EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr Z Fitzpatrick		**Mr and Mrs Giddings T/A Milborrow Chimney Sweeps**

Heard at: London South Employment Tribunal **On:** 5 and 6 August 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:
For the Claimant: Mr S Henderson (Solicitor)
For the Respondent: Mr J Bromige (Counsel)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The Claimant was at all material times an employee within the meaning of s.230 Employment Rights Act 1996 and can therefore proceed with all of his claims.

REASONS

Claims

1. By a claim form presented to the Tribunal on 1 March 2019, the Claimant brings claims of unfair dismissal and disability discrimination, as well as

claims for holiday and notice pay.

2. The purpose of this preliminary hearing was to determine the status of the Claimant, namely whether he was an employee, worker or a self-employed contractor. His status will determine which of the above claims the Tribunal has jurisdiction to consider.

Practical and preliminary matters

3. During the hearing I heard evidence from the Claimant and the following witnesses for the Respondent:

   (a) Mr Kevin Giddings, co-owner of Milborrow Chimney Sweeps ("MCS")
   (b) Mr Bryan Collins, Chimney Sweep for MCS
   (c) Ms Debra Underdown, Booking and Finance clerk for MCS.

4. I was referred to documents in a bundle extending to 567 pages. References to numbers in square brackets in this judgment are to pages in the hearing bundle.

5. Due to COVID19 and the limited capacity at the Tribunal centre because of the need to comply with social distancing requirements, this hearing was conducted using CVP video conferencing. Both parties consented to this.

6. The first day was spent largely hearing from the Claimant; the second day by the Respondent witnesses. Submissions were made by the legal representatives in the afternoon of day two, and due to the limited time available, I informed the parties that I would reserve my decision.

Relevant legal Principals

7. Before turning to the facts of this case, I think it would be useful to set out the legal principles which I will need to consider.

8. Section 230 of the Employment Rights Act 1996 ("ERA") defines the terms "employee" and "worker" as follows:

> ***(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."***

9. Persons falling within S.230(3)(b) are sometimes referred to as "limb 'b'" workers.

10. An employment contract is commonly referred to as a contract of services, whereas a self-employed person is commonly referred to as working under a contract for services.

11. Regulation 2 of the Working Time Regulations 1998 provides:

> ***"2 Interpretation***
>
> ***In these Regulations—***
>
> ***'employer', in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed***
>
> ***'employment', in relation to a worker, means employment under his contract, and 'employed' shall be construed accordingly;***
>
> ***'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;"***

12. The third relevant provision is section 83(2) of the Equality Act 2010

("EQA"), which provides as follows:

> ***"Employment" means—***
>
> ***(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; …"***

13. The definition of "employee" in the EQA, although it refers to a contract personally to do work, does not include an express exception for those in business on their own account who work for their clients or customers as do S.230 of the Employment Rights Act and Regulation 2 of the Working Time Regulations 1998. However, as was pointed out in the Supreme Court decision **Bates Van Winkelhof v Clyde & Co [2014] 1 WLR 2047** a similar qualification has been introduced by a different route. The court held, at paragraph 67 that the definition of the term "worker" in discrimination legislation did not include independent providers of services who are not in a relationship of subordination with the person who receives the services.

14. The starting point in terms of case law which has considered whether someone is an employee are the frequently cited cases known as **Ready Mixed Concrete v Minister of Pensions and National Insurance [1968] 2 QB 497** and **Market Investigations v Minister of Social Security [1969] 2 QB 173**. In Ready Mixed Concrete, Mackenna J (at 515) observed that

> ***"a contract of service exists if these three conditions are fulfilled. (i) The servant 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 master. (ii) 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 master. (iii) The other provisions of the contract are consistent with its being a contract of service.' Mackenna J considered he need say little about (i) and (ii) but went on to observe as to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be"***

15. At 515C, Mackenna J considered whether other provisions of the contract are consistent with it being a contract of service and said that an arrangement where someone used their own materials and tools was not consistent with it being a contract of employment. Whereas if a labourer worked for a builder providing some tools but who accepted the control of the builder, it would still be a contract of employment.

