EMPLOYMENT TRIBUNALS

Claimants: **Mr D Harris (1)**
Mr L Kearney (2)

Respondent: **Excel Brickworks Limited**

Heard at: **London Central** **On: 18 & 19 February 2020**

Before: **Employment Judge Emery**

Representation:
Claimant: Mr B Gil (counsel)
Respondent: Mr K Chaudhuri (consultant)

PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that both of the claimants were employees of the respondent.

REASONS

The Issues

1. Judgment was given at the preliminary hearing. The issues to be determined are whether the claimants were

    1. self-employed, as asserted by the respondent, or
    2. employees of the respondent - s.230(1) Employment Rights Act 1996 (ERA) as asserted by the claimants, or
    3. workers – s230(3) ERA, alternatively asserted by the claimants.

The Evidence

2. I heard evidence from the claimants. For the respondent I heard from Mr Tony Clifford a Director and Contracts Manager, Mr John Chapman, Director and Financial Controller, and Mr Ryan Knight, a Foreman for the respondent. I read their statements and considered their contents, as set out below. I do not set out

all the evidence I heard, instead concentrating on the evidence most relevant to the issues. The quotes of evidence below are not verbatim, instead a detailed summary of the answer given.

Findings of fact

3. Mr Harris started work with the respondent as a bricklayer in 2001. He worked his way up to Foreman and apart from an 8 month break in around 2010, the parties accepted he went from job to job for the respondent, working for the respondent continuously apart from breaks shown on the work rotas, discussed in more detail below. Mr Kearney, Mr Harris' son, worked for the respondent as an Improver/Bricklayer since February 2017. The respondent does not accept Mr Kearney worked continuously for them, pointing to several weeks when he did no work for them.

4. The claimants both signed contracts with the respondent. Mr Harris stated that his first contract was provided in 2014 (50a). The respondents point to a history of providing contacts to its contractors (as cited in an EAT case involving the respondent), arguing that Mr Harris must have received earlier contracts. The respondents state that they have not kept copies of these contracts. I preferred the evidence of Mr Harris, that the 2014 contract produced by the respondent in these proceedings was the first contract he received.

5. There was an issue about time given to the claimants to read the contract. Both stated that the respondent (usually Tony Clifford) would attend the site with contracts and give each of its contractors a copy. Mr Clifford had a pen and would ask the contractors to sign on the spot. They were given a copy of the contract to take away with them. Both claimants signed on the spot without being given a proper opportunity to review.

6. Mr Harris described in his evidence *"briefly running through"* the contract when he received it, that *"it did not seem meaningful to me as I had been with the company for so long".* He argues that its terminology and meaning was not clear to him, it was not explained to him. He argued that *"I am in working environment with 15/20 blokes, the Guvnor says to sign, I had been working for 15 years, I had to sign it."* Mr Harris argued that he did not believe he would have been allowed to work for the respondent had he not signed the contract. Mr Chapman's evidence was that the claimants would not work for them unless on the CIS scheme, and I accepted that the claimants could only work for the respondents if they worked under the CIS contractor scheme on this self-employed contract. Both signed their contracts without challenge to the terms. It was suggested that Mr Harris could have complained about his contract in subsequent years – 2015, 2016 and 2017 when he would have known what the contract says. He accepts that he signed the contract without challenge.

7. The contract terms say that the claimants are self-employed contractors providing services – i.e. a self-employed contract. The claimants agreed that these were standard operative contracts, given to all the respondent's contractors. The parties agreed that the claimants were never paid holiday pay or sick pay. The respondent deducted basic rate of tax under the CIS Scheme for building contractors. The claimants employed an accountant who apportioned

allowable expenses and submitted tax returns. The claimants paid national insurance on a self-employed basis and additional tax due. Mr Harris occasionally took on other work, details of which were also submitted to his accountant.

8. Mr Chapman accepted that the respondent provided insurance for its contactors, that it was *"our legal liability"* to do so, and he agreed that he would not engage a contractor not on the CIS scheme.

9. Mr Harris says he never accepted that the contract reflected how he worked. As he put it *"…how I worked was dictated by Tony from the outset of starting for them".* He says that he did not understand the issue of self-employment, other than he was required to submit tax returns as a subcontractor and that he employed an accountant to do so. He says that until he saw his contract he had no idea of the issue of self-employment and what it meant. I accepted this evidence.

