THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

Mr A Watkin

Claimant

And

Stratton and Hesler Limited

Respondent

ON: **4 July 2019**

Appearances:

For the Claimant: In Person
For the Respondent: Mr Chris Green

JUDGMENT

1. The Judgment of the tribunal is that:

    a. The Claimant was a worker pursuant to 230(3)(b) of the Employment Rights Act 1996.
    b. The Claimant was entitled to the national minimum wage
    c. The Respondent owes the Claimant holiday pay
    d. The claim for notice pay is dismissed.

REASONS

2. By a claim form presented on 11 February 2019, the Claimant claimed unlawful deduction of wages (non-payment of the national minimum wage and holiday pay) and breach of contract (notice pay). A claim for unfair dismissal was rejected on issue of the claim as the Claimant did not have sufficient qualifying service.

3. I heard evidence from the Claimant on his own account. On behalf of the Respondent I heard from Matthew Williams, Project Manager. There was no bundle, as such, but I was

provided with a handful of documents, which are referred to below, if relevant.

The Issues

4. The issues for the Tribunal to determine are as follows:

    a. was the Claimant a worker? If so;
    b. did the Respondent pay him the national minimum wage
    c. Is the Claimant owed arrears of pay
    d. Is the Claimant entitled to holiday pay. If so;
    e. Is the Claimant owed outstanding holiday pay from the Respondent
    f. Is the Claimant entitled to notice pay

5. All of the Claimant's money claims are dependent on his status being that of a worker. The Respondent contended that the Claimant was an independent contractor in business on his own account. The Claimant denies this.

The Law

6. Section 1 of the National Minimum Wage Act states that all "workers" are entitled to the national minimum wage (NMW) provided they have ceased to be of compulsory school age and ordinarily work in the UK. Worker for these purposes is defined in exactly the same way as in section 230(3) of the Employment Rights Act 1996 ("ERA").

7. Section 230(3) ERA defines a worker as an individual who has entered into or works under

    (a) a contract of employment, ("*limb (a) worker*") 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 customer of any profession or business undertaking carried out by the individual (*limb(b)worker*").

Findings and Conclusions

8. The Respondent is a carpentry-based contractor, providing its services to a number of household-name property development companies, such as Bellway Homes. The Claimant's case before the tribunal was that he was taken on by the Respondent, ostensibly as an Apprentice Site Manager and paid the NMW rate for apprentices of £3.50 per hour, as it then was. He said that he worked for the Respondent from around 20 September 2017 (The ET1 says 22/9/17) until the 18 January 2019, only then to be told that he was not on an apprenticeship. The Claimant says in his claim form that the Respondent used the pretence of an apprenticeship to pay him "slave" wages. He therefore seeks payment for the full NMW, amongst other things.

9. Matthew Williams, Project Manager for the Respondent, provided a brief witness statement. In his oral evidence, he said that the Claimant had initially interviewed for an apprenticeship in September 2017 and did a 1-week trial, shadowing him on site. They

discussed how the carpenters on site worked and on speaking to them, the Claimant realised that there was more money to be earned in what they did than as an apprentice. He therefore abandoned the apprenticeship. Mr Williams said that he offered the Claimant the role of assistant site manager on a Bellway contract at its Nine Elms site from November 2017, when the building project was due to commence. Unfortunately, there was no paperwork before me evidencing either version of events.

10. The one thing the parties did agree on (though for different reasons) was that the Claimant was not employed as an apprentice. Apprenticeships involve a combination of work and study, normally at a college, and the terms of an apprenticeship contract tend to be recorded in a formal apprenticeship agreement. There was no such agreement in this case and the Claimant did not undertake any form of study at a college or otherwise. It is simply not credible that the Claimant spent 18 months working for the Respondent under the misapprehension that he was an apprentice and I therefore prefer the Respondent's evidence that he abandoned the apprenticeship and was engaged as an assistant site manager instead. I also accept the Respondent's evidence that the engagement commenced in November 2017 to coincide with the start of the Nine Elms job. That is consistent with the schedule of payments provided by the Respondent which shows that the first payment made to the Claimant was on 23 November 2017. Also, the following paragraph supports this.

11. The Claimant says that in late September or early November 2017 (I find that it was the latter) he received an email asking him to register with the Respondent through an internet link to the Respondent's website as this was necessary in order for him to get paid. As part of this process, the Claimant was required to sign up to the Respondent's sub-contractor conditions on the website.

