.

4 I was also referred to relevant documents in a bundle of over 92 pages. There was an evident lack of contractual documentation regulating the relationships between the relevant parties connected with this dispute. In particular, Mr Hayes maintained that there was a clearly defined contractual relationship with Mr Sonntag but did not produce any documentation to evidence this assertion. This assertion was contrary to the contents of Mr Sonntag's letter and Mr Sands' statement both of which were produced well before the hearing. In making my findings I therefore drew inferences against the Respondent following lack of any the contractual documentation in this regard.

Facts

5 I made the following findings of fact.

6 The Respondent provides the rail industry with services including arboriculture, environmental, building, fencing works and maintenance. It holds full trackside principle contractor status with Network Rail and his heavily regulated and audited under the Construction (Design and Maintenance) Regulations 2015. It is required to comply with extensive health and safety, quality and environmental management regulations and have management systems in place to demonstrate this.

7 In order to undertake it's tasks the Respondent employs qualified operatives and contracts with several smaller companies and self-employed workers to do the work required. However, it is essential that all relevant operatives demonstrate the competencies required to be registered by Network Rail under the Sentinal Card to work trackside. The Sentinal Card was in effect a passport to allow operatives to work on the rail infrastructure across the UK.

8 Network Rail required the Respondent to sponsor all operatives it used on the rail infrastructure network. For identification purposes, this meant that sponsored operatives were required to wear the sponsoring company's branded protective clothing.

9 The Claimant is an experienced tree surgeon. He responded to an advertisement placed by Mr Giles Scott in September 2013 for work. The Claimant was interviewed by Giles Scott, who at that time was working with Mr Sonntag. The Claimant was offered the chance to work alongside Mr Sonntag and Mr Scott in providing services as contractors to the Respondent. In order to do this the Claimant was required to pass a 3 day Personal Track Safety (PTS) training course provided by the Respondent. The Claimant passed this and was offered a 'Contract of Sponsorship' by the Respondent. The Claimant signed this document on 22 October 2013 and was then was sponsored by the Respondent and given a Sentinal Card issued by Network Rail.

10 Initially Mr Giles Scott, Mr Sonntag and others worked together in teams providing services to the Respondent and the individuals in the teams authorised Mr Sonntag to invoice the Respondent on their behalf under a single group invoice for the work done by all team members. According to Mr Scott, Mr Sonntag was better at accountancy and that is why he submitted the invoices on behalf of the teams. All individual team members who undertook the work were specifically identified on the schedule to the invoice and the email that accompanied the invoice. For example, the invoice of 6 November 2013 refers specifically to the Claimant in the schedule and the accompanying cover email that Mr Sonntag sent to the Respondent stated *"…Attached please find the invoice for Ben Philcox, who worked at Ebbsfleet Station with Simon Pearce of Friday 01/11…"* When Mr Sonntag was paid by the Respondent for the invoices submitted, he then transferred the relevant sums to the team members concerned.

11 Ms Chapman stated that under no circumstance was paperwork issued under a Purchase Order raised other than to Tilmann Sonntag. I find that this reflects the responsibility of assigning work to the COSS but does not impact on whether the sponsored workers were actually undertaking work for the Respondent.

12 The Contract of Sponsorship states that it defines the contractual relationship between the Respondent as Primary Sponsor for the Claimant regardless of his employment status i.e. directly employed/self employed, sub contractor, etc. It stated that it does not constitute a contract of employment or a contract for services and such

terms and conditions shall be covered under separate contractual arrangements. Under the Contract of Sponsorship the Respondent accepted 17 responsibilities and commitments related to health and safety, provision of PPE and training. Under the Contract of Sponsorship the Claimant accepted 12 responsibilities and commitments including compliance with health and safety, company policies, identification and reporting.

13 From the evidence provided, the Claimant's first assignment was 1 November 2013. However, the Claimant was obliged to accept any work offered. He had also set up his own business 'S & B Tree and Gardening Services' ("S&B") and was able to undertake work through his own business as he wished.

14 On 5 November 2013, the Respondent provided the Claimant with an induction where it provided details of its operational structure and gave the Claimant instructions regarding the relevant policies and issued the Claimant with a company identification card, track safety handbook, PPE and outlined the emergency arrangements. The Claimant was issued with a Network Rail Track permit that stated that his employer was the Respondent and that he must be supervised by a Rail Safety Leader (aka COSS).