10. Mr Harris was asked in detail about his day to day role and work history. He described his role as liaising with management, setting work levels, liaising with the team, getting all areas ready for team to work on. He attended site meetings as the respondent's representative, and Minutes of site meetings were sent to the respondent, and occasionally the respondent sought corrections (e.g. date changes) to the Minutes. Mr Harris signed off the Risk Assessment Method Statements – for example page 344, which identifies risks on the building site and precautions to minimise risk. He was told of the order in which he and his team were required to get the job done, this was on instructions from the client and from the respondent, and he was directed during the build, liaising with the client and with Mr Clifford. The weekly meetings were where it was discussed what was to be done and how. *"I did not run multi-million £ jobs without the influence of Tony, I would not have the knowledge to do this…. So if any issues arose we would talk to Tony and he would make the decision."* He described Mr Clifford asking whether he had enough work for his team, and if not *Tony "would move them around"* to another site. He described that if there was a health and safety issue he would call Mr Clifford or if he was not available John Chapman before making a decision. He referred to page 225a – a video of heavy rain on site which he sent to Mr Clifford to show why they could not continue work.

11. One issue in the claim was the right of the claimants to work at another site. The claimants' contract (57) says *"you will not have to … work at another site"*. In fact the claimants did work on the direction of the respondent from site to site. Mr Harris says that he would be asked to go to another site on occasion, he always did so, and he never refused to go. He agreed he did not test this contractual clause. His evidence, which I accepted, was that Mr Clifford *"… tells you what he wants, you know if you don't go to another site you will not work again for him. … Tony moulded people into what he wanted. I know that certain comments – I had been to emergency dentist, and he said, 'not interested why you're not on site'. This is part of moulding people. Many comments. E.g. ferry did not sail back from Ireland, very sarcastic comments. 'I need you in'. He would always put it out that he wanted you in at all times".*

12. Mr Harris described this situation as applying to a core group of staff "…*Bricklayers would jump for job to job, but core workers were loyal and I was for several years..."* Mr Clifford says that this was Mr Harris' choice *"he was offered a contract for the next job and he wanted to take it up… it was his choice".* I accepted that there was little difference to being told where the next job is and being offered it. That in practice the claimants moved from role to role, and this is what the respondent came to expect, in particular from Mr Harris and from their 'core workers'. Mr Harris and later Mr Kearney expected an offer of the next site where the respondent was working, and the respondent always provided work for them.

13. An issue about the claimants right to work when they wanted – the contracts says *"you will not have to … work fixed hours; … you have the right to … leave the site without our permission…"* Mr Harris' statement paragraph 10 references an incident 10 years ago when he was not able to arrive at the Chiswick site at the time requested by the Site Foreman, 7.15am. It became a disagreement and he told Mr Clifford he could not work on that site because he was always deemed a late arrival. He was told there was no other work for him with the respondent *"…so I left. About 8 months later Tony Clifford rang me … and asked me if I wanted to come back. I said yes."* Mr Harris' evidence, which I accepted was that he could not turn up on his own hours; *"… someone would have to do my job. I would be let go."* Mr Clifford could not recall this incident.

14. Mr Clifford accepted that it would *"not be fine"* for contractors to turn up when they wanted, *"but if they did there is not a lot we could do as it's their right",* that it would be *"common curtesy"* to call if unable to attend work, He referred to 'the Monday club', who would not turn up every Monday. In evidence he was asked about the uniformity of contractors' hours, for example page 177 shows 20 contractors recording 9 hours a day, the same on other weeks. Mr Clifford accepted this, saying they would not get paid unless they worked and that the respondent records when contractors don't work a full day. I accepted Mr Harris' account that he could not turn up and leave at will; he was let go for 8 months because of a dispute about his start-time, which is indicative that this clause did not in fact apply.

