THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

Mr C Wood

Claimant

And

Your Local Plumbing Company Limited

Respondent

ON: **13 June 2019**

Appearances:

For the Claimant: In Person
For the Respondent: Mr P Knowles, Company Secretary

JUDGMENT ON PRELIMINARY ISSUE

1. The Claimant was an employee of the Respondent pursuant to section 230(1) and (2) of the Employment Rights Act 1996.

2. The matter will be listed for a telephone case management hearing on a date to be notified, in order to set the final hearing date and make other case management orders.

REASONS

1. This was a preliminary hearing to determine whether the Tribunal had jurisdiction to hear the Claimant's unfair dismissal, unlawful deduction of wages and breach of contract (Notice Pay) claim against the Respondent by virtue of his employment status.

2. I heard evidence from the Claimant on his own account. On behalf of the Respondent, I heard from Patrick Ross McKiernan, shareholder, and Peter Knowles, Shareholder and company secretary. The Claimant prepared a short witness statement to supplement the matters set out in his particulars of claim. The Respondent's witnesses did not produce any statements but relied on their grounds of resistance set out in the ET3 form and their additional evidence given in chief.

The Issues

3. The issues I had to consider were as follows:

    a. Was the Claimant an employee of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996 (ERA)

    b. Was the Claimant a worker within the meaning of section 230(3)(b) ERA.

The Law

4. By section 230(1) and (2) ERA, an employee is a person who works under a contract of employment, which is defined as a contract of service or apprenticeship, whether express or implied, and if express, whether oral or in writing.

5. By section 230(3) ERA, a worker is defined as (a) an employee, or an individual who has entered into or works under (b) any other contract …..whereby the individual undertakes to do or perform personally any work or service 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.

Findings of Fact

1. The Respondent is a plumbing and heating specialist and the Claimant Gas Heating Engineer.

2. By a letter incorrectly dated 3.1.13 (it should have been 3.1.14) the Respondent offered the Claimant a fixed term contract as an installer and service and breakdown engineer. Under the heading "Contract terms" the letter provided that the contract was to expire on 28 November 2014, that the Claimant would be paid at the rate of £225 per day and that his hours of work would be 8am-5pm, Monday to Friday and every other Saturday. The Respondent says in its ET3 that the Claimant was given standard contractor terms of engagement which set out the contractual terms between them. However, the email referred to above was the sum total of the written agreement. There were no additional

terms set out elsewhere.

3. The expiry date of the contract came and went, and the Claimant continued to work in the same role until 21 August 2017, when he resigned. There is a dispute as to whether that termination amounted to a dismissal but it is not a matter for determination at this hearing.

4. The Respondent contends that the Claimant's engagement ended on 7 November 2014 and that thereafter he was engaged by a company called Vertent Ltd. The Respondent relies on an email sent to the Claimant by Jennifer Dedman, Managing Director, on 11 November 2014 asking him to make his invoices out to Vertent Ltd for work from now on and advising him that future invoice payments will come from that business. The Claimant says that he was never told by anybody that he was employed by Vertent Ltd and that he was never given a new agreement and that nothing changed except the pay arrangements. I accept that evidence.

5. Vertent Ltd is a company owned by the same individuals that own the Respondent and both companies have the same registered office. Indeed, Jennifer Dedman is the sole director of both companies and has a 33% shareholding in each of them, as does her husband, Ross McKiernan. The remaining 33% shareholding in both companies is held by Peter Knowles, who is also the Company Secretary of the Respondent. Peter Knowles told the tribunal that Vertent Ltd was set up to allow him to work outside the local plumbing industry; in the oil and gas industry. He said that as a separate income stream, Vertent Ltd started to provide staff for the Respondent, for which it received a management charge. No evidence of this was produced by the Respondent, such as financial accounts, and when I asked Mr Knowles what Vertent's fee for this service was, he did not know. Whatever the business endeavours of Vertent Ltd were, there is no evidence that the Claimant's contract transferred to it. The most that can be said on the evidence is that the change in the payment arrangements was an internal accounting matter between the two intertwined companies. I therefore find that the Claimant's contract continued with the Respondent until termination.

6. The Claimant's evidence was that most of the time, he worked the hours stipulated in the agreement and that it was only latterly when the Respondent did not have the work that he did fewer hours. However, he says that this was their choice and not his. He said that at the end of each week, he completed and handed in timesheets, and was paid weekly in arrears against invoices which he submitted to the Respondent.

7. The Claimant received his pay gross, with no deductions for tax or national insurance. The Claimant's evidence was that he paid his taxes directly to the inland revenue by filling out a self-assessment form. On the form, he did not complete the "Employment" section but entered his details as a self-employed person.

