



EMPLOYMENT TRIBUNALS

Claimant: Mr M Hollis

Respondent: Stone Brook Builders Limited

Heard at: Manchester

On: 15 March 2019

Before: Employment Judge Morris
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Neither present nor represented

JUDGMENT having been sent to the parties on 28 March 2019 and application for reconsideration of that judgement having been made by the respondent in accordance with Rule 71 of the Employment Tribunals Rules of Procedure 2013, it is considered appropriate that the following reasons should be provided:

REASONS

1. The claimant had just finished his apprenticeship as a plasterer in August 2017, having achieved Level 1 and Level 2, when he identified a job as a plasterer for the respondent on the “Indeed” job site. He applied for that job and Mr Gary Shipp of the respondent invited him to attend for an interview, which the claimant did. He was successful at interview and he commenced work for the respondent on Tuesday 5 September 2017.

2. Mr Shipp offered the claimant options of being employed on a zero hours’ contract or being self-employed under the Construction Industry Scheme (“CIS”). The claimant opted for employment because he felt more comfortable being employed. Mr Shipp said that this would mean that he would deduct 30% from the claimant’s wage and mentioned that if he were to go self-employed it would be lower at 20%. He also said that the claimant being self-employed would mean that he

could say that he was not coming into work but if he was employed he could not let Mr Shipp down. The claimant chose the 30% option. Mr Shipp was happy with that commenting that both relationships would be zero hours anyway and remarked that if the claimant were to opt for the 30% tax he would have more rights with the respondent.

3. Mr Shipp said that he would send the claimant a contract of employment and all necessary paperwork out in the post but that was never received.

4. Although recognising that the accepted approach to determining the status of an individual in these circumstances is that known as the 'multiple test', there is nevertheless an accepted "irreducible minimum" of relevant factors to be brought into account. I heard the claimant's evidence on each of these factors, which I shall address in turn.

Control

5. The claimant was a credible witness who gave his evidence in a very open almost naïve fashion. As to this factor of control, he stated that Mr Shipp had watched him "24/7". Mr Shipp was constantly in the room and said that the claimant had to be supervised because he was just out of his apprenticeship and Mr Shipp could get into trouble. "He told me what to do". Mr Shipp had explained that although he could not apply plaster to the walls he had experience in plastering and knew what it should look like. While Mr Shipp was supervising the claimant he was "watching me, telling me what to do and where to do it".

Mutuality of Obligation

6. The claimant gave convincing evidence that he had to attend work and that if he had not done so Mr Shipp would have dismissed him. On the other hand, Mr Shipp had undertaken to give the claimant work, saying, "If I'm in work you'll be in work". He explained that if there was no plastering to do the claimant would be engaged in labouring, joinery, studding out, brickwork, boarding, etc., stating "Don't worry it, we'll learn you".

Regular Work

7. The claimant's evidence, which I accepted, was that he had started work on Tuesday 5 September and, the weekend apart, had worked continuously until Friday 15 September 2017; his hours of work being 8.00am until 10.00pm each day. I pressed the claimant on that, saying that surely not every day was worked to that extreme, but he explained that the house that was being plastered was "on a deadline. We were mixing plaster and plastering in the dark and I wasn't happy about that because you should never plaster in the dark".

Personal Performance

8. I accepted the claimant's evidence that he could not send someone else to do the plastering work in his place and that Mr Shipp wanted him to do it. Indeed, the relationship came to an end when the claimant declined to go to work on one of the

respondent's jobs in Oldham because he had just recently passed his driving test and was not confident about driving on the motorway and Oldham was simply too far to drive not using the motorway. The claimant had offered to send someone else to do the Oldham job (Mr Michael Curran who had trained the claimant) but Mr Shipp had said that it had to be him. Mr Curran had offered to do this work in place of the claimant.

9. Moving on from consideration of the "irreducible minimum" required to establish employment status, there are, in addition, other factors that I have brought into account in coming to my judgement including the following:

- (1) Financial considerations – The claimant was to be paid a regular wage and did not carry any financial risk of the business. He was paid £120 per day and not a lump sum payment for the job and had no rights to set the rate that he wished to be paid.
- (2) Income Tax – I accept the claimant's evidence that when he opted to be an employee Mr Shipp had said that he would take 30% off his wage to cover income tax and national insurance payments. Further, that if the claimant went self-employed it would be a lower rate of 20%.
- (3) Intention – The claimant was offered options of employment or self-employment. He chose employment and I accept his evidence that Mr Shipp on behalf of the respondent was happy with that on the basis that both relationships would be zero hours anyway and that he said words to the effect that with the 30% tax "you will have more rights with me".

In this connection, the claimant handed in prints of messages sent between him and Mr Shipp on Sunday 17 September 2017. In one of those messages timed at 09:42 Mr Shipp refers to himself as being "a boss" and that if the claimant cannot drive on motorways "we cannot continue with the employment". Those terms of "boss" and "employment" are indicative of employment status but not necessarily determinative.

10. For the above reasons I am satisfied on the balance of probabilities (indeed beyond that) that the claimant was an employee of the respondent.

11. I am further satisfied that the terms of that employment included that the respondent would pay him £120 for each day of work no matter what type of work he was doing, and that he was persuaded that that was "good money" but would necessitate him working long hours.

12. I am similarly satisfied on the claimant's evidence that he did work 14 hours on each of the nine days referred to above.

13. In these circumstances the claimant was entitled to gross pay of £1,080, which the respondent did not pay to him.

14. As indicated in the Judgment, therefore, the respondent is ordered to pay to the claimant that amount of £1,080 in respect of which, given that that calculation has been made by reference to the claimant's gross pay, any liability to income tax or employee national insurance contributions shall be the liability of the claimant alone.

Employment Judge Morris

Date 23 April 2019

REASONS SENT TO THE PARTIES ON

24 April 2019

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