



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Kitson

**Respondents:** 1. The Property and Lifestyle Company Limited  
2. Southport Property Developments Limited

**Heard at:** Manchester

**On:** 27 February 2020

**Before:** Employment Judge Leach

## REPRESENTATION:

**Claimant:** In person

**1<sup>st</sup> Respondent:** Did not attend

**2<sup>nd</sup> Respondent:** Did not attend

**JUDGMENT** having been sent to the parties on 28 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant was the only party in attendance at the hearing of this claim.
2. Mr Wheble of Property and Lifestyle Company Limited (first respondent) had attended a previous hearing. South Property Developments Limited (second respondent) had submitted a response form out of time but they were not in attendance today and had not sought an extension of time to submit a response form.
3. In this claim the claimant claims unpaid wages of £2,178. This is the second hearing to deal with the matter. I decided that it was proportionate and appropriate to deal with the matter notwithstanding the respondents' non attendance. I was

satisfied that both respondents had received details of the claim and the hearing. Mr Wheble of the first respondent had attended a hearing on 27 November 2020 when the current hearing date was set. It was apparent from correspondence on the Tribunal file that both respondents had received written notice of the hearing.

4. I heard evidence from the claimant which I considered, together with relevant documentation on the Tribunal file, in order to reach my decision.

**Finding of fact.**

5. The claimant is a labourer and he works on construction sites. He started working on the relevant site in Ormskirk in January 2019. Immediately prior to then, he had been working for a builder on another site. The work at that previous site was coming to an end. At that site he met Mr Wilce of the second respondent and asked him if he had any work. The claimant understood that Mr Wilce was starting a new building project. Mr Wilce told him that there was work on this new project and the claimant was engaged at the address of Courtyard 2 in Burscough near Ormskirk ("Site").

6. The claimant had understood (and he told me at the previous hearing) that (1) the developer for the Site was called Procuco; (2) Mr Wilce and Mr Wheble of the first respondent were both involved in or owned Procuco (3) that Mr Wilce was in charge of the building side and Mr Wheble was in charge of the office side.

7. The claimant was not provided with a written contract. The claimant was told what to do on a day-to-day basis on the site itself, principally by Mr Wilce. Mr Wheble told him to provide invoices. Mr Wheble asked him to invoice The Property and Lifestyle Company Limited. The claimant told me that this was the first time in his working life that he had provided invoices and that he was unsure about what to do. I accept the claimant's evidence.

8. The claimant accepted that he was not engaged by Mr Wheble personally. We established that at the previous hearing.

9. The claimant told me he had provided invoices in the name of Mr Wheble because that is who told him to provide invoices. I have also been provided with an email from Mr Wheble to the claimant dated 8 March 2019, in which Mr Wheble directs the claimant as follows:-

*"Hi Troy as advised to you and Andrew the other day, please can you start invoicing to the following:  
The Property and Lifestyle Company Limited,1 School Lane,  
Burscough, Lancashire, L40 4AE"*

10. The claimant confirmed that he received this email and that he was told by Mr Wheble to invoice The Property and Lifestyle Company Limited (the first respondent).

11. At the previous hearing, Mr Wheble said that Southport Property Developments Limited (second respondent), in which Mr Wilce has an interest, was in fact the entity which had engaged the claimant.

12. Mr Wheble had also said that he had not paid the claimant for the amounts owing because a dispute had arisen between him and Mr Wilce (or rather between the first and second respondent) and that this dispute was going to arbitration. He also stated that he expected that the claimant would be paid once that dispute was resolved.

13. The claimant has still not been paid.

14. The issue as to who/which entity the claimant entered in to a contract with was far from clear. My findings of fact on this are below:

- (1) The claimant did not enter in to a contract with either Mr Wheble or Mr Wilce personally.
- (2) The Site was being developed by the first and second respondents acting together. It was a joint venture between the two parties.
- (3) There was no legal joint venture entity. There were two corporate partners, being the first respondent and the second respondent.
- (4) The claimant was instructed to provide invoices to the first respondent, and I have seen evidence that the payments received by the claimant into his bank account were from the first respondent.
- (5) Mr Wheble as well as Mr Wilce provided instructions to the claimant.
- (6) the claimant informed me of a discussion that he had with Mr Wheble early on in his engagement when Mr Wheble said that he would set up the tax position in relation to payments being made to the claimant.