8. The Claimant provided his own general plumbing tools, though any specialist tools were supplied by the Respondent.

9. The Claimant, along with other engineers, was allowed to carry out private work and was permitted to use the Respondent's van to do so, subject to a charge for mileage and subject to him not using the Respondent's materials or branded clothing. The Claimant said that he had another client that he worked for occasionally and also did jobs for family and friends, but his private work was done outside the hours he worked for the Respondent. He said that during those hours, he worked solely for the Respondent.

10. The Claimant had £2 million worth of professional indemnity insurance, which he had taken out when at his previous job with Pimlico Plumbers. He kept it going throughout his time with the Respondent, though there was no specific requirement that he do so.

11. The Claimant says that he was instructed by Ross McKiernan that if he wanted any time off, he needed to book it well in advance. The Claimant told the tribunal that if he wanted to take a particular day off, it was generally fine as long as he gave a couple of weeks' notice. Mr McKiernan denied this and claimed that the Claimant, along with other contractors, worked according to his availability and would not be booked for work unless he confirmed that he was available. I do not accept that evidence as it is inconsistent with the written terms of the agreement which clearly anticipate the Claimant working a fixed number of minimum hours per day.

12. Although the Claimant gave evidence that from March 2017, Mr McKiernan started asking him if he was available, he said that this was done in a pointed way and was a departure from previous practice, which was that he would receive notification of the following weeks' work schedule by text on the Friday or Saturday beforehand without any discussion. I accept that evidence as the Respondent did not adduce any documentary evidence, such as a text or email, showing any occasion prior to March 2017, when the Claimant was asked about his availability. Also, it is noteworthy that the requests for availability from March 2017 coincided with a downturn in work generally and, on the Respondent's case, its inability to give anybody more than 3 days a week of work. It seems to me therefore that the new practice of asking if the Claimant was available suited the Respondent and was more to do with the lack of work than the Claimant's freedom to turn down work. Also, around this time also, the Respondent asked the Claimant to set up a limited company and to invoice the Respondent through the company, which he refused to do. The Respondent said that this was done on the advice of its Accountants. Whatever the reason, it is clear that, at this time, the Claimant's status was something that was very much in the Respondent's focus and may explain the change in the way that it sought to deal with him contractually.

13. When working for the Respondent, the Claimant was required to wear a branded uniform. He was also required to attend staff meetings. The Respondent had intimated in its ET3 that contractors only attended health and safety meetings. However, in cross examination, Mr McKiernan accepted that contractors were required to attend other meetings on a range of topics such as feedback from customers, sharing of business reporting, better ways of working etc. The Claimant along with other contractors was also encouraged to sell the Respondents products and services and a commission scheme was set up for this purpose. Mr McKiernan confirmed in his evidence that the Claimant received commission under this scheme.

14. The Respondent controlled when and how the work was carried out. That is clear from an email from Peter Knowles dated 2 August 2016, sent to all engineers and headed "Business Performance Notice". Set out in the email are various performance requirements including; when and how the work is to be carried out, when the working day is to start and finish, when the lunch break is to be taken, when paperwork is to be completed etc. It also provides that a report on individual engineers' performance against these requirements will be made on a weekly basis with the risk that a financial sanction may be applied if performance falls below that required. Where such sanctions were applied, there was also an Appeals process available to the engineers.

15. The Claimant was required to correct any defects in his work in his own time and at his own cost. This is supported by a group email sent to staff on 2 August 2016 mandating that all call backs had to be done outside normal hours and if done in normal hours, a minimum of 1 hour had to be credited to the Respondent.

16. The Respondent contended in its ET3 that the Claimant could provide substitute labour if he needed to and that this was expressly permitted in contractor contracts. In other words, he was not required to undertake the work personally. The Claimant denied that he was entitled to substitute his labour and said that he had never done so. The Respondent suggests that this provision is part of its standard terms of engagement. The contractual documentation, such as it was, comprised the email referred to at paragraph 2, above. To describe this as standard contractor terms of engagement is to give it an elevated status above what is deserved. I accept the Claimant's evidence on this.