16. Finally, at 517 he said,

> ***"An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with***

> ***its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract [a task like that of distinguishing a contract of sale from one of work and labour]. He may, in performing it, take into account other matters besides control."***

17. In Market Investigations Cooke J observed at page 184:

> ***"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes,' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."***

18. Clearly a court or Tribunal must give appropriate weight to how the parties categorise their relationship (**Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99**) but this is subject to the case of **Autoclenz v Belcher 2011 ICR 1157.**

19. Under ordinary contractual principles, the ability of courts to look behind the written terms of a signed contract is limited to situations where there is a mistake that requires rectification or where the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract, i.e. the contract is a sham. However, the Supreme Court in **Autoclenz** definitively accepted the premise that employment contracts are an exception to ordinary contractual principles in this regard. It endorsed a line of cases which stressed that the circumstances under which employment contracts are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. The Court held that "*the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part*".

20. There are many forms of control — for example, practical and legal, direct and indirect. It is not necessary for the work to be carried out under the employer's actual supervision or control. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employee does, not how he does it.'

21. In the context of employment status, control is a matter of degree: it is rarely a question of whether there is any control, but rather of whether there is enough control to make the relationship one of employer and employee. An absence of day-to-day control over work does not preclude an employment relationship.

22. In simple terms a mutuality of obligation is usually expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered. However, the phrase 'mutuality of obligation' should not be understood as requiring the purported employee to be obliged to work whenever asked by the employer. It permits him or her to refuse work, although this may involve a factual assessment as to whether any refusal is so extensive as to deny the existence of an obligation even to do a minimum of work.

23. The third necessary ingredient of a contract of employment is personal service. Here Respondents often point to a right to substitute contained in the agreement between the parties, which if genuine and reflects what was actually agreed between the parties, would point to self-employed status rather than employed status. However, as is stated above, **Autoclenz** is the authority which says that Tribunals are entitled to look behind the written contract if it concludes that the written words do not, in truth, accurately represent what was agreed.

Findings of fact

24. The following findings of fact were reached on the balance of probabilities having considered all the evidence given by witnesses during the hearing and documents referred to by them. I have only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

25. The Respondents, Mr Kevin Giddings and Mrs Kate Giddings are owners of Milborrow Chimney Sweeps ("MCS"), which Mr Giddings described in evidence as one of the biggest and most successful chimney sweeping companies in England. As well as chimney sweeping, the business run by the Respondents provides a stove and boiler maintenance, repair and installation service, a repair and maintenance service for fireplaces and, as

was made clear from the evidence from Mr Collins, a roofing repair and maintenance service. MCS holds two Royal Warrants, one from HM The Queen and a second from HRH The Prince of Wales for their services at the Royal Palaces in London.

26. The Claimant began working for the Respondent, under a contract for services, in 2001 after he responded to an advert in a local paper for a self-employed chimney sweep. The Claimant was not qualified or trained in chimney sweeping and had no experience. However, it was clear from the advert that experience was not required. At the time, the Claimant was working as a maintenance manager and was looking for a change. In his evidence, Mr Giddings said that the vast majority of people he recruited had no experience as chimney sweeps and were therefore trained by him. He said that he could recall only ever recruiting one person with experience in chimney sweeping. The Respondents have between 10-20 chimney sweeps engaged on a contract for services

The contractual terms

27. The contract which the Claimant signed when recruited by the Respondent was a short two-page document headed “Contract for Services” (“the first contract”). In it, the Respondent (described as “Principal”) was contracted to provide the Claimant (described as “Agent”) with fifteen chimney sweeping jobs per week at an agreed fee. From the fee, the Claimant was expected to pay for his own vehicle running costs and to deduct a percentage to keep for himself, with the remainder being paid over to the Respondent as, what was described as an “introductory fee”.

28. The fee that was payable by the Respondent to their chimney sweeps remained constant throughout the Claimant's time with the Respondent. If the chimney sweeps used a company vehicle, they retained 48% of the chimney sweep fees, plus the total amount of any extras charged by the sweep when they visited the property and assessed the job for themselves. The percentage increased to 50% plus extras if they used their own van. The extras were generally small amounts of anything up to approximately £25.00 per day according to the evidence provided in the bundle.

