



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

MR CARL SIMMONS

AND

Respondent

SPACE WISE SOLUTIONS LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 25TH FEBRUARY 2019

EMPLOYMENT JUDGE MR P CADNEY

APPEARANCES:-

FOR THE CLAIMANT:- IN PERSON

FOR THE RESPONDENT:- MR P HUBBARD

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claims of unlawful deduction from wages and breach of contract are dismissed.
2. The respondent's application for a preparation time order is dismissed.

Reasons

1. By this claim the claimant brings a claim alleging that some £3,290 remains outstanding in respect of work he carried out for the respondent during a six week period commencing on 9th October 2017. It is not in dispute that he has been paid in respect of five of those weeks but one invoice for one week's work remains outstanding. There is a dispute as to the amount owed but before that issue is

considered there is the fundamental question of the claimant's employment status to be determined. The tribunal only has jurisdiction to hear the claim (whether as a claim for unlawful deduction from wages or as a breach of contract claim) if the claimant was an employee (or worker) of the respondent. The respondent contends that he was in reality a self-employed independent contractor. If that is correct the effect would be that the tribunal has no jurisdiction to hear the claim which would fall within the jurisdiction of the County Court. At an earlier preliminary hearing it was decided that the case should be listed to determine the claimant's employment status which is the issue before me today.

2. There are essentially three categories into which a worker in the broad sense may fall. They are in summary; an employee (essentially an individual who works under a contract of service s230 (1) and (2) Employment Rights Act 1996); a worker (essentially anyone who is an employee within subsections (1) and(2) or anyone undertakes to personally perform any work, except where the other party to the contract is a client or customer of any business undertaking being carried on by the individual (ERA 1996 s 230 (3)); or an independent contractor (essentially anyone who is not employed under a contract of service and who falls within the exception set out in subsection (3) above).
3. The tests for whether an individual is an employee are well known, and no one feature is determinative; the tribunal has to look at all the evidence in the round. The question here is whether the claimant was genuinely in business on his own account and if so whether that was the basis of, and his status when contracting to provide his services to the respondent. In other words, what was the true nature of the contract between the parties.
4. There is one point about which both parties agree; the claimant was remunerated under the terms of the Construction Industry Scheme. In outline if a contractor registers under the scheme it can engage independent contractors from whose payment they deduct either twenty or thirty percent (depending on whether the subcontractor is himself registered with the scheme) for which they account to the revenue. When the self-employed subcontractor submits his tax return the payments made under the scheme will be taken into account in determining any tax liability or rebate. The respondent makes the point that this scheme is only open as a means to deduct tax for a genuinely independent self-employed contractor. If the claimant was employed they would have been obliged to pay PAYE, and deduct national insurance. They genuinely believed him to be an independent contractor or they would not have used the scheme, and for the reasons set out below in reality so did the claimant. It follows, submits the respondent that as the claimant was paid under this scheme and as neither party is contending it is a sham, the claimant himself explicitly having adduced evidence that he was indeed a subcontractor, it must follow that he was not an employee. The tax treatment of earnings is not determinative of employment status, even where the parties agree about it. However, it became clear during the course of the evidence that the claimant had misunderstood the question this tribunal has to answer. He has attended specifically in order to demonstrate that he was genuinely a subcontractor and has produced evidence from HMRC to that effect. The respondent not only accepts this but contends that it effectively makes

- their point for them, as both parties are contending that the claimant's tax status genuinely reflected his employment status. This is I accept, a powerful point but not necessarily of itself determinative. However for the reasons set out below it is my view that it genuinely reflects the reality of the relationship.
5. The claimant markets his services as "Total Home Care", and presents invoices for payment. He pays for materials for which he then also invoices his client. The contract arose in this case when the respondent advertised for subcontractors to price a specific part of the work they had agreed with the client. The claimant contacted them but was reluctant to agree a contract price as there were aspects of the work with which he was unfamiliar. I have no doubt that if the claimant had been more familiar with the work required a specific price, rather than a day rate, would have been agreed, which is in and of itself inconsistent with employment status. Equally pertinently the claimant accepted that in carrying out this contract he himself engaged two subcontracted labourers. It is not alleged that this was done at the behest of the respondent, nor that there was ever any contractual relationship between them and the respondent, nor that he was given any instruction as to how or with how many subcontractors of his own he should carry out the work. In my judgement if the claimant were an employee or worker he could have had no authority to engage staff to carry out the work, and this is in and of itself only in reality consistent with his status as a self-employed independent contractor. In addition, as the respondent points out the dispute about the unpaid invoice arises because whilst on site the claimant entered into a separate agreement to carry out works for the respondent's client. In essence the respondent is at least in part seeking specific details of the work carried out for the client, when that work was carried out and what was charged, together with a similarly detailed explanation of the work being performed for he respondent, in order to ensure that there is no overlap between the two. The respondent is and remains suspicious about the claimant's failure, as it sees it, to do so. However, whatever the rights and wrongs of the dispute the respondent submits that entering into an entirely separate contract to carry out work for the client is wholly inconsistent with an assertion that the claimant was in fact an employee of the respondent for the duration of the contract, and is only in reality consistent with his status as a self-employed independent contractor. In my judgement this must also be correct.
 6. It follows that in my judgement all of the evidence overwhelmingly supports the proposition that the claimant was a genuinely self-employed independent contractor and not an employee or worker of the respondent and that the tribunal has no jurisdiction to hear his claim for unpaid wages or breach of contract.
 7. The respondent has sought a preparation time order and/or its expenses on the basis that it has been to time and expense to meet a claim in which the claimant had fundamentally misunderstood the nature of the dispute. There was in effect no factual dispute between the parties. When the claimant contended that at the earlier preliminary hearing he had understood the employment judge to say that he needed to prove that he was genuinely a subcontractor he had got it completely wrong. What he needed to prove was that his tax status as a subcontractor did not genuinely or accurately reflect his status when engaged by the respondent, but in reality because

of this misunderstanding there was no dispute between the parties. The respondent accepts that this was clearly an entirely honest and genuine misunderstanding but contends that because of it has incurred entirely unnecessary expense.

- 8. Under the provisions of rule 76(1)(b) it is open to me to make the order sought where the claim has no reasonable prospect of success. This requires an objective analysis, rather than an assessment of the genuineness of the claimant's belief. It appears to me that this test is met. The claimant has adduced no evidence that could have allowed me to conclude that he was an employee of the respondent and all the evidence, including the claimant's own, was to the opposite effect. However there is still a discretion as to whether to make such an order. The claimant is not legally represented and the question of employment status is not necessarily one that it is easy for a lay person to comprehend or analyse. It is not appropriate for me to hold him to the standards of a legal representative. As I have no doubt that the claimant has acted entirely honestly albeit misguidedly throughout the proceedings I am not persuaded that it would be just in this case to exercise my discretion to make the order sought.

**Judgment entered into Register
And copies sent to the parties on**

EMPLOYMENT JUDGE Cadney

.....2 March 2019.....

Dated: 26 February 2019

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for Secretary of the Tribunals