Submission

17. The parties gave very brief oral submissions which I have taken into account.

Conclusions

18. Having considered my findings of fact, the submissions and the relevant law, I have reached the following conclusions on the issues:

Was the Claimant an employee of the Respondent within the meaning of section 230(1)&(2) ERA

19. In deciding whether the contract that existed between the Respondent and the Claimant was a contract of service, I have applied the well-established multi-factorial test as set out in Ready Mixed Concrete (South East Ltd) v Minister of Pensions and National Insurance [1968] 2 QB 497. That provides that a contract of service exists if 3 conditions are fulfilled:

    a. The individual agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his [employer].

    b. He 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 [employer]

    c. The other provisions of the contract are consistent with its being a contract of service

20. On condition a) I am satisfied that the Claimant was required to carry out work personally for the Respondent and that the Respondent's assertion that he was able to provide a substitute is not supported by the evidence. It is also clear that the Claimant performed the work in exchange for payment from the Respondent. The fact that, latterly, the Claimant invoiced and received payment from a third party is not inconsistent with this provision, for the reasons referred to in paragraph 5 above.

21. On condition b), I am satisfied, from the evidence, and in particular the email referred to at paragraph 14 above, that not only did the Respondent direct what the Claimant did (by providing him with a non-negotiable schedule of works for the week) it also directed when and how it was to be done, with the potential for the application of a financial sanction in the event of non-compliance. I am satisfied that the degree of control exercised by the Respondent was consistent with an employment relationship.

22. On condition c) it is established law that if there is no mutuality of obligation between the parties, then it is highly unlikely that there will be a contract of employment in existence. In other words, there must be an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered.

23. The issue of mutuality of obligation is not specifically expressed in the written terms originally provided to the Claimant. However, as is clear from the initial email setting out the terms of engagement, up until 28 November 2014, the Claimant was required to work specific hours on fixed days and there was no suggestion of flexibility on either his or the Respondent's part. After November 2014, it was the Claimant's evidence that nothing much changed and as he was not presented with new terms of engagement, it can be assumed that the existing terms rolled over.

24. I have already rejected the Respondent's suggestion that the Claimant was booked based on his availability and was free to turn down work. The fact that the Respondent resorted to asking about his availability from March 2017 was, in my view, self-serving and had nothing to do with any flexibility associated with the contract. Further, the fact that the Respondent reduced the Claimant's days down to 3 per week, is not evidence of lack of mutuality of obligation as the Claimant's substantive claim is predicated on the Respondent acting unilaterally and unlawfully in reducing his hours.

25. Further, the fact that the Claimant was allowed to undertake private work is not inconsistent with a contract of service. Employers often allow employees to have 2nd jobs, usually with the proviso that it does not interfere with the performance of the main job. There is nothing in the evidence that I have heard to suggest that the Respondent would have allowed the Claimant to undertake other work during his contractual hours, indeed the evidence points to the other way.

26. A factor that might be said to be inconsistent with being an employee is the fact that the Claimant had professional indemnity insurance, something which is normally associated with someone who bears the financial risk associated with running their own business. However, I don't consider this to be a strong factor against the Claimant being an employee. He was not mandated by the Respondent to take out such insurance; it was a pre-existing policy that he chose to keep going. Given that he occasionally did plumbing jobs for others, there were reasons for him to continue such insurance. Further it is clear that the bulk of the risk associated with the relationship between the parties was borne by the Respondent. The only risk to the Claimant was that he would have to repair any defects in his work at his own cost. There was no suggestion that he would have to indemnify the Respondent against other losses arising from his work, for example, litigation costs and damages or non-payment by the customer.

27. Another factor that might be said to mitigate against employee status is the fact that the Claimant completed his tax return as a self-employed person and received payment

from the Respondent without any deductions for tax or national insurance. Again, I do not consider this strong evidence against employee status. It is settled law that payment of tax and national insurance on a self-employed basis is not conclusive as to status for employment law purposes. It is just one of the factors that needs to be weighed in the balance with everything else.

28. The fact that the Claimant was required to wear a branded uniform, drove the Respondent's branded vehicle, was required to attend staff meetings, and was incentivised to sell the Respondent's products for commission suggests a level of integration into the business consistent with employment.

29. Having considered all the above factors in the round, my overall assessment is that weight of evidence leans towards the Claimant being an employee. I therefore find on balance that he was. It therefore follows that the tribunal has jurisdiction to hear all of his claims.

30. If I am wrong about that, I find, in the alternative, that the Claimant is a worker pursuant to 230(3)(b) ERA. I have already found that he was required personally to undertake the work. I am also satisfied that the Respondent was not a client or customer of any business undertaking of the Claimant. The terms of engagement were dictated by the Respondent and the work done by the Claimant was for the Respondent's customers under the Respondent's branding and at a price dictated by the Respondent. This, plus the level of control and integration present leads me to conclude that the Claimant was not in business on his own account. Hence, as a worker, the Claimant would be able to pursue his claims for unlawful deduction of wages.

Judgment

31. The Claimant was an employee of the Respondent pursuant to section 230(1) and (2) of the Employment Rights Act 1996.

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Employment Judge Balogun
Date: 9 July 2019