EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Bubicz

MM Tech Electrical Ltd

v

PRELIMINARY HEARING

Heard: via CVP **On: 24 September 2020.**

Before: Employment Judge Tuck QC

Appearances:

For the Claimant: Ms Czepiel, lay representative.
For the Respondent: Mr Corbon, solicitor

JUDGMENT

1. **The claimant was not an "employee" within section 230 (1) of the Employment Rights Act 1996.**

2. **The claimant was a worker within s230(3)(b) of the Employment Rights Act 1996.**

REASONS

Claim.

(1) By a claim form presented on 2 June 2019 following a period of early conciliation between 23 April 2019 and 7 May 2019 the claimant states that he had worked for the Respondent as a self- employed person for 18 months, but "would like to claim to employment tribunal [sic] to establish my employment status and other issues relating to work for the company such as annual leave (holiday pay), enrolment for pension scheme and claim a compensation [sic]".

He stated that he worked for the Respondent from May 2017 until September 2017, and again from January 2018 until February 2019.

(2) In its ET3 the Respondent asked for a preliminary hearing to determine employment status, setting out its contention that the Claimant had been engaged "as a self-employed consultant, responsible for his own earnings, tax and national insurance contributions".

Issues.

(3) Today's preliminary hearing was to determine the status of the claimant, specifically whether he worked:

- **(i)** As a self- employed contractor, as asserted by the Respondent,
- **(ii)** As an employee of the respondent within s230(1) of the Employment Rights Act 1996 as asserted by the Claimant, or
- **(iii)** As a worker within section 230(3)(b) of the Employment Rights Act 1996 as alternatively asserted by the Claimant.

Evidence.

(4) I heard evidence from the Claimant, and read statements from Mr Levi Gunn and Mr Daniel Hamilton, though neither was called to give oral evidence to the weight attached to their statements was necessarily limited. For the Respondent I heard evidence from Mr Luznierczyk, company director of the Respondent, and from Mr Dawid Araszkiewski and Mr Pawel Szulist who had both previously worked as supervisors engaged by the Respondent company at the same time as the Claimant. Neither of the supervisors are engaged by MM Tech any longer.

Findings of Fact.

(5) MM Tech Electrical Ltd is a company which carries out electrical work on construction sites. The claimant and Mr Luznierczyk (and indeed Mr Araszkiewski and Mr Szulist) are Polish. Mr Luznierczyk explained that in 2017 he placed an advert for electricians on a website used by Polish people based in London, and the claimant replied to the advert. The advert stipulated a daily rate of pay; I did not have a copy of the advert and neither party recalled that it said anything about the terms of engagement being offered.

(6) Following an interview over the telephone Mr Luznierczyk provided work to the claimant as an electrician. No contractual documents were provided to the Claimant at any time by the Respondent. Mr Luznierczyk said that the Respondent has no company handbook or policies.

(7) The Respondent sub-contracted with other companies who provided electrical services, to carry out electrical work on construction sites. The claimant worked primarily on three large projects, each of which was under the control of a 'site manager' –not a person connected to the Respondent company. For any tradespeople working on the sites, an induction was provided by the company in control of the site (i.e. not the Respondent). The site managers required that every person who came on site sign in (so that it

was known at all times who was on site), and Mr Szulist explained that it was a requirement that when electricians were undertaking work, that they were supervised.

(8) Mr Araszkiewski said that on the Claimant's first day, he told the claimant that he would be working on a "self employed basis".

(9) Throughout their working relationship Mr Luznierczyk would text the claimant with the address which he should attend to work, along with the name of the foreman on site. There were examples of these texts in the bundle – in Polish, translated for me by the Claimant (and not challenged by the respondent witnesses).

(10) The Claimant would be told where to go, and at what time. When he arrived on sites, once he signed in, he would report to a respondent supervisor who would set his tasks for the day. The claimant would have his own "small tools", but any large tools or equipment would be provided by the Respondent. The respondent witnesses all said that materials to carry out the work was provided by the company controlling the site; the supervisors would email with the requirements for the following day/s.

(11) The Claimant was generally required to work from 7.30am until 4.30pm; Mr Luznierczyk said this was the 'industry standard', he agreed that if the claimant did not work a full day however, he would not receive his 'daily rate'. If the claimant was ever late, he would contact his supervisor to tell them, and while Mr Araszkiewski said that he would not "tell off" those who were late, he did say that if electricians left early "without permission" he would "have a chat as it cannot happen". Supervisors instructed when breaks and lunch would be taken by the Claimant and other electricians. The claimant would give several weeks' notice of when he was going to go on holiday, and Mr Luznierczyk said that he had never refused or sought to delay the holiday of any electrician.