15 The Claimant worked 'on and off' for the Respondent from 2013. He invariably accepted work when he was offered it but work was not guaranteed and there was no obligation on him to actually accept work offered.

16 The Respondent had no contractual obligation to actually provide any assignments to teams or individuals and there was no requirement for a team or individual to make itself available for work. In respect of the Claimant actually being assigned work, Ms Chapman instructed Mr Sonntag or Mr Giles where the team was expected to work including the start and finish times. It was necessary for Ms Chapman to assign work to Mr Sonntag or Mr Giles as they were designated as a Controller of Site Safety (COSS). However, a COSS could not undertake the work with any individuals they wished as Ms Chapman would only permit authorised workers sponsored by the Respondent to work in the team. Sole working was not allowed on the track and if an individual needed any time off during an assignment the Respondent expected to be notified of the reason. It was important for the Respondent to be able to demonstrate that they were aware who was trackside. Ms Chapman would also arrange for work to be checked and ensured that all relevant workers had the required training, updates and safety information. Each team that was provided with work was provided with a branded van which was supplied and fuelled by the Respondent with the necessary tools. The Respondent's branded personal protective equipment (PPE) was provided and it was a requirement that it was worn.

17 The Claimant did not invoice Mr Sonntag for the work he did for the Respondent, whether trading as S&B or otherwise, and there was no contractual documentation specifying the nature of the relationship between Mr Sonntag, Mr Giles and the Claimant. This is to be contrasted with the position following the breakdown of working relationship between Mr Sonntag and Mr Giles in February 2016. Mr Giles was frustrated with the alleged lack of professionalism and poor management by Mr Sonntag and he established Branchline Limited to regulate his future relationships with the Respondent and members of the team. Mr Rahman, on behalf of the Respondent sought to refer to an unsigned "Branchline Limited Contract for Services" as evidencing the relationship that the Claimant had with Mr Sonntag and Mr Giles since 2013. The

Claimant had not seen or considered the contents of this 6 page document which must have been drafted in 2016 and, in view of Mr Giles' evidence concerning alleged lack of professionalism and his reasons for stopping working with Mr Sonntag, it could not reasonably be relied to evidence the prior state of affairs. The Claimant had no dealings with Mr Giles since 16 February 2016 and he continued to work with Mr Sonntag, as required, working under the undocumented arrangements that existed prior to Mr Sonntag and Mr Giles parting company.

18 Having considered the above, I find that Mr Sonntag was the COSS and conduit for payments for work provided by the Claimant to the Respondent. This was underpinned by the sponsorship agreements and the mandatory Network Rail regulations relating to identification of workers and qualifications for track safety.

19 On 18 January 2018 the Claimant had discussions with Ms Chapman and Ms Rachel Merryweather, Respondent's Supervisor complaining about comments that had been made about him. Mr Hayes was informed that Ms Chapman and Ms Merryweather felt threatened and intimidated by the Claimant's alleged aggressive manner to them. Mr Hayes did not contact the Claimant to find out his version of events. However, he contacted Mr Sonntag on the evening of the 18 January 2018 to inform him that the Claimant would no longer be used for any of the Respondent's work. The Claimant was not required to undertake any further work for the Respondent from 19 January 2018.

Law and conclusions

20 Section 230 of the Employment Rights Act 1996 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;*

21 Therefore, the starting point for my consideration is whether there is a contract, express or implied, between the Claimant and the Respondent. If there is such a contract consideration of whether there is a contract of service. If there is not a contract

of service, consideration will be given to whether there is work undertaken by the Claimant requiring personal service.