15. It was accepted that the respondent paid for Mr Harris' training, for example the crane slinging course in Spring 2018. Mr Harris' evidence which I accepted was that "*Tony had asked me to do course, and I was taking on more responsibility and work".*

16. The rotas produced for Mr Harris shows days of absences and part-days. For example week ending 13/10/17 he worked 21 hours, 3 hours on Monday, not working Wednesday and Thursday. There were several other weeks with similar work patterns for Mr Harris. It was suggested this showed he worked variable hours, he could work when he liked. Mr Harris rejected this, pointing to cold days and bad weather causing part or whole days off site, holidays, medical appointments, or materials not on site, *"it could have been many things"*. He says that the team could be sent to another job, or asked if they wanted the day off, but most occasions he would travel to another site because he would not get paid otherwise. He said that when work was not possible on site he would call or text

Tony Clifford, and ask *"what do you want us to do. The decision would be up to him."*

17. A further issue was whether the claimants negotiated their rate of pay or it was imposed. The documents show that contractors' rates often went up simultaneously. For Mr Clifford, this was evidence that he may negotiate a rate with a contractor, his workmates would find out and they would all ask for a rise. I accepted the claimants' explanation that the rate was set by Mr Clifford, that raises were occasionally given. On being asked about the day rate increase from £175 to £180 at Courtould Road, Mr Harris said *"Tony used to put money up now and again, I did not negotiate this. I wouldn't negotiate for a fiver, I would ask for more"*. Page 86a-b shows that all rates were put up at the same time on this contract, the same with other day rate increases shown in the bundle, and I accepted that these were rates applied by the respondent rather than based on individual negotiations.

18. A significant dispute of fact arose over the substitution clause in the claimants' contracts. The claimants' case is that they were never required to appoint their own substitute despite the contract wording, *"you have the right to … send someone with similar experience and qualifications in your place"*.

19. Mr Harris' evidence was that he was never asked to provide a substitute, he never expected to do so, and in fact he always told Mr Clifford if he was absent, and Mr Clifford would arrange his replacement. He said arranging a substitute to turn up as his replacement *"just would never have happened."* Mr Harris described a system of site induction, in some cases fingerprint entry, reporting to the site office to get registered and inducted, then have to run through the drawings, knowing the run of the job and how it's working, knowledge gained on site, ongoing issues *"…basically everything … it would take a day or more. And the main contractor would not accept anyone as they would want someone with experience of this job."*

20. Mr Clifford's evidence was that substitution had never occurred in his 20 years with the respondent. He said it could happen, that the site would let contractors with the safety ticket and had gone through a site induction, that if the claimant wanted to substitute someone *"that's fine",* that if Mr Harris substituted, the new Forman would need to speak to the charge-hands and brickies, and would be *"able to work it out. As it's never happened I don't know how it would work …"*

21. Mr Harris' evidence was that if he was not available, for example time off for holiday or medical appointment, a charge-hand on site could take over *"or a supervisor would come to the job. Tony would appoint another supervisor…"* Copies of texts in the bundle corroborate Mr Harris' account, showing that he texted Mr Clifford to say *"sorry"* for leaving early and giving the reason (on one occasion because a relative had died), another asking whether he should go in after a medical appointment. On one occasion Mr Harris' wife texted to say he was ill, after he had broken a rib and had a migraine (332), another occasion when he had burst his appendix. Mr Harris' evidence was that *"if I thought it was my entitlement I would not bother sending him a message."* I accepted the claimants evidence that they were not required to provide a substitute and that

they considered they were required to provide explanations if they were unable to attend or had to leave site.

22. Holidays: Mr Harris described letting Mr Clifford know before his holidays that *"we would always have to let him know when we wanted time off."* He described being asked 8-9 years ago to rearrange a holiday when on working on a site in Tottenham as another supervisor was off, and he changed his holiday by a week. He rejected the respondent's contention that he was off work for a lot of time because it was his choice to attend work or not.

23. Mr Clifford's evidence was that the claimants didn't always turn up, and that they only sometimes informed of holiday dates in advance, but that he could not recall incidents when they had not done so. He accepted that cover was not required from the claimants, that someone on site would usually take over. He cannot recall the swapping request, but he says that *"it would be reasonable if it suited us both … I would negotiate with them."*

24. Other work: Mr Harris occasionally took on his own work, usually domestic properties working evenings and weekends. A typical example is 2011-12, where he made £1,300 from work outside of his income from the respondent. However in 2013-4 he made an additional £8,500 income. It was suggested that this was indicative of work as a self-employed contractor working for himself. Mr Harris' evidence, which I accepted, was that this likely a large job over several weekends, and this is typical as everyone looked for extra work at weekends.