29. Under the heading “penalty clause” it said that the Claimant was responsible for correcting “unsatisfactory work” in his own time and at his own expense. In addition, the first contract contained the following clauses:

> ***The Agent is entitled to hire personnel to undertake the work supplied by the principal, provided they are properly trained, assessed and acceptable to the principal, the Agent understands that he is absolutely and totally responsible for all such work carried out, and must correct unsuitable work, damage etc. done by such personnel in his own time and at his own expense. Any such people are to be paid by the Agent.***
>
> ***The Agent is under no obligation to work any fixed period of time, or to***

work in any particular fashion, excepting that all work will be carried out to the standards required by the principal.

The Agent shall have the final say as to how he works, he will be responsible for his actions with respect to Health and Safety. He will not be required to enter any premises, or do any work he does wish to, or considers unsafe, or a potential danger. He is only required to work on those days that are mutually agreed between the Agent and the principal.

30. During the time that the Claimant worked for the Respondent, his contract was updated twice. I find that there was no discussion with the Claimant about the issuing of a new contract, neither was he given any choice as to whether he should sign it. Each time it was updated, the new contract was issued to the chimney sweeps for them to sign. The Claimant signed both subsequent contracts.

31. The second contract was issued and signed by the parties in 2012 ("the second contract"). It is a longer and more comprehensive contract than the one it replaced. It included the following terms:

The Agent is under no obligation to work any fixed period of time, or to work in any particular fashion, excepting that all work be carried out to the standards required by the Principal as set out by the current building regulations and Milborrow Chimney Sweep's Code of Practice and accepting that all work is completed as required by the Principal in the time allocated.

The Agent will provide the Principal with a schedule of availability for work in advance and notify the Principal of any changes in availability in advance, this schedule must be agreed by both the Agent and the Principal.

If the work allocated to the Agent is not completed within the specified schedule the Principal reserves the right to charge the Agent expenses to cover the inconvenience caused and clerical costs incurred to reschedule to complete the work.

The Agent acknowledges the necessity of commitment to a full and busy schedule during the months of September to December and will make him or herself available to the Principal during this time and avoid taking Holidays during these months.

The Agent must complete information on work completed and any follow up work due in writing on the daily job sheets which must be returned to the Principal immediately or the Principal must be informed by telephone, fax or email immediately of any completed/ follow up work.

The Agent must return to the Principal the job sheets and forms or paperwork, and introductory commission on a weekly/daily basis and is not authorised to withhold more money than he/she is due nor to withhold or stockpile completed job sheets and information or paperwork.

The Agent agrees to maintain regular contact with the Principal and his

office staff and to return/respond to telephone messages immediately or at his or her earliest opportunity.

The Agent will be responsible for his or her actions with respect to health and safety, risk assessments, and any other legislation, guidelines or regulations that the Agent has to meet to carry out the work provided by the Principal.

The Agent is entitled to hire personnel to assist him/her with work supplied by the Principal, provided the additional personnel is capable, honest and properly trained and assessed.

Any such personnel are wholly the responsibility of the Agent as is any work that they may undertake.

The Agent accepts that he/she must correct any unsuitable work, or damage that such personnel may cause in his/her own time and at his/her own expense.

The Agent is totally responsible for any payment and tax implications for any such personnel, and also is responsible for any injury, damage and or accident which the personnel may be involved in or cause.

Any equipment used by the Agent in relation to work supplied by the Principal must be up to all relevant health and safety requirements and all regulations and requirements it must be maintained and serviced regularly where applicable, including all portable electronic appliances being PAT tested and the Agent providing the Principal copies of the certification this is all the responsibility of the Agent .

The Agent agrees to lease all equipment which he may use for work provided by the Principal whilst under his contract for services for the payment to the Principal here with of the sum of £1.00.

32. In addition to the above terms, the contract provided for a grievance and disciplinary procedure. The disciplinary procedure set out a system of verbal and written warnings and stated that no notice would be given in cases of gross misconduct.

33. The contract was again updated, issued and signed by the Claimant two years later in January 2014 ("the third contract"). This third contract was longer and more detailed than the second contract and was drafted by an employment solicitor instructed by Mr Giddings. It stated expressly that it replaced all previous contracts between the Respondent and the Claimant. The contract contained the following clauses which I have selected because they were the subject of focus during the hearing or I consider them to be relevant to the issues I have to consider in this case:

2. Services

Milborrow engages the Sweep to provide and the Sweep agrees to provide the services to Milborrow as Milborrow and the Sweep may agree from time to time.

Milborrow does not guarantee the amount of work it can provide to the Sweep and cannot guarantee that the Sweep will be required to provide any services.