12. The Claimant duly signed the conditions and the Respondent relies on this in support of its contention that he was an independent contractor in business on his own account. I have therefore examined the conditions, including the circumstances around their signing, to see if they truly reflect the reality of the relationship on the ground.

13. Clause 2.2 assumes that the sub-contractor will issue a quote or tender for his services to the Respondent. The Claimant says that he did neither and the Respondent has not shown otherwise. I accept his evidence.

14. Clause 9 of the agreement contains an elaborate process for payment to the sub-contractor, involving a request for an interim payment on account of the completed works. Neither party suggests that this was applied in the Claimant's case. Mr Williams said that the Claimant would invoice the Respondent for his work, which the Claimant denied. No invoices have been produced by the Respondent and I therefore prefer the Claimant's evidence.

15. Clause 16 required the sub-contractors to have in force full and comprehensive Insurance in respect of their work and to indemnify the Respondent for any breach, failure or default of the sub-contractor in connection with their duties and obligations under the contract. The Claimant had no such insurance. He said that around May 2018, the Respondent sent an email to him and all the other workers saying they had to take out public liability insurance. He said that when he approached Mr Williams about this, he told him not to worry as he did not need it. Mr Williams denied this, however I prefer the Claimant's evidence. The Claimant did not take out public liability insurance

and I consider it unlikely that he simply elected not to do so, in breach of the instruction. Mr Williams said that he never checked to see whether the Claimant had insurance and then went on to say, revealingly: "*to be honest, I would not know how to check it.*" That suggests that he never checked it for any of the so-called sub-contractors working for him. The reality therefore seems to be that such insurance was not considered necessary, and that the term in the sub-contract terms, in so far as it applied to the Claimant, was superfluous.

16. Clause 25.3 of the terms provides that he sub contractor may not sub-let or sub-contract part or all of its obligations or duties to carry out and complete the works without the Respondent's prior written consent. Mr Williams' evidence was that this allowed the Claimant to provide a substitute if he was not available on a particular day. The Claimant denied that this was the case.

17. When I asked Mr Williams how the clause operated in practice, he was rather vague. He did not seem to know the process for authorising the use of substitutes or what criteria would be applied in granting the consent. He claimed that he simply allowed substitution without written consent. I did not consider that response credible and felt it was said as an afterthought to bolster his answer. When I asked for an example of when substitution had been used, Mr Williams referred to a situation where a sub-contractor with his own team of workers engaged on various jobs that he did for businesses other than the Respondent would substitute workers from one job to another. The sub-contractor in the example sounded like someone genuinely running their own business and bore no resemblance to the Claimant, who did not have a team of workers or external contracts.

Was the Claimant limb b worker

18. Taking the 3 requirements in turn:

Was there a contract

19. Whilst some of the terms of the arrangement between the Respondent and the Claimant are in dispute, there was clearly a contract between them, under which the Claimant agreed to perform work or services, as directed by the Respondent, in return for payment.

Did the Claimant undertake to do or perform personally the work or services

20. In light of my findings at paragraphs 16 and 17 above, I do not believe that the substitution clause in the conditions reflected the reality of the contract with the Claimant and I find that he was required to undertake the work personally. However, if I am wrong and there was a right of substitution pursuant to that clause, whether it is inconsistent with personal service depends on the degree of substitution permitted. There has been much caselaw on the extent and nature of substitution necessary to negate personal service and this was recently addressed by both the Court of Appeal and Supreme Court in Pimlico Plumbers Ltd & Ors v Smith [2018]UKSC 29. In the Court of Appeal, Sir Terence Etherton MR identified a number of scenarios in which substitution might apply and from those he extrapolated the following:

    a. An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

b. A conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality

c. A right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance

d. A right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work will, subject to any exceptional circumstances, be inconsistent with personal performance

e. A right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance

21. The above examples, although not intended to be a finite list of circumstances, provide useful guidance in assessing the requirement for personal service when viewed against the substitution clause in the Contract.