25. The claimants evidence, which I accepted, was that on the occasion that they or member of the team did faulty work, they would be asked to take it down, but would not be deducted any pay for its rebuild (contrary to his contract which says *"you must do the following … correct any faulty work in your own time, free of charges."*).

26. Mr Kearney's evidence was that he could not leave site without permission, if he did he used to get a call or text from his dad or Ryan asking him where he was even if he went to the toilet. He never heard of anyone providing a substitute, he had never seen it happen and that he was never asked to do so. When he was off sick he would tell his Dad, and he gave notice of his holiday *"everyone notified foreman or Tony"* regarding holiday, that he would book holiday weeks before. He recalls having something planned with his fiancée one Saturday, but that they needed people that day, and he *"had to work … Ryan needed people this Saturday".* His evidence, which I accepted, was that if he walked off site one day *"A high chance I would not be on site the next day … Anyone else would say this".* He said he asked permission to go to the dentist because *"I believed I needed permission. … in the middle of a job, just go off site, they're going to be annoyed."* He described being told what to do on the job and in what order, following the job method and assisting the bricklayer and would bricklay when he could. He described being told his rate of pay, and not having any say in his hours of work, *"everyone coming and leaving at same time like clockwork".* Mr Kearney did have significant time off between February and September 2018, approximately 54 days. He said, and I accepted, that this included sickness for an underlying medical condition, bad weather and some holiday.

Submissions

27. Both parties provided written submissions/skeleton arguments, I considered these and the legal cases referred to within. Mr Chaudhuri argued that the written contract shows the true agreement; just because a party does not exercise a contractual right doesn't meant that it does not apply, that they can't use it. The claimants could substitute, and if they thought they could not substitute, this was a misconception on their part. There was a right to work or not to work and the claimants were not on site for significant periods of time – as was their right. The claimants did not need permission – and the texts show Mr Harris giving information rather than seeking permission to leave site. Mr Harris' tax returns show significant private work some of which must have been during the respondent's core hours. The claimants were therefore working on their own account.

28. Control: Mr Chaudhuri argued that the end client may control some aspects of the contract, this can't be assigned to the respondent and the tribunal is required to consider the relationship between the respondent and claimants. By delivering on the contract Mr Harris is delivering services for the respondent, and he can deliver these services as he sees fit. The evidence shows that the contractors negotiated their own rates, consistent with the contract saying rates will be negotiated per contract.

29. The claimants never claimed holiday pay when engaged, no evidence that sought permission to take holiday, no evidence that they were paid sick pay. In determining the bargaining position, consider the records and the flexibility and benefit to the claimants – for example the 11% tax rate.

30. See *Brain v National Gallery*, an ET decision. Mr Chaudhuri argued that there is no basis to argue that just because a relationship has lasted a long time that this has changed the contractual nature of the relationship.

31. For the claimants, Mr Gil argued that the issue of whether the claimants were self-employed or not is question of fact *(Autoclenz).* It is true that the claimants ticked the 'self-employment' box on tax returns, they signed up to the CIS scheme and there was some randomness and inconsistency in their attendance. The only way onto site was via CIS. It is possible to be in CIS but end up as an employee. A broad analysis shows that the claimants did not leave site without informing their boss, they gave notice for holidays, sickness, Dr and personal matters. This was akin to employee status

32. Looking behind contract, the issue of control. There was dispute, but no one from the respondent can point to any examples of the claimant exercising control,

33. Substitution: Much is made that the claimants had a contractual right do something; but no one from the respondent can point to any examples in the last 20 years; why – because of the ground it was not permitted. There are practical reasons about why substitution was not applicable; health & safety and reputation

are everything and not anyone would be able to go onto site and substitute. It would not would not happen, and in fact personal service was required.

34. Consider also the inequality between the claimants and the respondent – just because the contract says the claimants can do something, in fact the reality was they could not.