The Sweep will:

take instructions from and comply with all reasonable requests of Milborrow in relation to the provision of the services;

use all reasonable care and skill in the provision of the Services, and provide the Services to the best of his ability and in an expert manner;

comply with all reasonable requests of the Customer when providing the Services;

comply with Milborrow Chimney Sweep's Code of Practice and all applicable laws relating to the provision of the Services;

use all reasonable endeavours to minimise any disturbance to the Customer or the property;

leave the property where services are provided in a clean and tidy condition

The suite will provide Milborrow with a schedule setting out when the Sweep is available to provide the Services and will notify Milborrow of any changes to this schedule. The sweep will provide the schedule and notify Milborrow of any changes as far as reasonably possible prior to the period to which the schedule relates. The Sweep acknowledges that without this schedule being accurate and provided as early as possible in advance of the period to which it relates, Milborrow may not be able to provide the sweep with any work during that period. The sweep also acknowledges that Milborrow's busiest months are from September to December and agrees that he will be available to provide the Services and will not take holidays during these months other than over the Christmas period or as otherwise agreed by Milborrow in writing.

Milborrow will for each day of work provide the Sweep with a daily job sheet setting out the appointments for that day, including the work to be performed, the names of the Customers and the addresses of the properties where the Services are to be performed, and the times during the day of the appointments. The Sweep will use all reasonable endeavours to perform the Services in accordance with the time set out on the daily job sheet and will notify the Customer and or Milborrow if the sweep considers he is going to be late for any such appointment.

4. Equipment

Except where specified in clauses 4.2 and 4.3 the Sweep will provide his own equipment required for the proper performance of the services.

Milborrow may provide equipment to the Sweep in which event such equipment will remain the property at all times of Milborrow and must be returned to Milborrow on demand.

Milborrow will sell to the Sweep and the Sweep will purchase from Milborrow such ladders as the parties may agree for the price of £1 (or

such other price as the parties may agree). On payment of the price, ownership of the ladder will vest in the Sweep. On the termination of this Agreement, or at any time on demand by Milborrow, the Sweep will sell back to Milborrow and Milborrow will purchase from the Sweep any such ladders previously sold by Milborrow to the sweep for the price of £1.

The Sweep will ensure all equipment (including all ladders) is in good and safe condition and in accordance with the standards required by all health and safety and other relevant legislation, and will only use such equipment if it is in good and safe condition and in accordance with the standards required by all health and safety and other relevant legislation. This obligation of the Sweep will continue to apply whether or not the Sweep has notified Milborrow of any defects in any equipment.

8. Charges

The legal position of the parties relating to the charges and the Commission is that Milborrow acts as booking agent of the Sweep arranging appointments for the Sweep to provide the Services and the Sweep provides the Services to the customer. The customer pays the Sweep the charges for the Services. The Sweep then pays to Milborrow a Commission for the booking services.

The amount of the Commission to be paid by the Sweep to Milborrow is as agreed between the parties from time to time.

The Sweep will collect the charges from each Customer when providing the Services to the Customer. The charges are to be paid in cash, cheque or BACS made payable to the Sweep or Milborrow, and the Sweep will request payment of the charges from each Customer in such a way that he is able to pass on the Commission to Milborrow in cash or in cheques, debit card, credit card or BACS payment made payable to Milborrow

The sweep will pay Milborrow the Commission do each day or weekly as the parties may agree

9. Subcontractors

The Sweep will procure that the Services are provided exclusively by the Sweep and no other person unless Milborrow agrees in writing otherwise.

If the Sweep wishes to work with an assistant, the Sweep will notify Milborrow of the name, address and experience of the assistant. If Milborrow agrees to the Sweep working with an assistant, the following provisions will apply.

The assistant will act as a Subcontractor of the Sweep, and the Sweep will remain liable for the provision of the Services and for any act or omission or negligence of the Subcontractor in the provision of any services.

The Sweep will be responsible for all acts or omissions of the Subcontractor and will indemnify Milborrow in respect of any claims, and for any loss or damage, caused by the Subcontractor and or resulting from or in connection with the Subcontractors involvement in the provision of the services.

