EMPLOYMENT TRIBUNALS

Claimant: Mr M Hollis

Respondent: Stonebrook Builders Limited

Heard at: Manchester **On:** 28 August 2019

Before: Employment Judge Morris
(sitting alone)

REPRESENTATION:

Claimant: Neither present nor represented
Respondent: Neither present nor represented

JUDGMENT

The judgment of the Tribunal is as follows:

1. The correct name of the respondent is as shown above and any necessary corrections are made without the need for re-service.

2. The respondent's application dated 29 March 2019 for reconsideration of the Judgment sent to the parties on 28 March 2019 is refused.

REASONS

1. The hearing of the claimant's complaints against the respondent took place on 15 March 2019. The claimant attended and gave evidence. The Tribunal found in his favour: in essence he was an "employee" of the respondent, and the respondent was ordered to pay to him the unauthorised deduction from his wages in the sum of £1,080.

2. As indicated above, by email of 29 March 2019 a director of the respondent, Mr Gary Shipp, applied for a reconsideration of the Judgment on the grounds given in that email. In essence: they had not been made aware of the hearing; the claimant was hired as a sub-contractor not an employee; the judgment was made against Stone Brook Builders Limited whereas the correct name of the respondent is

Stonebrook Builders Limited. Mr Shipp also indicated that the respondent had zero equity and, therefore, "may close before a reconsideration is to be made". On a search of Companies House conducted on the morning of the reconsideration hearing it is recorded that the status of the respondent is, "Active".

3. On initial consideration, in accordance with rule 72(1) of the Employment Tribunals Rules of Procedure 2013 ("the Rules"), I was satisfied that the respondent's application should proceed. I sought the views of the claimant on the application and views of both parties as to whether the application could be determined without a hearing. I also sent to the parties the reasons for my earlier Judgment, which had not been promulgated at the time.

4. By email of 7 May 2019 Mr Shipp submitted a detailed reply, which I have taken into account and return to below. By email of 8 May 2019 the claimant responded that he had given all the evidence to me and, "I still stand by all the evidence I provided to yourself". He disagreed with the reconsideration of the Judgment or another hearing.

5. As indicated above, neither of the parties was presented or represented at the reconsideration hearing. The claimant had not replied to recent correspondence from the Tribunal but, I repeat, had indicated in his email of 8 May 2018 that he stood by all the evidence provided at the earlier hearing. Mr Shipp had responded on behalf of the respondent to correspondence and had indicated that he might not be able to attend the hearing although he hoped to do so. In an email of 19 May 2019 he stated, "I believe that what I had stated in my reply should stand for what I would be saying in court. You have heard my side of the story…" and "I would like to request that my statement is to be my evidence and this to act as my presences to be at the reconsideration".

6. By a letter from the Tribunal dated 8 July 2019, I informed the parties as follows:

> "I do not consider that a hearing to consider the respondent's application is not necessary in the interests of justice; not least because of the stark contrast between the information contained in the emails from Mr Shipp on behalf of the respondent and the evidence given orally by the claimant at the hearing on 15 March 2019."

7. Given the content of the correspondence from the parties I advised them that although it is generally considered preferable and in the interests of the parties themselves for a party to attend a hearing to give oral evidence and they were therefore encouraged to attend the reconsideration hearing, rule 42 of the Rules enabled the Tribunal to consider written representations from a party.

8. In a letter dated 11 July 2019 (although sent to the Tribunal by email of 10 July 2019) Mr Shipp stated amongst other things, "I wish to attend the hearing, however due to my circumstances I may not be able to get leave" and "I wish the Tribunal to consider the contents of my emails dated 29th March and 19th May 2918 as my written representation", and agreed that the correct name of the respondent is Stonebrook Builders Limited.

9. By email of 12 August 2019 Mr Shipp wrote to the Tribunal including, “I am unable to attend in this instance but I do stick with my statement to be used as my evidence”.

10. Although, as indicated above, neither party was present or represented, I considered it to be in the interests of justice that I should proceed to address the respondent’s application for reconsideration. As they had respectively invited me to do, I took into consideration the claimant's evidence before me on 15 March 2019 as recorded in the Reasons for my Judgement that were sent to the parties on 24 April 2019, and the emails from Mr Shipp on behalf of the respondent dated 29 March and 19 May 2019, particularly his lengthy reply, which he assessed to be 2,000 words in length.

11. I first make an introductory point that at the previous hearing the claimant gave evidence having affirmed to tell the truth, in relation to which he answered openly and convincingly the questions that I asked of him.

12. I adopt as the structure for these Reasons the same structure used for the Reasons for my earlier Judgment, including the paragraph numbering used in those earlier Reasons:

1. There is no real dispute between the parties that the respondent advertised for a plasterer albeit that the respondent’s position is that the plasterer was to be self-employed with a chance of employment if their work was of a certain standard. One way of another, the claimant was engaged.

2. Similarly, there is no dispute that it was agreed that the respondent would deduct 30% from the claimant's pay. The dispute, however, is that the claimant's evidence before me was that the deduction of 30% was because he would be an employee because, if he were to be engaged on a self-employed basis, it would be at a lower rate of 20%. The respondent’s position is that the deduction of 30% is due to the fact that the claimant did not have the relevant information or was signed up to the Construction Industry Scheme (“CIS”) that would have enabled a deduction of only 20% to be made. Mr Shipp continues that the claimant was not an employee according to his accountant’s records and although it is right that Mr Shipp was happy that the claimant had chosen the 30% option, that was because he had chosen to be self-employed with the company not being responsible for paying his income tax or NIC but only his CIC deductions.