35. In face of the respondent's potential legal liabilities, the idea that the respondent was laid back about who works and when is unsustainable and implausible; and in fact it has never happened.

36. The contract is generic, and to suggest that it reflects the working reality is not realistic.

37. Mr Gil invited me to find that the claimants were trying best to be accurate and honest, and this was not the case with the respondent's witnesses. He referred to pay increases being given unilaterally to staff, akin to a pay rise.

38. Mr Gil said that Mr Harris was an employee on the facts, and also Mr Kearney – that the evidence was that with certain workers there was a building of trust and a gradual integration, longevity of work and becoming part of the respondent as an employee. He argued that Mr Kearney was at the start of this journey but that he was integrated, gaining experience and moving from job to job. Mr Gil conceded that there were 'fewer ticks' for Mr Kearney as he had some periods of absence with health issues, therefore his case on employment status was not as advanced.

The Law

39. Employment Rights Act 1996

s.230 — Employees, workers etc.

(1) In this Act *"employee"* means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2) In this Act *"contract of employment"* means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing
(3) In this Act *"worker"* (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
    a. a contract of employment, 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 on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act *"employer",* in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
(5) In this Act *"employment"*
   a. in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
   b. in relation to a worker, means employment under his contract;
   and *"employed"* shall be construed accordingly.

40. I considered the following issues. For employment status I noted the "irreducible minimum" test The central factors to consider whether an employment relationship exists are the irreducible minimum of:

    1. Personal service and substitution rights.
    2. Other factors.
    3. Control

41. At its strongest, this "irreducible minimum" principle means that if any one of the three core areas is not established, there can be no contract of employment.

The Multiple test

42. Does a contract of employment exist? *Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497*, the key tests for the existence of an employment contract:
    a. An agreement exists to provide own (personal) work or service, in return for a wage
    b. The employer has sufficient degree of control over the worker;
    c. The other provision are consistent with an employment contract

The nature of the relationship

43. *Carmichael v National Power Plc [1999] 1 WLR 2042* the Court of Appeal held that, in establishing the terms of agreement between the parties, the tribunal should be able to look outside the terms of the contract to the "overall factual matrix". In *Ministry of Defence HQ Defence Dental Service v Kettle UKEAT/0308/06* the EAT considered the circumstances in which a tribunal is entitled to look outside the terms of a written agreement when deciding an individual's employment status, and set out the following guidelines:

    1. Did the parties intend the document(s) to be the exclusive record of the terms of their agreement?
    2. If the tribunal finds (as a matter of fact) that this was the parties' intention, it will generally be restricted to the terms of the contractual documentation in determining whether the individual was an employee.
    3. If, however, the tribunal finds (as a matter of fact) that it was not the parties' intention that the documents should be an exclusive record of their agreement, it may look at other relevant material (including oral exchanges and conduct) to determine employment status.

44. *Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC),* the Supreme Court considered whether it was the intention of the parties that all of the terms of the contract should be contained in the contractual documents, and in particular whether this is the true agreement between the parties, or whether it was a "sham" that obscures the true nature of the relationship.

45. I considered the judgment of *Consistent Group Limited v (1) Kalwak and others (2) Welsh Country Foods Limited [2008] IRLR 505*: "If the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what can realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless".

46. *In Protectacoat Firthglow Ltd v Szilagyi 2009 EWCA Civ98* the Court of Appeal concluded:

    1. It is for the court or tribunal to determine the true legal relationship between the parties. If there is a contractual document, that will ordinarily provide the answer. However, if it is alleged that the documentation does not represent or describe the true relationship, the court or tribunal has to decide what the true relationship is by considering the evidence of the parties
    2. Contracts may be partly written and partly oral and they can also be constituted or evidenced by conduct. If the evidence establishes that the true relationship is, or was intended to be, different from that described in the written documentation, then it is the **true relationship**, not the written documentation alone, that defines the relationship.
    3. To amount to a sham, contractual arrangements did **not** need to be entered with a common intention on the part of the parties to mislead third parties. It would be sufficient if the arrangements as recorded and, where appropriate, as evidenced by the parties' conduct, did not reflect the parties' true intentions or expectations not only at the inception of the contract but also as time passed.