The Sweep will ensure that before commencing any work with the Sweep the Subcontractor will sign and the suite will return to Milborrow, Milborrow's standard disclaimer (as may be amended from time to time)

13. Status and authority of the Sweep

The Sweep acknowledges that he is engaged as an independent contractor to Milborrow and nothing in this agreement renders him an employee, agent or partner of Milborrow and the Sweep will not hold himself out as such.

The Sweep has the status of a self-employed person and is exclusively responsible for the payment of National Insurance contributions and for the discharge of any income tax liability and will pay any such contributions and taxes to the appropriate authorities.

The Sweep will indemnify Milborrow in respect of any income tax, employee's National Insurance contributions, interest and or penalties thereon arising in respect of the Sweep for which Milborrow may be called upon to account to HM Revenue and Customs.

14. Indemnities and Insurance

Milborrow will maintain public liability insurance covering both Milborrow and the Sweep in the performance of the services.

The Sweep will indemnify Milborrow against any claims against Milborrow or any liability, loss, damage, costs and expenses of whatever nature incurred or suffered by Milborrow in connection with the Sweep's negligence or breach of this Agreement

15. Termination

Either party may terminate this Agreement on giving not less than three months' notice to the other

Milborrow may terminate this Agreement with immediate effect in the event of the gross misconduct of the Sweep or if the Sweep is in breach of any term of this Agreement and fails to remedy the breach within seven days of receiving notice from Milborrow requiring the Sweep to do so.

The Sweep will on termination immediately return to Milborrow any vehicle, and all equipment, provided by Milborrow.

The working relationship

(a) Control

34. During the hearing, I was referred to a Code of Practice ("code") produced by the Respondent, dated 2005 and re-issued in 2006. The code was supplied to the chimney sweeps, including the Claimant. In effect, it is a detailed practice manual giving information and instructions on everything concerned with sweeping chimneys, ranging from step by step instructions

to sweeping a chimney, the equipment to be used and how customers are charged. The code even sets out behavioural requirements such as how to greet customers, what to say (including adopting a "smiley face") and what to wear. It includes phrases such as "*Remember you are going into customer's homes and therefore must look respectable*" and "*When you are in your van, you are representing Milborrow Chimney Sweeps, drive with care, courtesy and consideration*".

35. Mr Giddings was asked about the code in evidence and he suggested that the intention behind it, was to share his knowledge about sweeping chimneys. He said the code was "*my way of sweeping chimneys*" and suggested that the code provided guidance to the chimney sweeps. Whilst I accept that in some respects the intention of the code was to provide information and guidance, I find as fact that the intention behind the code was to maintain standards by instructing the chimney sweeps how to do their job. I consider that there was an expectation by the Respondent that the code would be followed and that it was not the case that chimney sweeps could simply ignore the code as they wished. There are many references in the document to what the chimney sweeps 'must' do. In addition, there is a sentence at the end of the code which says: "*The Management reserve the right to ensure that the above objectives are met*".

36. The Claimant, like other chimney sweeps, was expected to meet with Mr Giddings once a week to discuss how the past week had gone. This Weekly Office Visit is referred to at page 74 of the Bundle which says as follows:

> ***Each week an allocated day is booked for when you are nearest to the office when feasible. Please pop in and go over:***
>
> ***"The boys book". This is for any questions or queries about work etc.***
>
> ***Check the van, stock, equipment, make sure you have the relevant parts for up-coming work***

37. The "Boys' Book" which I accept was jokingly called the "Naughty Boys Book" was a form of communication with the chimney sweeps and included details of any complaints by customers. During their visits to the office, I find as fact that the chimney sweeps, and therefore the Claimant, were expected to look through the Boys' Book.

38. In September 2006 the Claimant received a written warning about his performance [152] which included the following extracts:

> ***Up until 1 September you had not provided the office of your new address nor landline contact number, thus we did not know the whereabouts of our equipment and ladders during your recent holiday period….***
>
> ***You <u>did not</u> return all job sheets back to the office before you (sic) annual leave. Despite being only too aware of the Company rule that all job sheets, money, van (if company owned) equipment and ladders must be***

returned the yard during periods of leave for safe keeping, this you blatantly ignored.
……..

Your time keeping needs to be addressed, especially your 1st appointments

…….