(12) The claimant said that he could not hire anyone to help him with a job, or send someone in his place; the respondent did not dispute that substitution was not permitted. It was accepted by all the witnesses that the claimant did not quote for jobs, price materials or produce invoices. Nor did he set his own working hours; he did the tasks assigned to him by the supervisor on site.

(13) As to pay, the claimant and Mr Luznierczyk agreed a daily rate, initially of £150 per day in 2017, rising to £160 and then £170. The ET3 stated that the claimant "was responsible for his own tax and national insurance contributions." None of the statements provided for the respondent said anything more about pay. The claimant disclosed payslips, which showed that the "CIS Deduction" was made from the claimant's daily rates, and he received net pay. This is a reference to the Construction Industry Scheme. The parties provided no evidence about this scheme, but considered it appropriate that I have regard to the government website which describes it in the following way:

"Under the CIS contractors deduct money from a subcontractor's payments and pass it to HM Revenue and Customs.
The deductions count as advance payments towards the subcontractor's tax and National Insurance.
Contractors must register for the scheme. Subcontractors don't have to register but deductions are taken from their payments at a higher rate if they're not registered.

Rules you must follow

(i) You must register for CIS before you take on your first subcontractor.
(ii) You must check if you should employ the person instead of subcontracting the work.
(iii) …."

I have seen no evidence to suggest that Mr Luznierczyk complied with the second of these rules and checked whether he should be employing electricians rather than subcontracting work to them.

(14) The claimant gave frank evidence that he had seen himself as being "self employed" during his engagement with the Respondent, and had paid an accountant to prepare his tax returns. He was not paid for any holiday or sickness absence from work, and was not enrolled in any pension scheme. However, after he had stopped working for the Respondent – which I accept was when Mr Luznierczyk declined to agree a higher daily rate of pay –the claimant consulted various government websites which caused him to reflect on his earlier understanding.

(15) The claimant had a break of around a month from December 2017 until January 2018 when he did not work for the Respondent – I understand because the respondent had no work for him to do. During that period the claimant undertook other work. Both parties agreed that from January 2018 until February 2019 the claimant, save for holidays, worked 'for' the Respondent full time. Sign in sheets, 'pay slips' and bank statements from the claimant show that he was working five days per week save when he was on pre-arranged holidays.

(16) The only real dispute of fact concerned whether there was some restriction on electricians engaged by the Respondent working for other electrical firms on the same site for a period of 6 weeks. The claimant said that such a restriction was well known by all the electricians on site, Mr Luznierczyk denied any such covenant or instruction ever existed. However, Mr Araszkiewsk confirmed that this "was mentioned to the guys" in order "to protect the company from losing guys, if for example another company offers £5 per hour extra". He said he heard this rule from Mr Luznierczyk. Mr Szulist said that as far as he knew "M Tech had no formal arrangement, but if we lose the guys we cannot do the work and the main contractor gets penalised". Weighing up this evidence, I find it more likely than not that the claimant was told that he would be prohibited from working for other electrical firms on the same sites for a period of six weeks after "finishing" with the respondent, though there is nothing to suggest that this was a restrictive covenant recorded anywhere, and it would have been highly unlikely that it could be enforceable.

(17) The claimant produced two witness statements from employees of Bridgegate Electrical Limited, the company which, on some sites, subcontracted work to M Tech. Neither Mr Gunn or Mr Hamilton attended to be cross examined on their statements. Mr Luznierczyk however said of these two individuals that "the claimant knew they were employees, and knew the difference between employees and self-employed…. If he [the claimant] asked me to be an employee I could have done that. But it was short term, temporary employment". I do not accept that the claimant could have asked to be an employee; if that had been an option for the claimant to request it is inconsistent that he was simply told he would be self employed, and I would have expected this evidence to be set out in Mr Luznierczyk's witness statement. It is also inconsistent with the respondent's evidence that it did not employ any electricians at all.

(18) Mr Corbon spent some time asking the claimant to confirm that he had no desk or designated work station in the respondent's offices. Given the Claimant's role as an electrician I found this entirely unsurprising, and did not find the inquiry of any assistance. He also sought to highlight the claimant expressing himself in different ways to suggest the claimant's evidence lacked credibility. English is not the claimant's first language, and I did not accept his evidence was contradictory or lacking in credibility. I found him to be a truthful witness.

Submissions.

