



EMPLOYMENT TRIBUNALS

Claimant
Mr C Keith

Respondent
Holywell Chimney Systems Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT North Shields

ON 18 December 2018

EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances

For the Claimant: in person
For the Respondent: no attendance

JUDGMENT

The claim is withdrawn but will not be dismissed

REASONS

1. The claim form presented on 28 April 2018 named as respondent Holywell Chimneys /Shaun Hutchinson. It was served on 16 May, a response was due by 13 June but none was received. Employment Judge Speker made a search of Companies House website which showed a company Holywell Chimney Systems Ltd existed . He asked the claimant if it was his employer. He replied that it was and Mr Hutchinson was a director. A limited liability company is an association of one or more human beings registered at Companies House. It is a legal **person** in its own right. The people who manage the company are called Directors. The people who “own” the company are called shareholders. Neither the Directors nor the shareholders are personally responsible for the debts of a company. If it runs out of money, its creditors have no right to be paid by the Directors or shareholders. The respondent is now shown to be subject to a proposal to strike off but the claimant has lodged objection. A registered office is the official address of a company, not necessarily the same as its trading address. The respondent’s name was amended and re-served on 25 June with a new date for response of 23 July , but at the claimant’s request it was sent to the home address of Mr Hutchinson and/or his wife rather than the registered office .

2. Still no response was received. I reviewed the file and directed a letter be sent to the claimant saying that for service on a company to be indisputably valid, it had to be on the registered office or place of business. I asked the claimant to agree to it being re-sent with a 14 day extension of time to respond. On 3 August he emailed the Tribunal saying Mr Hutchinson had promised him payment and asking if he could put his case "on hold". The payments were to be £980 on each of 9 August and 9 September. He sent the tribunal a copy of the text he had received to that effect. He was not paid.

3. On 4 October an email was received at the tribunal from Sarah Hutchinson describing herself as Company Secretary. It said the claimant only ever worked for the respondent company as a subcontractor, responsible for his own tax and national insurance under the CIS scheme so the claim being brought was in the wrong place. She did not admit or deny its validity. Employment Judge Shepherd asked the claimant for his comments. A reply was received on 10 October which clarified situation.

4. The facts are that from June 2017 the claimant worked as a flue fitter. He was told by Mr Hutchinson he would be paid £150 per day for 12 hours plus any overtime accrued at £12.50 per hour, plus £60 per night for accommodation expenses. He provided his own tools and was to pay tax through the CIS scheme.

5. On 20 February 2018 Mr Hutchinson on behalf of the respondent requested his original receipts for expenses as he needed them to claim tax relief against the company's income. These were posted 3 days later. The claimant says he was paid for hours worked on the 10 July, 10 August, 7 September, 10 October, 10 November, 11 December and 11th January. He also received two payments of £2440 on 25 October 2017 and £660 on 20 November 2017. He has bank statements as evidence.

6. On 22 July 2018 Mr Hutchinson messaged him saying he could pay over two dates, 9 August £980 and 9 September 2018 £980 which was less than owed. Payment has never arrived and the claimant did not receive any further correspondence.

7. On 29 October Employment Judge Buchanan set the case down hearing today, directed the claimant should bring details of all sums claimed and details of his status with the respondent as either an employee or worker. Also at his direction a letter was sent to the respondent saying as it had not entered a response so judgment may be given against it but it was entitled to attend the hearing to participate to the extent permitted by the Employment Judge.

8. Section 230 of the Employment Rights Act 1996 (the Act) provides:

(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...whether expressed or implied, and (if it is express) whether oral or in writing.

(3) *In this Act ‘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 a customer of any profession or business undertaking carried on by the individual;*

9. For brevity I shall use three terms throughout these reasons:

“employee” has the meaning given in s230(1) of the Act ;

“worker” has the meaning given **only** in s 230(3) (b) of the Act;

“self employed “ means a person who performs work for another as neither of the above but is in business on his own account .

10. The statutory definition of “employee” begs the question “ what is a contract of service?” . The modern test is set out in a case called Ready Mix Concrete v The Ministry of Pensions There are three elements:

(a) Did the worker agree to provide his or her own work and skill in return for remuneration?

(b) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

(c) Were the other provisions of the contract consistent with it being a contract of service or not as the case may be?

11. In Hall v Lorimer Lord Justice Mummery said that the Tribunal should not go through “a mechanical exercise of running through items on a check list to see whether they are present in or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of the detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole” .

12. In my view the claimant on his own case was a construction industry sub contractor and while he was almost certainly a “ worker “ , I doubt he was an employee.

13. The law relating unlawful deduction from wages in Part 2 of the Act includes

*13 (1) An employer shall not make a deduction from wages of a **worker** employed by him unless—*

(a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*

(b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

14. Section 23 includes

(1) A worker may present a complaint to an industrial tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

15. Section 27 includes :

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

but excluding any payments within subsection (2).

(2) Those payments are—

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

16. This means that if the respondent has not paid **wages for work done**, a "worker" may bring a claim in the Tribunal but **not for expenses**. The Employment Tribunal (Extension of Jurisdiction) Order 1994 enables an "employee" to claim his expenses as a breach of contract claim provided the contract has ended . If he is not an employee he can only sue for his expenses in a County Court. The division between the Employment Tribunal's and the County Court's jurisdiction over certain types of debt has been the subject of a report by Lord Justice Briggs. Unless and until Parliament changes the law, I think it unlikely this claim can succeed in this Tribunal.

17. The evidence to which the claimant referred me that, whatever his " status", ie employee, worker, or self employed sub contractor, he is owed money, is overwhelming and, in the County Court, his status is irrelevant.

18. Rules 51 and 52 of the Employment Tribunal Rules of Procedure provide

51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, ..

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

19. The claim of breach of contract in the County Court would have none of the problems it has before the Tribunal. Moreover, the County Court could deal with a claim for interest. The limitation period for issuing is six years from the breach. I gave the claimant the information to consider the position. He informed me he wished to withdraw the claim here and bring it later in the County Court. I am satisfied there would be legitimate reason for doing so. Therefore, the claim will not be dismissed.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 18 DECEMBER 2018