22. On the Respondent's evidence, the Claimant could provide a substitute if he was not available on a particular day. That would seem to fall within example (c) and would be consistent with personal service. Clause 25.3 does not specify that qualification. However, the requirement for prior written consent is not qualified by, for example, an obligation on the Respondent not to unreasonably withhold consent. Neither is there any provision for the Claimant to challenge the withholding of consent. It therefore appears that the discretion is absolute and that the right to substitute is one falling within example (e) above. That is also consistent with personal service. Hence, even if clause 25.3 applied to the Claimant, I am satisfied that it is not inconsistent with my finding that the Claimant undertook to do or perform the work or services personally.

Was the Respondent a client or customer of a profession or business undertaking carried on by the Claimant

23. I am satisfied that this was not the case. Although the Respondent points to the fact that the Claimant was registered with HMRC as self-employed, that is not definitive of his employment status and does not outweigh the other factors. The Claimant's evidence was that immediately prior to working for the Respondent, he was unemployed and on universal credit, doing the odd labouring job, here and there. He also said that he worked exclusively for the Respondent during the 18 months or so that he was there and had no other work. I accept that evidence.

24. In all the circumstances, I am satisfied that the Claimant satisfied the definition of a limb b) worker.

<u>Was the Claimant a limb a) worker</u>

25. When I delivered my extempore judgment, I told the parties that it was not necessary for me to go on to consider limb a) as none of the claims depended on it. However, I was wrong about that as I overlooked the breach of contract claim in respect of notice pay. Such a claim can only be brought if the Claimant was a limb a) worker. I have therefore gone on to deal with that matter. I have not gone back to the parties before doing so as it

was always an issue in the case and they have had an opportunity to make submissions at the hearing.

26. A key feature of limb a) as well as personal service, is mutuality of obligation. That is, an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered.

27. The Claimant said that he was obliged to work Monday to Friday, from 8am to 5pm and was paid £30 per day and £600 per month. The Respondent contends that the Claimant had no minimum hours. Mr Williams said that the Claimant was paid on a "price work" basis which meant that he was paid per task, based on the fixed price the Respondent assigned to that task. He said that there were different prices for things such as fitting a door, the daily briefing, the daily de-briefing and other templated jobs that were assigned to the Claimant. He said that the Claimant would be given a list of jobs to do, which he would sign off on completion and that payment would be made based on how many jobs on the list he had done. The amount of work he did and was paid for was dependent upon how much work the Respondent had available.

28. Neither party has produced any documentation that specifically addressed this point. However, the Respondent has provided a print out of a schedule of monthly payments made to the Claimant between 23/11/17 and 29 January 2019. The payments vary from month to month. For example, in December 2017 the Claimant received £440, in May 2018, £1056, in July 2018, £512 and in September 2018 and November 2018, £64. If the Claimant was obliged to work a fixed number of hours per week, he would have been paid the same amount each month regardless of whether sufficient work was available. I therefore prefer the Respondent's evidence and find, on balance, that there was no mutuality of obligation.

29. As mutuality of obligation is, as the authorities describe, the irreducible minimum requirement for a contract of service; and in the absence of clear evidence of other terms consistent with such a contract, I find that the Claimant was not a limb a) worker.

Was the Claimant paid the NMW

30. As mentioned above, the Claimant was paid on a price work basis. That sort of work for the purposes of the NMW Regulations 2015 is defined as output work.

31. Reg 36 defines output work as "*work, other than time work, in respect of which a worker is entitled under their contract to be paid by reference to a measure of output by the worker, including a number of pieces made or processed or a number of tasks performed.*"

32. Reg 59 requires the employer to keep a record of hours sufficient to establish whether the employer is remunerating the worker at a rate at least equal to the NMW. The Respondent's evidence was that the Claimant signed off completion of each task. It should therefore have the records. Those records have not been produced so it is not possible at this point to determine the number of hours of output work within the pay reference period i.e. per month and therefore the Claimant's hourly rate.

33. As a worker, the Claimant is entitled to holiday pay. The Respondent did not pay the Claimant any holiday pay throughout his engagement.

34. Remedy in this matter will be stayed to allow the Claimant the opportunity to refer the question of his hourly rate to the HMRC, the enforcement body for the national minimum wage. Either party can apply for the stay to be lifted.

Judgment

35. The Judgment of the tribunal is that:

    a. The Claimant was a worker pursuant to 230(3)(b) of the Employment Rights Act 1996.
    b. The Claimant was entitled to the national minimum wage
    c. The Respondent owes the Claimant holiday pay
    d. The claim for notice pay is dismissed

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Employment Judge Balogun
Date: 30 September 2019