<u>Personal service:</u>

47. Did the claimants undertake to personally perform work and services? I had regard to *Redrow Homes (Yorkshire) Ltd v Wright [2004] EWCA Civ 469* which confirmed that, whether or not an individual undertook work personally depends entirely on the terms of the contract, construed in light of the circumstances in which it was made including the parties' intentions.

48. Did the claimants have the right to offer a substitute to do their work? I noted the EAT judgment in *Yorkshire Window Company Ltd v Parkes UKEAT/0484/09*, which considered the following principles:

    1. The question whether or not a contract provides for the performance of personal services is essentially a matter of construction. The court is

concerned with construing the contract, rather than with general policy considerations.

2. The fact that the individual chooses personally to supply the services is irrelevant; the issue is whether he is contractually obliged to do so.
3. The right or obligation to employ a substitute will not necessarily mean that there is no obligation on the part of the individual to perform personal services unless that right to employ a substitute is unfettered.
4. In cases where the individual has accepted an obligation to perform those services but is unable (as opposed to unwilling) to do so, and where he himself does not bear the costs of employing a substitute, a limited or occasional power of delegation may not be inconsistent with a contract to provide personal services.

49. In *Express & Echo Publications Ltd v Tanton [1999] IRLR 367*, the claimant sometimes provided a substitute. The Court of Appeal found that the unlimited power of substitution was inherently inconsistent with a contract of employment, and the court therefore held that he was self-employed. The court also found that, if a contractual right to substitute exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement.

50. *Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29*: the question to consider is the significance of a right of substitution by reference to whether the dominant feature of the contract remained personal performance on his part, stressing that this did not supplant the statutory test. An unfettered right to provide a substitute is inconsistent with an undertaking to provide services personally. The Court of Appeal in Pimlico Plumbers set out the following guidance: A conditional right to provide a substitute may or may not be inconsistent with personal performance. It will depend on the precise contractual terms and the degree to which the right is limited or occasional. By way of example and subject to any exceptional facts, a right to substitute:

    1. Only when the contractor is unable to carry out the work, is consistent with personal performance
    2. Only with the consent of another person who has an absolute and unqualified discretion to withhold consent, is consistent with personal performance.
    3. Limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, is inconsistent with personal performance.

<u>Control</u>

51. *Ready Mixed Concrete:* "control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done".

52. *White & Anor v Troutbeck SA [2013] UKEAT 0177/12*: the question of control is not determined by whether the worker has day-to-day control over their own work but rather by whether there is a contractual right of control over the worker.

Autonomy over the way they carried out their duties was not a factor pointing away from employment, if the employer has the right to give instructions to them.

Mutuality of obligation

53. Mutuality of obligation is the obligation on an employer to provide work and the obligation on an individual to accept that work. *Carmichael v National Power [2000] IRLR 43* is one of the leading cases on mutuality of obligation. Saying that work may be offered, and the claimants agreeing to be open to invitations to undertake that work does not create mutuality of obligation and therefore no employment relationship. However, providing the individual with an open-ended opportunity to work may be sufficient *Younis v Trans Global Projects Ltd and another UKEAT/0504/05)*.

Other factors

54. It is necessary to look at all elements of a contract to determine its true nature. In *Market Investigations v Minister of Social Security [1969] 2 QB 173*, it was held that the test is whether the person is performing services as a person in business on his own account – the "economic reality" test, involving consideration of a wide range of factors, which may include:
    1. Who provides and maintains the tools or equipment used.
    2. Whether the person hires their own help.
    3. The degree of financial risk adopted.
    4. The degree of investment in and management of the business.
    5. Whether the individual has the opportunity to profit from their own good performance.
    6. Whether the person is paid a fixed wage or salary.
    7. Whether the person is paid when absent due to holiday or sickness.

Other activities

55. Were the claimants required to provide exclusive service? If they were free to work for others, this may be a sign of self-employment. The amount of other work undertaken and their independence from any particular company are relevant factors in determining self-employed status for tax purposes.