3. The claimant’s evidence was that Mr Shipp had said that he would send him a contract of employment but it was never received, whereas the respondent maintains that it has multiple contracts, one of them being a sub-contractor contract, which the claimant would have received if he had stayed with the company as a sub-contractor.

4. My earlier Reasons then addressed the “irreducible minimum” of relevant factors.

5. As to control, Mr Shipp's position is that he is the Principal Contractor under the CDM Regulations 2015 (i.e. the Construction (Design and Management) Regulations) under which he used to supervise the claimant. Although taking that into account, I do not consider that it answers the claimant's evidence before me, including that Mr Shipp had watched him "24/7", was constantly in the room, told him what to do and, while supervising the claimant he was "watching me, telling me what to do and where to do it". I continue to be satisfied that the claimant's evidence is indicative of control by an employer rather than merely supervision by a supervisor for the purposes of the CDM Regulations.

6. As to mutuality of obligation, the respondent explains with regard to dismissal that "as Principal Contractor I am in my right to do so if work undertaken is substandard or if the sub-contractor could not attend a site". Again I accept that but the first phrase addresses work quality rather than the obligation to attend work and the second phrase is applicable to a relationship of employment as well as with a subcontractor. As I noted in my earlier Reasons, 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".

   Also in this paragraph the respondent refers to the claimant's evidence of Mr Shipp having stated, "If I'm in work you'll be work", explaining that that actually refers to if Mr Shipp has "clients that require Mr Hollis services or if I have an odd job that requires a non-skilled worker, I would offer Mr Hollis the opportunity to work as a sub-contracted labourer". I accept that the statement, "if I'm in work you'll be in work" is ambiguous, but given that I am satisfied that the claimant was obliged to attend work I am satisfied that that statement of Mr Shipp, which he accepts, is sufficient to establish a sufficient mutuality of obligation.

7. As to regular work, the respondent's position is that the "working hours said by Mr Hollis 8.00am until 10.00pm is not normal working hours and only a subcontractor would choose to work these hours, an employee would have set hours and there after overtime hours or even on a zero-hour contract. Mr Hollis had agreed what his daily rate would be for Stonebrook Builders Limited. This does and cannot represent Mr Hollis as an employee. It was up to Mr Hollis what hours he worked".

   I agree that in an established working relationship such hours as I found the claimant to have worked (being 8.00am until 10.00pm each day) might be more commonly found in a relationship of sub-contractor but the claimant was a young man who had just finished his apprenticeship approximately one month previously and this was his first job. I am satisfied that he would be unfamiliar with a working relationship and, as he indicated to me at the previous hearing, would have been keen to comply with the requirements of his employer. As recorded in my earlier Reasons, "I pressed the claimant" on his evidence in this respect but I was satisfied with his answers that the house that was being plastered was "on a deadline".

8. As to personal performance, the respondent states, “an employee cannot decline where he wishes to work as the company worked all over the uk, this would be totally unworkable to a Company that worked Nationwide, only sub-contractors would be able to decide which jobs they worked on not an employee”. That, however, is the point. I accepted the claimant's evidence that he did indeed decline work for the reasons he gave and, having done so, the respondent terminated its relationship with him. As the respondent states, that is consistent with a relationship of employment rather than with a sub-contractor.

   With regard to Mr Curran, the respondent comments that my earlier finding, “Mr Curran had offered to do this work in place of the claimant” “only proves that Mr Hollis was a subcontractor and not an employee”. I agree that it would have gone a long way to proving that the claimant was a sub-contractor if the respondent had allowed him to substitute Mr Curran in his place, but I accept the claimant's evidence, as recorded in my earlier Reasons, that “Mr Shipp had said it had to be him”.

9(1) The respondent comments in respect of the agreed rate of pay to the claimant, his poor workmanship and the cost of remedying it do not address my findings that the claimant “was to be paid a regular wage and did not carry any financial risk to the business”.

   The parties dispute whether the claimant had the right to set the rate at which he wished to be paid but I accept the claimant's evidence that, as previously found, he “had no rights to set the rate that he wished to be paid”.

9(2) The further information provided by the respondent with regard to the payment of income tax is helpful. It is apparent that tax can be deducted at 30% if the worker has not given the employer his/her Unique Tax Reference Number (“UTR”) or HMRC cannot find his or her UTR on its list of registered sub-contractors. One reason for that, of course, is that the worker could be an employee, which I found and continue to find on the evidence before me was the status of the claimant.

9(3) The respondent had not particularly addressed the “Intention” subparagraph except to set out the “definition of a boss” and the role of a principal contractor. I accept those definitions but they do not cause me to alter my earlier finding that the terms used by Mr Shipp in the text messages that he sent to the claimant of “boss” and “employment” are indicative of employment status but are not necessarily determinative.

13. Thus, having considered very carefully, on the one hand, the respondent’s written representations and, on the other, the claimant's evidence before me on 15 March 2019, which I repeat he gave having affirmed to tell the truth and in relation to which he answered openly and convincingly the questions that I asked of him, I maintain my conclusions that, on balance of probabilities:

(1) The claimant was an employee of the respondent.

(2) The terms of his employment included that the respondent would pay him £120 per day.

(3) The claimant worked 14 hours on each of the nine days Tuesday 5 September 2017 to Friday 15 September 2017 (i.e. excluding the weekend).

(4) The claimant was entitled to receive gross pay in respect of those days totalling £1,080, which the respondent did not pay to him.

(5) The respondent is ordered to pay that amount to the claimant.

14. In summary, therefore, the respondent's application for reconsideration is refused.

Employment Judge Morris

Date: 1 September 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 October 2019

FOR THE TRIBUNAL OFFICE