Contract

22 In view of my findings of fact set out above, I conclude that there was contract between the Claimant and Respondent to undertake work. This was the reality of the arrangements. The contract was underpinned by the sponsorship agreement and evidenced by the operational oversight that the Respondent had over the work being undertaken by the individuals in the teams concerned. The work was monitored and signed off by the Respondent's managers and supervisors. Further, the Network Rail Regulations were such that Claimant, whether an employee, worker or genuinely self employed, could not have worked for the Respondent on his own. The regulations were such that work had to be assigned to a COSS and the Claimant had to work with a COSS. Further, a COSS could not assign work to any individual who was not identified, trained and approved by the Respondent to do the work. The work undertaken by the Claimant was specifically identified on the invoices submitted by Mr Sonntag and then approved for payment. There was no documentation pointing against there being a contract between the Claimant and the Respondent nor was there any documentation specifying the nature of the relationship between Mr Sonntag and the Respondent or the Claimant and Mr Sonntag to support the suggestion that it was only Mr Sonntag who had a contract with the Respondent and that he separately contracted with others, including the Claimant. I accept the Claimant's evidence of how he worked with Mr Sonntag and the Respondent in this regard.

Employee status

23 As I have concluded that the reality is that there was a contract between the Claimant and the Respondent, I then considered whether there was a contract of service. I considered the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 QB, where MacKenna J stated:

> *"… a contract of employment exists if these conditions are fulfilled: (i) The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, express 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. (iii) The other provisions of the contract are consistent with its being a contract of service."*

24 In respect of control MacKenna J stated that this:

> "*includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in so doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be restricted."*

25 Mutuality of obligation is another quintessential ingredient of a contract of service. In the case of Carmichael v National Power PLC [2000] IRLR 43, the House of Lords held that mutuality of obligation was not present to entitle the two casual workers to be

granted employee status and that it was not deemed necessary to imply a clause into an agreement to this effect.

26 When the Claimant was working for the Respondent he was subject to their control in respect of the time he was to work, where he was to work, the tools he was to use and the standards of work required. I therefore conclude that he was subject to the control of the Respondent.

27 However, I do not conclude that there was the necessary mutuality of obligation in this matter. The Claimant worked 'on and off' for the Respondent and the Respondent was under no obligation to provide work. The Claimant was under no obligation to accept work and he set up his own business and was able to undertake his own work separately if he wished.

28 In respect of other relevant factors for consideration of employee status I had regard to the fact that the Claimant accounted for his own tax and national insurance, he was not subject to the Respondent's disciplinary procedure nor given a contract of employment at the induction. However, he was provided with Respondent's branded PPE and vehicle that he was required to use.

29 Having considered the above factors, given the absence of mutuality of obligation I conclude that the Claimant was not employed under a contract of service. He is therefore not an employee pursuant to section 230 of the Employment Rights Act 1996.

30 As the Claimant is not an employee, he is unable to pursue a claim for unfair dismissal or breach of contract in the Tribunal. His claims in this regard therefore fail and are dismissed.

Worker status

31 When considering whether the Claimant is a worker, to pursue claims for accrued holiday pay, given my findings regarding the contract above, I am required to consider whether the Claimant was required to perform personally any work or services for another party.

32 I was referred to the Court of Appeal and Supreme Court Judgments in the Pimlico Builders cases ([2017] EWCA Civ. 51 and [2018] UKSC 29) and I also considered the Judgment of the Court of Appeal in the Uber cases [2018] EWCA Civ. 2748.

33 I have little difficulty in concluding that the Claimant was required to personally perform the work he was assigned to do. The Claimant did not believe that he could suggest a substitute and the regulations that the Respondent operated under, with the sponsorship system, induction requirements, Network Rail oversight and COSS supervision meant that the Claimant could not have proposed another tree surgeon to work in his place at any given time. The Respondent would only permit individuals it sponsored and authorised to work and as such would have prevented any substitute suggested by the Claimant from attending trackside.

34 The Claimant was therefore required to provide personal service for the work he undertook. He is therefore a worker for the purposes of section 230 of the Employment Rights Act 1996.

Remedy

35 I did not have sufficient evidence to calculate the amount of holiday pay due to the Claimant. The Claimant is ordered to specify the amount being claimed for accrued holiday pay by sending a schedule of loss to the Respondent by 11 January 2019. The Respondent is ordered to notify the Tribunal by 25 January 2019 whether the remedy being sought by the Claimant is agreed.

36 If there is no agreement a remedy hearing is listed for 2 hours on 18 February 2019 at 10am. Documents for the remedy hearing must be exchanged by 1 February 2019. The Respondent is ordered to produce a supplementary remedy bundle for use at the remedy hearing. Witness statements for the remedy hearing must be exchanged by 8 February 2019.

Employment Judge Burgher

27 December 2018