39. The letter ends by warning the Claimant that if "*our partnership is to continue we have to address these matters and see some improvement on your side*…"

40. All of the chimney sweeping jobs undertaken by the Claimant were arranged by the Respondent. The customer would ring the Respondent and they would be given an indicative price from a price list prepared by the Respondent. The price actually charged by the chimney sweep would be dependent on the extent of work necessary. Sometimes the work actually required was more than anticipated by those in the office who had the initial conversation with customers. It was suggested by the Respondent that this 'flexibility' to charge was more consistent with self-employed status, than employed status. I have concluded it was nothing of the kind; it was merely a case of the chimney sweep charging the correct price for the job. What became clear during evidence was that the chimney sweeps did not have the freedom to charge what they liked and, in effect, increase the profitability of a particular job. There was very limited scope to depart from the pricing structure of the Respondent.

(b) Mutuality of obligation

41. When the Claimant started work for the Respondent, his contract guaranteed him a minimum of 15 chimney sweeps each week. The Claimant was kept fully occupied and worked full time for the Respondent. I accept the Claimant's evidence that generally he worked for the Respondent from Monday to Friday between 8am until 5 or 6pm, also working Saturdays during busy months. I find that the Claimant was expected to do the chimney sweeps offered to him and I accept his evidence that he was expected to work full-time.

42. In the second contract the minimum guarantee was replaced with a clause which stated that the Respondent could not "*guarantee the quantity of work that the agent will receive each week*". However, the amount of work received by the Respondent and the number of hours worked by the Claimant did not change in reality, up to the point that the Claimant's contract was terminated. I accept the Respondent's evidence that the business was certainly busier during the winter months and therefore the Claimant would have been busier during the winter months than the summer months. Mr Giddings suggested in evidence that his objective was to keep the chimney sweeps as busy as he could in the summer months. I

conclude that Mr Giddings felt obligated to keep his chimney sweeps busy with work.

43. The job sheets which listed the Claimant's appointments for the day were sent to him the day before. The code required chimney sweeps, at the end of each day, to "*Phone the office so [they] know all your work is finished and [they] can send your Job Sheet for the next day, or find you more work for that day*".

44. At the end of each job, chimney sweeps were required to complete and give to the customer a report with the Respondent's branding and letterhead on.

45. The Respondent suggested that because the chimney sweeps could reject work offered to them, that this meant that there was no mutuality of obligation. I accept that the Claimant and other chimney sweeps could tell the Respondent that he would not be available on a particular day. However, I also find that the Claimant was expected to give as much notice as possible of his availability and any days he did not want to work.

(c) Personal service

46. Each of the contracts entered into and signed by the Claimant contained clauses which the Respondent represented were substitution clauses. For the first contract the relevant clause is at paragraph 30 above and is arguably what one would expect to read in a substitution clause. The second contract contained a different substitution clause (paragraph 32 above) and states that the agent is entitled to "*hire personnel to assist him/her with work supplied by the Principal*". The emphasis therefore changed from hiring someone to do the work provided by the principal, to one which said that the chimney sweep could hire someone to assist him. The third contract contained yet another change to the substitution clause (paragraph 34 above) and said that "*the Sweep will procure that the Services are provided exclusively by the Sweep and no other person unless Milborrow agrees in writing otherwise. If the Sweep wishes to work with an assistant, the Sweep will notify Milborrow of the name, address and experience of the assistant…."*

47. The Claimant did not provide a substitute, or ask to provide a substitute, throughout the entirety of his contract with the Respondent. The accepted practice between the parties was that if the Claimant was unable to perform the services, the work would be reallocated to one of the other sweeps engaged by the Respondent. The Claimant denies that the substitution clause in the contract therefore reflected reality at all. When Mr Giddings was asked about the ability to substitute, he said "*We need to know who they [the substitutes] are. We have allowed it in the past from other chimney sweeps. It is a very strenuous job*." He accepted that the Claimant did not offer substitutes and when he could not work, the work was reallocated.

When it was put to Mr Giddings that it was not something he encouraged, Mr Giddings said:

> ***We don't want anyone going into people's houses. It is better that they go on their own as they are people we trust.***
>
> ***Several of my chimney sweeps have assistants and we are ok with that. People feel vulnerable when there is two people in the house.***
>
> ***If the sweep wants to take them we are not going to stop them.***

48. The clear impression given by Mr Giddings, notwithstanding some of his answers, was that providing a substitute was not encouraged, and indeed frowned upon. I accept that some chimney sweeps did on occasion take assistants with them, but I do not accept that there was a genuine right on the part of the chimney sweeps to provide a substitute. I find support in that conclusion not only from the oral evidence but from the third contract. This is hardly clear about the right of substitution. The words "*and no other person*" could easily be interpreted as an assistant, particularly when read with the next paragraph which does refer to assistants. When it was put to Mr Giddings in evidence that the third contract did not contain a clear substitution clause, he could not explain why it did not expressly state what he seemed to be suggesting in his evidence, despite his receiving the advice and assistance of lawyers in drafting it.