(19) Mr Cordon made submissions summarising the factual evidence given. He highlighted that the claimant had seen himself as self-employed at the time, and was not paid for holiday or sick leave. Mr Cordon made no submissions as to the legal test to be applied and referred to no case law. He said on a number of occasions that he would "leave the law to [me]". I told Mr Cordon that it appeared that I would need to have regard to the Pimlico Plumbers and Uber lines of authority (see below for citations), and he replied that he would not object to that, but left "in [my] hands".

(20) Ms Czepiel made focused submissions addressing the factors she had researched on government websites, as to the personal service required, inability to engage assistance or send a substitute and the control exercised by the Respondent. When I read section 230(3) ERA to her, she submitted that the claimant supplied personal service, and that he was not in business on his own account as he did not quote for jobs, supply his own materials or (for the most part) tools, did not generate invoices, and did not have any flexibility as to start / finish times.

Law.

(21) The Employment Rights Act 1996 provides:

> **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.

(22) *Multiple Test for "employment":* The so called 'multiple' test requires consideration of a number of factors while having regard to the arrangement as a whole in determining whether there is an employment contract: see *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 2 QB 497. Key tests are:

(i) Whether an agreement exists to provide personal service or work in return for a wage

(ii) Whether the employer has a sufficient degree of control over the worker

(iii) Whether the other provisions of the contract are consistent with an employment contract.

(23) *Label:* How the parties themselves label the relationship is a relevant but not a conclusive factor: *Massey v Crown Life Insurance Co* [1978] IRLR 31, *[1978] ICR 599, CA*. The same approach has been seen more recently in *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] IRLR 257 in which it was held that when deciding whether someone comes within either limb of s 230(3) of the ERA 1996, the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a 'realistic and worldly-wise', 'sensible and robust' approach to the determination of what the true position is.

(24) *Personal Service:* In *Redrow Homes (Yorkshire) v Wright* [2004] EWCA Civ 4689 the Court of Appeal confirmed that whether or not an individual undertook personally depends entirely on the terms of the contract, construed in light of the circumstances in which it was made, including the parties' intentions. Of relevance is whether there is a right to send a

substitute to do their work. The Supreme Court in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] IRLR 872 approved the analysis of the Court of Appeal in that case [2017] IRLR 323. Etherton MR at paragraph 84 held:

> "…. I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution 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, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

(25) *Mutuality of obligation:* In an employment relationship this consists of an obligation on an employer to provide work, and on an individual to accept that work. However, merely stating that there may be times when no work is available (but that the employee is required to do the work when it is) will not negate an employment relationship: *Wilson v Circular Distributors Ltd* [2006] IRLR 38*, EAT*. Further, the fact that a particular engagement can be terminated at will does not necessarily defeat employment status: *Drake v Ipsos Mori UK Ltd* [2012] IRLR 973*, EAT*.

(26) *Control:* In Ready Mixed Concrete it was held that "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". In *White & Anor v Troutbeck SA [*2013] UKEAT 0177/12 the EAT held that 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.

(27) *Worker:* This is a deliberately wider definition than "employee" (see s230 (3)(*b*) and *Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, EAT*). Langstaff J held:

> The statutory definition of "worker" in reg. 2(1) of the Working Time Regulations [which is materially the same as s230(3) ERA] focuses not upon any obligation owed by the employer (save sufficient to ensure that there was a contract between the "employer" and the "worker"), but upon the nature of the obligation resting upon the "worker". For an individual to be a "worker" in terms of reg. 2(1), he must be: (a) subject to a contract; (b) whereby he undertakes to perform work personally; (c) for someone who is not a client or customer of a profession or business of his.

(28) *Worker or in business of his own*: Etherton MR at paragraph 94 of *Pimlico Plumbers Ltd* held:

> "In deciding whether a worker is a limb (b) worker or falls within the second category in paragraph 66 above [i.e. is self employed in business on their own account], the ET carries out an evaluative exercise, with an intense focus on all the relevant facts: *Jivraj v Hashwani* [2011] UKSC 40, [2011] IRLR 827 at [34]. There is no single touchstone, such as whether there is a relationship of subordination of one party to another, for resolving the issue: *Bates van Winkelhof* at [39]. Subordination might, nevertheless, be relevant, as might be such factors as whether there are a number of discrete separate engagements, whether obligations continue during the breaks in work engagements (sometimes called an 'umbrella contract'), and also the extent to which the claimant has been integrated into the respondent's business: *Secretary of State for Justice v Windle* [2016] EWCA Civ 459, [2016] IRLR 628; *Halawi v WDFG UK Ltd (t/a World Duty Free)*; *James v Redcats (Brands) Ltd* [2007] IRLR 296.