15. Having regard to the facts as found, my decision is that there was a contract between the claimant and the first respondent.

16. I asked the claimant whether he was expected to attend on site to carry out the work or whether he could send someone else. He told me that he was expected to be the person turning up to carry out the work, that was expected to turn up on a daily basis at the construction site, and that there was no suggestion that he could send somebody to carry out the labouring work on his behalf. I accept the claimant's evidence.

### **The Law**

17. The claimant's claim is for unpaid wages. Legislation provides considerable protection for wages. The relevant legislation is at Part II (sections 13 to 27) of the Employment Rights Act 1996 ("ERA").

18. Section 13 states as follows:-

*“13(1) An employer shall not make a deduction from wages of a worker employed by him unless:-*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of a deduction.*

19. Section 13 therefore provides protection against deductions from wages to “workers.”

20. Section 230(3) of the ERA sets out the relevant definition of “worker.”

*“s230(3). In this Act “worker” means an individual who has entered into all 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 express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party 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 the worker’s contract shall be construed accordingly.*

21. Sections 230(4) and (5) set out definitions of employer and employment.

*“230(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.”*

*“ 230(5) In this act “employment”-*

*(a) in relation to an employee, means..... employment under a contract of employment and*

*(b) in relation to a worker means employment under his contract;*

*and “employed” shall be construed accordingly*

## Analysis

### Was the claimant a “worker”

22. I considered the three components of the test in section 230 ERA:
- (1) Whether there was a contract;
  - (2) Whether that contract was personally to carry out work; and
  - (3) Whether or not the claimant was in business and the first respondent was in the nature of a client or customer of the claimant.

23. It is clear that there was a contract. The claimant was to provide his labour and would be paid £50 a day for this. That was the agreement reached. Even though the claimant was never provided with a written contract, a legally binding contract was in existence and that this was between the claimant and the first respondent.

24. I next considered whether the contract was for the claimant to carry out the work personally. As noted in my findings of fact, there was no question of substitution.

25. I have also considered whether this was in the nature of a business or commercial relationship and I have decided that it was not. It is clear that the claimant was not subject to any risk or reward from this venture. He was paid a flat rate of £50 a day for his labour. It is also clear that he was not engaged to provide a specific service in that he was told on a regular basis (principally by Mr Wilce) what to do on the construction site. I heard evidence (which I accept) from the claimant about this, that he was told sometimes to (for example) manhandle plasterboard, carry it upstairs, to mix concrete; really whatever labouring activities that the construction site required as it was developed and as he was told to do.

### The amount of unpaid wages owing

26. On the basis that the claimant was a worker then the protections from wages under sections 13-27 of the Employment Rights Act 1996 (“ERA”) apply to him. The claimant has not been paid for 42 days’ pay. Section 13 of the ERA provides that a worker shall not suffer unauthorised deductions from wages. There is no indication at all that the deduction, or non payment, is in some way authorised and falling within other terms of the ERA which might allow the employer (first respondent) to withhold wages. Therefore the claimant is entitled to the 42 days’ pay which has not been paid which amounts in total to £2,100.

27. The claimant was also claiming an additional £78. The circumstances in which this debt arose are as follows: that there was a day when a plumber that was working on the construction site needed some parts. Neither Mr Wilce nor Mr Wheble were on the construction site at the time. The plumber would not continue with his work without those parts being provided. Mr Wilce spoke with the claimant on the phone and asked him to go and buy the parts with his own money and he

would then be reimbursed for those parts. That is what the claimant did, and he provided the parts to the plumber. In fact the claimant has never been reimbursed for the £78 that was paid.

28. I have considered whether this non payment, would fall within the definition of “wages” under section 27 of the ERA, and I have decided that it does not. It is more akin to a payment in respect of expenses incurred by the worker which is excluded from the wages protection provisions, and the exclusion is at section 27(2)(b) of the ERA. Therefore the judgment is for £2,100.

Employment Judge Leach

Date: 24 March 2020

REASONS SENT TO THE PARTIES ON

3 April 2020

FOR THE TRIBUNAL OFFICE

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