(d) Other factors

49. There was no expectation on the chimney sweeps to provide their own equipment. Mr Giddings said in evidence that the chimney sweeps could choose to use their own equipment but that there was a cupboard full of equipment from which the chimney sweeps could take whatever they needed to do their job. Indeed, the code [75] said: "*The Vans are all kitted out as per our Equipment List*". A copy of the Equipment List was shown to me during the hearing [161] and included in excess of 60 items that the chimney sweeps were expected to have with them, all of which were provided by MCS.

50. As is clear from above, the second contract introduced a system of leasing equipment to the chimney sweeps for £1.00. However, I concluded that the only purpose of such an arrangement was to give the impression of engaging with persons running their own business. In reality, I find that neither the Claimant nor the other chimney sweeps were required to pay the £1.00 to the Respondent.

51. The Claimant chose to use his own van, but it was MCS branded on the side and displayed the telephone number of the business; it did not have the Claimant's own telephone number on it. I do not accept that the Claimant had any choice about this. I accept the Claimant's evidence that the one

time the van may not have shown the MSC branding was when the van was involved in a minor accident.

52. Throughout his time working for the Respondent, the Claimant was responsible for paying his own tax and national insurance. He had an accountant who would prepare a self-assessment annually and calculate the taxes payable.

53. The Claimant was expected to have his own personal accident insurance, whereas public liability insurance was provided by the Respondent.

54. The Claimant worked solely for the Respondent. He did not have any clients of his own (i.e clients that were not engaged by the company). I reject the evidence of Mr Giddings that the Claimant and other chimneys were encouraged to go and do other work on their own account. They were not permitted to take on chimney sweeping jobs on their own account as Mr Giddings saw this as competition for his own business. Mr Giddings accepted in cross examination that he would have been unhappy if any of the chimney sweeps worked for another chimney sweeping company.

Submissions

55. I considered carefully the submissions made by representatives for the parties before reaching the conclusions below.

Analysis, conclusions and associated findings of fact

56. Turning to whether any of the key ingredients or "irreducible minimum" to a contract of employment was missing, I have concluded that it was not. It is quite clear, and most striking in this case, that there was a high level of control over the Claimant and other sweeps by the Respondent. I refer to my findings of fact at paragraphs 34-40 above and do not propose to repeat them.

57. I conclude that there was mutuality of obligation. The Respondent's emphasised throughout the hearing that the sweeps could turn down work whenever they wanted. They were not paid holiday pay and were not paid when they were sick. Yet I have concluded that the ability to tell the office that one might not be available on a particular day is not necessarily inconsistent with mutuality of obligation when looked at in the context of the overall relationship. There were clear expectations on the chimney sweeps to provide notice of unavailability and I am in no doubt, having listened to the evidence of Mr Giddings, that such a situation would not have been tolerated on an on-going basis, particularly during busy periods, or they risked being replaced. The request for "free days" is no different, in my view and in this case, to an employee requesting time off. Again, I rely on my above findings of fact for the purpose of reflecting the actual agreement between the parties.

58. Finally, regarding personal service, I have concluded that it was expected that the Claimant and other chimney sweeps would do the work themselves and that it was simply not open to the Claimant to explore a perhaps more profitable arrangement which involved sub-contracting or substitution. I do not consider that the agreement expressly provided for the right to substitute, but even if it was to be read as though it did, this did not reflect what happened in practice.

59. Taking all of the above into account, it is quite clear to me that the Claimant was at all material times an employee in all but name. All my above findings, including other factors referred to at paragraphs 49-54 above, are entirely consistent with the relationship being one of employer and employee. I conclude therefore that the Claimant had employment status whilst working for the Respondent and may therefore pursue his claims before the Tribunal.

60. A case management order will accompany this judgment giving directions relating to this case.

……

Employment Judge Hyams-Parish
27 August 2020