Conclusions on the Issues.

(29) In contrast to the majority of reported cases in this area, there is in this case no written contract.

(30) I have considered first whether the Claimant was engaged as a 'limb b' worker:

(i) I am satisfied that when the claimant answered an advert to work as an electrician, after his telephone interview, Mr Luznierczyk, the parties entered into an oral contract. The respondent agreed to provide work to the claimant, for a set daily rate of pay.

(ii) I am further satisfied that the agreement entered into by the parties was for the claimant to personally perform electrical work at the instruction of Mr Luznierczyk. The agreement from the outset was for the claimant to DO work – not to arrange to have work done.

Throughout the relationship, the claimant did not have any right to send a substitute or hire additional assistance to carry out the duties assigned to him. The suggestion that this was required only because of site health and safety I reject; it would have been possible to permit substitutes from a defined category –i.e. other electricians who worked with M Tech and had been inducted to the site in question, but this was never done. The contract clearly required personal service.

(iii) The real issue between the parties is whether the claimant was providing this personal service because he was carrying on a profession or business undertaking on his own account, such that he entered into contracts with clients or customers to provide services for them. As Etherton MR set out in *Pimlico*, there is no single touchstone to answer this point. It requires careful consideration of all the facts. I am satisfied that the claimant was NOT carrying on a profession or business on his own account during the periods when he worked for the Respondent. In reaching this conclusion I have had particular regard to the following factors:

a. The Claimant accepts that he had seen himself as 'self employed', and was paid as a subcontractor under the CIS scheme. However, whilst this goes onto the side of the scales pointing towards the claimant being in business on his own account, I find it outweighed by the other factors I set out below.
b. The claimant was required to work set hours.
c. The claimant received a daily rate of pay; he did not 'quote' for jobs or provide invoices. He was not rewarded for working faster or penalised for working slower.
d. He reported to, and did the tasks assigned to him by, a supervisor appointed by M Tech. Whilst he had a degree of professional judgment as to how he approached a particular task, this was at a level consistent with being a worker or indeed employee with relevant qualifications and experience.
e. The Claimant was under a significant degree of control as to what his next job would be when he finished on a site – as indicated by the text messages shown to me.
f. The relationship persisted continuously between January 2018 and February 2019, with 'breaks' only for annual leave which was arranged by agreement. During this time, having reviewed the time sheets provided to me, the claimant was working five days per week for the Respondent.
g. If the claimant was late, or needed to leave the site, he would have to explain himself to and seek permission from the supervisor.
h. Whilst the Claimant's requests for holiday dates were acceded to, he did have to make requests and give notice.
i. The claimant had his own 'hand tools' – in the same way that a chef will frequently have their own knives but this does not determine the nature of their employment relationship. All heavy machinery and all materials were provided to the Claimant.
j. Whilst the claimant was not formally subject to a restrictive covenant, I find that he was told that he would be prohibited

from working for other companies providing electrical services on the same sites as he worked on, for a period of six weeks after any work on that site for M Tech.

k. Whether or not there was an overarching contract covering the entire period the claimant worked for the Respondent or not (see further below), I am entirely satisfied that during periods when there was ongoing electrical work available at a site, there was mutuality of obligation between the parties; the claimant was obliged to turn up to work at the hour stipulated and work for a full day, and the respondent was obliged to pay the daily rate agreed. There was a classic work/wage bargain.

(31) I have gone on to consider whether, beyond being a 'worker', the claimant was also an 'employee'. I have found that there was a contract for personal service (with no right of substitution), and there was a significant degree of control exercised by the Respondent over the claimant. I am satisfied that there was mutuality of obligations between the parties during any particular job. Between December 2017 and January 2018 there was no work available for the claimant, and he did not therefore work for the Respondent for a month. I have noted the case of *Wilson* above, that an absence of work does not negate there being a contract of employment. However, I am not satisfied that if M Tech got more work, they were under any obligation to provide it to the claimant. They were free to do so, or to offer it to another electrician as they saw fit. Similarly, once they won more work, the claimant was free to accept it or, for example if he was happy with the work he was undertaking elsewhere, to reject it. I am therefore not satisfied on the evidence before me that the mutuality of obligation once a particular job had finished, was such as to point to there being a contract of employment.

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Employment Judge Tuck QC

25 September 2020

Sent to the parties on:19/10/2020

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For the Tribunal:

…Jon Marlowe