Conclusions on the evidence and the law

56. I considered first whether it was the intention of the parties that all of the terms of the contract should be contained in the contractual documents, and in particular whether this is the true agreement between the parties (*Autoclenz).* I concluded this was not the intention of the respondent that this was the true agreement between the parties. It was clear that a significant number of the contractual clauses for both claimants were not intended to be relied on by the respondent, in particular:
    - Correct faulty work in own time at own charge
    - Provide an invoice so we can pay you
    - You will not have to work at a different site

- You will not have to do any work you don't want to. You can chose whether to provide your services. You are not under any obligation to do so
- You will not have to work fixed hours
- You have the right to decide how to carry it the work
- You have the right to leave the site without our permission
- You have the right to send someone with similar experience and qualifications in your place

57. I next considered whether the actual reality of the working relationship was consistent with a finding that Mr Harris and Mr Kearney were self-employed. I concluded not, for the following reasons:

    1. Neither had a right to substitute, and in fact there was an obligation to provide personal service. I accepted that if either claimant had attempted to substitute someone, this would not have been accepted. If the respondent had intended the substitution clause to apply, it would have cited this clause and told the claimants to supply their own replacement. Instead Mr Clifford determined who the replacement would be from the respondent's own pool of labour.
    2. Both claimants were required to work set hours, and a degree of control was exercised over them by the respondent and the main contractor on what they did and when they did it.
    3. Both were under a significant degree of control over what their next job was – they were directed to their next job and if work could not continue on site for any reason they were directed to another site if work was available.
    4. Both sought permission to leave site or informed the respondent in advance of medical appointments – in other words they provided a 'good' reason for not being at work. If they were allowed to come and go at will this would not have been necessary.
    5. Mr Clifford was controlling in relation to time off, and was not happy if Mr Harris was off work unexpectedly – ill-health or delayed ferry.
    6. No thought was given to the way substitution could work in practice.
    7. If the claimants were not prepared to work site hours, they would likely lose their job as Mr Harris did several years ago.
    8. Mr Harris was in fact acting as the respondent's representative on site, attending site meetings and liaising between the Site managers and the respondent. This was not, as suggested by the respondent, him deciding as a sub-contractor on his own account the work to be done with the client. The fact that documents were approved by the respondent suggests that Mr Harris was acting as the respondent's representative on site.
    9. Mr Clifford's statement refers to the supervisors and foremen being there to 'plan'. I accepted that this was planning on behalf of the respondent, strongly suggesting that the claimant was integrated into the respondent's operations.
    10. Mr Harris sought permission to stop work if adverse weather or other issues on site and would take instructions on what to do next.
    11. Mr Harris was responsible for the respondent's health and safety operation on site.

58. I next considered whether there was mutuality of obligation between the claimants and the respondent. I concluded that there was more that an agreement that work may be offered which the claimant could accept. The respondent came to rely in particular on Mr Harris, who expected work to continue from contract to contract, and the respondent expected Mr Harris to be available for this work. Mr Harris described a core group who always worked for the respondent and I found that both claimants were part of this core group. The fact is also that there was always a next job for the claimants, apart from the one occasion when there was a dispute about start-time for Mr Harris.

59. If, for any reason, Mr Harris had turned down work I considered that it was highly likely he would not be asked back to work for the respondent. I concluded that Mr Kearney was in the same position – he expected to be offered work and the respondent expected him to undertake it, from site to site.

60. I accepted that there were factors which pointed away from an employment relationship: the wording of the contract, the fact that the claimants were self-employed for tax-purposes. I accepted that the claimants had little choice over these issues – they had to sign the contract and they had to be part of the CIS scheme. Also, both undertook work at weekends on their own account. However, the other factors identified pointed to an employment relationship and these far outweighed the factors suggesting self-employment.

61. If I was wrong about the issue of employee status, I next considered whether the claimants were workers. I was satisfied:

    1. There were contracts between the claimants and the respondent; terms in writing were varied by the parties' conduct, as set out above.
    2. The claimants provided personal service, for the reasons set out above on the issue of substitution.
    3. The respondent is not the customer or client of a business carried on by each of the claimants.
    4. During the periods the claimants undertook work for the respondent, there was mutuality of obligation between the respondents and claimant.

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Employment Judge Emery
Dated: 16 March 2020

PRELIMINARY HEARING JUDGMENT SENT TO THE PARTIES ON

18/3/20

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS