Case Nos. 1802016/2020
1802018/2020
1802022/2020

EMPLOYMENT TRIBUNALS

Claimants: Mr S Agyemang
Mr D Conway
Mr S Fowler

Respondent: Stonebridge Homes Limited

Heard at: Leeds **On:** 25 September 2020
22 October 2020 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:
Claimants: Mr Henry, counsel
Respondent: Ms Gardiner, counsel

RESERVED JUDGMENT

1. The complaints of failure to provide written reasons for dismissal are dismissed on withdrawal by the Claimants.

2. The Claimants were not employees.

3. The complaints of failure to provide a statement of main terms and conditions and unfair dismissal and the claims for a redundancy payment and damages for failure to give notice of termination of employment fail and are dismissed.

4. The Claimants were not workers.

5. The claims for unpaid holiday pay and the complaints of unauthorised deductions from wages fail and are dismissed.

REASONS

1. The Claimants worked for the Respondent ("the Company"), a construction business, in a bricklayers' gang until their employment ended in January 2020. They presented claims to the Tribunal alleging that the Company had unfairly dismissed them, failed to give them a statement of their main terms and conditions of employment or notice of termination of their employment, failed to pay them holiday pay and owed them arrears of pay and redundancy payments. At the Preliminary Hearing they withdrew claims for failure to give written reasons for dismissal and these were dismissed.

The law and the issues

2. Only an employee is entitled to complain of unfair dismissal and failure to provide a written statement of main terms and conditions, and to claim a redundancy payment and damages for breach of the contractual right to notice of termination. An employee is an individual working under a contract of employment, whether express or implied and whether oral or in writing (Section 230(1) of the Employment Rights Act 1996 (the ERA) and Article 3 of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994).

3. The High Court in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1967) 2QB 497 gave guidance on how to decide whether an individual is an employee:

    a. An employee is someone who agrees that, in return for a wage or other payment, he will provide his own work and skill in the performance of some service for the employer.

    b. He agrees, expressly or impliedly, that in performing that service he will be subject to the employer's control to a sufficient degree to make the employer the "master".

    c. The other terms of the agreement between the individual and the employer are consistent with it being a contract of employment.

4. All the circumstances of the individual's working relationship must be taken into account in deciding whether he is an employee, including the degree to which he is integrated into the employer's business.

5. A broader category of individuals is entitled to bring claims for arrears of pay and unpaid holiday pay. Such claims can be brought not only by employees but also by individuals who work under an agreement (which can be express or implied, oral or in writing) to perform work personally for the employer. This does not extend to the situation, however, where the individual has his own business and the work he is doing under the contract is for the employer as a customer of that business (Section 230(3) ERA and Regulation 2(1) of the Working Time Regulations 1998).

6. In Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 97, the Employment Appeal Tribunal explained that by extending protection to "workers" the legislation is intending to cover those who may not meet the definition of an employee but are, substantively and economically, in the same subordinate and dependent position in relation to the employer as employees are. "Workers" can therefore be distinguished from those with their own business who are working under a contract between that business and the employer and who are in an arms-length and independent position in relation to the employer.

7. A Preliminary Hearing was held to decide the preliminary issues of whether all or any of the Claimants were employees and/or workers within these statutory definitions.

The evidence

8. At the Preliminary Hearing, which was conducted by video link, the Tribunal heard oral evidence from each of the Claimants. For the Company, it heard oral evidence from Mr Stewart Loben, who is Head of Construction and in charge of labour resources across the Company, including the allocation of workers across the Company's various construction sites. The Tribunal also heard from Mr Jason Gray, who is a site manager with day-to-day responsibility for running the construction sites the Company operates, including responsibility for health and safety. On the basis of that evidence and the documents to which it was referred, the Tribunal has made the following findings on the facts of the case.

9. Before recording those facts, however, the Tribunal needs to comment on the evidence from Mr Agyemang. Several paragraphs appeared in identical form in each Claimant's witness statement. It became apparent as Mr Agyemang answered questions during the Preliminary Hearing that his situation whilst working for the Respondent was in fact different in what might turn out to be significant ways to that of Mr Conway and Mr Fowler. His witness statement did not reflect that and was, on his own admission, inaccurate. Mr Agyemang's level of literacy is not high and the Tribunal does

not criticise him in any way for the inaccuracies in and omissions from his statement nor does it consider these undermined his credibility as a witness in relation to the oral evidence he gave. The Tribunal asked him some questions to find out what his situation had actually been whilst working for the Respondent, but there was a limit to how many questions it was fair for the Tribunal to ask, particularly given the fact that this was new evidence of which the Respondent had had no notice. The Tribunal gave Mr Loben leave to give further evidence in response and he dealt with Mr Agyemang's oral evidence as best he could. The Tribunal reached its conclusions about Mr Agyemang's case on the basis of the evidence with which it was presented.

The facts

10. It is customary in the construction industry for those involved in bricklaying work to work in gangs, commonly comprised of two bricklayers who lay the bricks and a bricklayers' labourer. The bricklayers' labourer supports the bricklayers by providing a constant supply of bricks and mortar to enable them to work productively. This is a different and more specialised type of work than that of a general labourer. This Company employs general labourers to work on its sites and acknowledges them to be its employees.

11. Mr Agyemang began working on the Company's sites at some time in 2015 as a bricklayers' labourer. Initially, he worked in a gang with a bricklayer with whom he had worked before for a different company. Mr Agyemang's evidence was that that person paid him the standard rate for a bricklayers' labourer. The Tribunal infers from this and comments made in evidence by the other witnesses that there is a standard hourly or daily rate that is generally acknowledged to be the "going rate" for a bricklayers' labourer.

12. When the bricklayer he originally worked with left in around September or October 2018, Mr Agyemang asked one of the Company's managers at the site where he was working whether he could carry on working there, there still being brickwork to be completed on the site. They asked him who he wanted to work with. He named Mr Conway and Mr Fowler and the manager said "OK". Mr Agyemang spoke to Mr Conway and Mr Fowler and asked if he could work with them. They asked if he had spoken to the site management about this and he said he had. They agreed he could work with them.

13. Mr Conway said he began working as a bricklayer on the Company's sites in February 2015 and Mr Fowler said he began in March 2016. The Company's records appear to indicate that they both started in March 2016. The Tribunal does not consider it necessary to reach a finding of fact on their start dates because it is not contested that both men worked continuously for the Company from at least March 2016 until 13 January 2020, that Mr

Fowler and Mr Conway worked together as a gang with a bricklayers' labourer and that Mr Agyemang was that labourer from sometime in late 2018.

Documentation

14. There was no written record of the terms on which the Claimants were working for the Company. The Tribunal therefore had to decide the nature of their employment relationships from the way in which they worked in practice.

Organisation and control of work

15. At each of the Company's sites at which Mr Fowler and Mr Conway worked, the site management agreed a price for the work they were going to do (discussed further below). The site foreman then told them which building plots they would be working on and what needed doing. (Two plots were usually allocated so that the Claimants could work continuously between the two plots as the build progressed.) The gang was issued with the drawings and then largely left to get on with it, although if they had any queries about what needed doing they could raise them with the site manager. Mr Conway and Mr Fowler were skilled workers who knew their trade and Mr Agyemang knew what was required of him to support them in their work. They organised their own work within the gang. The Company kept a broad check on the quality of their work as it progressed and they were expected to comply with building regulations in the way they did it. Nobody closely supervised their work on a day-to-day basis, although site managers would monitor whether they were complying with health and safety rules such as keeping the scaffolding tidy and wearing hard hats.

16. Once the work on one site was completed, the Company asked Mr Fowler and Mr Conway whether they wanted to work on another site. Whether they did so or not was up to them. They wanted the work and so agreed to move. If they had not agreed, the Company would have found another bricklayers' gang willing to do the work. Those whom the Company viewed as its employees were told to move site once the work was completed or if they were needed on another site; they were not entitled to refuse to move.

17. As explained further below, if the Claimants had not completed their work to a satisfactory standard and had failed to do the necessary remedial work, the Company could have withheld a "make good" retention bonus. It could not, however, require them to make good the work.

18. In their witness statements, the Claimants all said that on one occasion when they refused to do a certain job they were told that they had to do it or

leave the Company because they were there to follow the programmed works. It became apparent during cross-examination that this incident had in fact involved Mr Fowler and Mr Conway only, not Mr Agyemang. Mr Fowler said in evidence that he had been told that Mr Loben had said he needed the gang to revisit a job at Adel working on the Company's Managing Director's house. This was a small additional item of work for which the Company was not going to pay. Mr Fowler was told that he had to do it or the Company would not give the gang any more work. He relayed this to Mr Conway who then went and did the work. The Tribunal views this evidence with some caution: these details of the incident were not in the Claimants' witness statements and were not put to the Respondent's witnesses. In any event, the Tribunal finds that this was a one-off event and not indicative that the Company had a general right to instruct Mr Fowler and Mr Conway as to what they should do, where and when.

19. Mr Agyemang worked co-operatively with the gang he was part of, initially with another bricklayer and then with Mr Conway and Mr Fowler, to get the job done. If anyone else was in control of the work he did other than himself, it appears to have been the bricklayer or bricklayers in his gang, in that his role was to support him or them in their work and they told him what they needed. There was no evidence that the Company was in control of his day-to-day work when he was working with the gang.

20. The evidence that Mr Agyemang gave in response to the Tribunal's questions was that on occasions when Mr Fowler and Mr Conway did not need him to labour for them the site management gave him small items of work to do which he referred to as "patching". This happened once or twice a month. Mr Loben's evidence about this was that the Company had never to his knowledge given Mr Agyemang as an individual direct instruction to take on extra work and that any extra small items of this work could only have been allocated with the agreement of the bricklayers in the gang. Mr Agyemang did not explain how he was paid for this extra work if it was indeed entirely separate from what he did with the gang, since it would not have been included in the claim form for the gang if it was not part of the gang's work. The Tribunal concludes that the Company gave Mr Agyemang any small extra items of work as part of the work it was allocating to the gang.

21. In the weeks just before the Claimants' working relationship with the Company ended, Mr Conway sent Mr Loben the following text messages:

> *Hi mate*
> *We been told to stay at home for a few days because we are waiting on steel and trad etc, is there anything else we can do? I go on holiday 14th of December could do with working mate,*

> *Morning mate. We having a change at work mate iv decided I want to work 1+1 without dale basically. Hope that's ok with you and I want to phone you later this afternoon if that's ok to discuss..we've basically worked up at Kingsley farm..*
> *Ps I'm not leaving Stonebridge.*

22. The Claimants argued that these text messages indicated that the Company was in control of the work they were doing. The Tribunal considers that the first message is more consistent with the Claimants having been told that there was no point in their coming onto the site because no bricklaying work was currently available. In the second message informing Mr Loden that Mr Fowler had decided to work "1+1", Mr Fowler was indicating that he would be working as a bricklayer with a labourer in support, rather than with Mr Conway and a labourer. It was a decision he had already made, although he wanted to discuss it with Mr Loben. This appears to have been as a matter of courtesy rather than because Mr Fowler viewed the change in the working arrangement in the gang as requiring the Company's agreement.

23. This is consistent with the Company's evidence, which the Tribunal accepted, that the Company has no control over the makeup of a bricklayers' gang. If one member decides to leave or someone else joins, that is a matter for the gang. The Company's agreement is with the gang, and is simply that the gang will carry out the allocated work for the agreed price.

Equipment and insurance

24. Mr Fowler and Mr Conway used their own hand tools, including trowels, levels, lines and profiles. Otherwise, all the plant, equipment and materials they used in their work were provided by the Company.

25. The Tribunal accepts that the Claimants also used the Company's hi-vis jackets which bore its logo but the Tribunal equally accepts Mr Gray's evidence that although the Company supplied these jackets to sub-contractors who had lost or forgotten their own, there was no Company policy to hand them out as standard equipment to all bricklayers' gangs.

Health and safety

26. The Claimants were all required to undergo a site induction before they were allowed to start work on a site. At this, the Company explained the rules they were required to follow. This covered mainly health and safety matters but also site opening times and the planning restrictions on the operating hours of the site. This took around 20 minutes. They also had to sign a method

statement, which the Tribunal understood to be a statement in which they acknowledged what the Company required by way of a safe system of working on the site.

27. The Company operates a system where any worker on site, whether or not a Company employee, who is found by site management not to be working to the method statement can be given a yellow card, akin to a written warning, or, if the breach involves a risk of imminent danger to the worker or others in the area, a red card requiring them to leave the site.

28. The Company held public liability insurance covering the Claimants' work.

Working hours

29. The Claimants' evidence in their witness statements was that the Company required them to work between 8am and 4pm. The Tribunal accepts that the Claimants may usually have been working between these times, but it does not accept that this was due to the Company requiring them to be there between those hours. The Company was expecting the gang to get through the work it had agreed to do, but it was not concerned with the times at which the work was done.

30. The Tribunal accepts that the Claimants were given timescales for the completion of their work that they were expected to meet. This was not, however, a precise timescale but a broad schedule for completing each stage of their work, to fit in with the other stages of construction. The Company kept in touch with Mr Fowler and Mr Conway about the progress of their work. This was in the Company's interests so that it would know when to order scaffolding, safety decking and joiners, and it was in the Claimants' interests because if they had to wait for scaffolding and safety decking to be installed or joiners to do their work, they would not be able to get on with their own work. The quicker they completed the work, the quicker they got paid.

31. The leeway that the Claimants had in the hours they worked is reflected in the relaxed tone of various texts that Mr Fowler sent to Mr Gray. On 20 November 2018 Mr Gray asked: "what were both your hours last week." Mr Conway replied: "we were both there Monday-Friday we left at 2.30 Friday". (This was during the one period during their time with the Company when Mr Fowler and Mr Conway were being paid on a daily rate, so their right to payment depended on the hours they had worked.) If the site manager did not know what hours the Claimants had worked the previous week, that indicates that the Company was not controlling the Claimants' hours of work.

32. Mr Fowler sent Mr Gray these further text messages on various occasions:

Ay up Jason I won't be in until break time buddy..feeling rough with the old [emoji of a tankard of beer]"

Jason I've slept in I'll be in as soon as I can [emoji]

running late bud

I'm not going to be in until 9.30am pal

I'm running rather late this morning mate

Running late mate stuck in traffic PS dales not coming
Running late bud

33. These messages appear to be Mr Fowler letting Mr Gray know as a matter of courtesy that he won't be in until later. On occasions, no reason is given to explain or justify his late arrival. The fact that Mr Conway (Dale) would not be coming in on a particular day was a statement, with no indication that Mr Fowler or Mr Conway thought the Company's permission was needed for that. These texts indicate that Mr Conway and Mr Fowler felt entitled to turn up late or not turn up at all, provided they let the site manager know. Mr Gray confirmed in his evidence that he had no issue with the Claimants turning up late because they were self-employed and that freedom and flexibility was part and parcel of their self-employed status.

34. Although the Claimants' witness statements stated that they were obliged to work until 4pm, Mr Fowler accepted in cross-examination that the gang might on occasion decide between themselves to knock off early. Mr Conway said that he routinely left at 2.30pm on a Friday because he had to pick his son up from school in Barnsley.

35. Mr Agyemang would customarily arrive on site before Mr Fowler and Mr Conway to start preparing a supply of raw materials, so that the bricklayers could start work as soon as they arrived. No one started work on site before 7.30am because that was when the site opened. If Mr Fowler and Mr Conway decided that the gang would finish work early, then Mr Agyemang did too.

36. Although the Claimants may in practice have worked around 39 or 40 hours each week, the Tribunal is satisfied that was not because they were required to do so by the Company. The Company's only concern was that the work was done.

Holidays

37. None of the Claimants asked the Company's permission before taking time off work to go on holiday. They did, as a matter of courtesy in Mr Fowler's words, inform the site manager two to four weeks in advance of their intention to be away.

38. Mr Fowler said that the Company dictated that he had two weeks' minimum time off during the Christmas holidays, on dates it instructed. The Tribunal considers that a more accurate account is that the Company's site closed over the Christmas and New Year period. No one, whatever their employment status, was working on the site at that time. The Tribunal rejects as not credible Mr Fowler's evidence that he did not know whether all trades were affected by the site closure at Christmas.

Substitution

39. The Claimants said that they were not entitled to sub-contract their work to anyone else or substitute anyone else to do their work. The Tribunal accepts that in practice Mr Fowler and Mr Conway did not arrange for anyone else to do the work they had agreed to undertake for the Company. The Tribunal also accepts, however, that neither the Claimants nor the Company would have considered that the Company had the right to object if the composition of the gang had changed. The Company would have accepted that someone else could take the place of any of the Claimants, provided the new gang member had gone through the site induction and signed the method statement and the Company was satisfied in general terms that the individual was competent to do the job. If someone were to leave the gang, the Company would not have the right to choose a replacement member, it was up to the gang to sort that out.

40. This is consistent with Mr Agyemang's evidence that he went to the site management to check if there was any more work when the first bricklayer he worked with left. In that conversation, the site manager appears to have acknowledged that Mr Agyemang needed to discuss with Mr Fowler and Mr Conway whether he could work with them: the Company had no right to impose him on them if they were not willing.

Payment

41. There are three stages in the construction of a house for the purpose of bricklaying: ground floor to first joists, first floor to roof and "top out". The rate at which the Company pays for the work is negotiated at each stage with the bricklaying gangs who are to do the work. If a gang is not happy with the rate

on offer, the Company asks for the input of its quantity surveyor (QS) on what the current market rate for bricklaying is. The overall price for the work at each stage is agreed and the rate at which that payment is made is usually determined by the meterage of bricks laid in any particular week, at a certain sum per meter upon which the overall price was based. On some occasions, which are relatively rare and happened on only one occasion during the Claimants' time working for the Company, the agreement is for work to be paid at a day rate.

42. Mr Gray dealt with this negotiation for the Claimants' gang. The Tribunal accepts his evidence that the Company was not in a position entirely to dictate the terms on which they worked for the Company: Mr Fowler and Mr Conway, like any bricklayers, had some negotiating power to secure an increase the rate on offer if they knew another company was offering higher rates. This is evidenced by the Company's agreement to raise the gang's rate of payment on one occasion, mentioned below.

43. The Tribunal heard no evidence that the Company discussed with anyone in the gang what Mr Agyemang would be paid. From the evidence Mr Agyemang and Mr Conway gave, it appears that the Claimants' all impliedly accepted that there was a "going rate" for a bricklayers' labourer and the gang discussed it between them and agreed that Mr Agyemang would get that rate, which was £120 a day. That would come out of the weekly sum the Company paid the gang for the meterage of bricks Mr Fowler and Mr Conway had laid.

44. The Company operates two retentions in payments it makes to bricklayers' gangs: a "make good" retention and a "health and safety" retention. The health and safety retention is paid provided the workers have carried out their work safely. The "make good" retention is paid once the Company has checked whether there are any errors in the brickwork that need putting right. If the gang do the remedial work, they are paid the bonus. If they do not, the retention is not paid and the Company uses the money to pay another gang to do the making good.

45. Mr Fowler took the lead in dealings with the Company on behalf of the gang. Mr Fowler was more able than Mr Conway to deal with administrative matters and use technology such as mobile 'phones. At the end of a week, Mr Fowler would meet Mr Gray and go through how many bricks the gang had laid that week (or what hours they had worked if the job was on a day rate) and work out the amount that the gang was owed for that week. Mr Fowler would then tell Mr Gray what the Company should pay to each member of the gang. That figure was then knocked off the overall agreed price for the job.

46. The Tribunal accepts the Company's evidence, which was unchallenged, that the gang agreed between themselves what they would be paid: the Company had no control over the allocation. This was supported by Mr Fowler's evidence that various texts he sent to the Company amounted to his instructions as to who in the gang should be paid what. In particular, it was up to the gang to decide what Mr Agyemang would be paid. Bricklayers' gangs differ in how much they decide their labourers should be paid. Some gangs work without labourers at all so that they can divide the money they earn between the bricklayers only.

47. Based on the work done and the allocation of the payment for that work that Mr Fowler had given, Mr Gray then completed a document headed "Labour only: payment claim". This recorded the site, the names of the individuals involved, a description of the work completed, the "amount claimed" and the total work value and the "gross to pay" for each individual. The Company then paid the gang members individually on the basis of the document.

48. On payment claims that the Tribunal saw, Mr Conway and Mr Fowler were paid the same amount. The Tribunal saw no forms from the period when Mr Agyemang was working in the gang, but from the oral evidence the Tribunal heard it seems more likely than not that in a typical week Mr Fowler asked for the amount the Company owed the gang for the work done to be split so that Mr Agyemang would receive the daily rate they had agreed of £120 for the work he had done and Mr Conway and Mr Fowler would be paid the balance equally between them.

49. Figures produced by the Company's Finance Director showed that there was a considerable fluctuation in the Claimant's earnings over time. Mr Conway's and Mr Fowler's monthly earnings fluctuated between around £1,800 and £5,000. Mr Agyemang's earnings fluctuated between around £400 and £2,450.

50. The Claimants said in their witness statements that they were issued with monthly pay slips, but the documents they were given were in fact headed "Construction Industry Scheme Payment and deduction statement". All three Claimants had deductions made from their payments under the Construction Industry Scheme. This is an Inland Revenue scheme whereby employers in the construction industry deduct a fixed sum of 20% from the payments they make to those working for them on account of the workers' income tax and National Insurance liabilities. The workers then account for any further tax they owe on completion of their self-assessment tax return.

51. All three Claimants completed self-assessment tax returns while working for the Company in which they identified themselves as self-employed and working on their own account. Taking 2018/19 (the last relevant complete

tax year) as an example, Mr Fowler declared £47,148 in business income and £13,673 in business expenses covering small hand tools, mileage for his travel to work by car and accountancy fees, leaving £33,475 to be taxed as net profit. Mr Conway declared £47, 648 in business income and £11,622 in mainly travel expenses, leaving £36,026 to be taxed as net profit. The Revenue's tax calculation for Mr Agyemang in that year showed that he had £17,544 profit from self-employment.

52. All the Claimants said in their witness statements that the Company gave them pay rises on two occasions. The Tribunal accepts the Company's evidence that on one of these occasions it gave Mr Fowler and Mr Conway an increase because they were saying that they might leave for another job if the Company would not increase their rate of pay. The text Mr Conway sent to Mr Loben at the time read as follows:

> "*Hi stew really need a chat. We've been contacted by Cara this week about us going back there, the QS who's my mate has basically offered us a 6 months job this side of York £550/tho on the bricks and £14 on the blocks with a £180 a day fall back rate guaranteed all the work preloaded with labourers. They ask us to go back all the time but this time it's difficult to say no. Dale is keen on going for the money and preloaded work, iv to let him know in the morning what either way."*

Sick pay and other benefits

53. Mr Conway stated in his witness statement that the Company had paid him sick pay for 10 weeks. The Tribunal accepts that the Company did indeed pay Mr Conway £1,000 per week for 10 weeks, The Tribunal accepts the Company's evidence that it had decided to make these payments to Mr Conway not because it considered him to be an employee who was owed sick pay but rather because he had been unable to work for that period due to an injury he had sustained at work. By paying him a sum to replace his lost income, the Company avoided the possibility of having to make a claim under its insurance for any liability it might have towards Mr Conway for that accident. It could not, therefore, properly be viewed as sick pay. In cross-examination, Mr Conway readily agreed that he would not have expected the Company to pay him sick pay if he had been unable to work because of illness.

54. The Company treated the Claimants differently from those it accepted as its employees. Unlike the Company's acknowledged employees, the Claimants did not receive sick pay or holiday pay. They were not provided with tea and coffee on site or given training.

Length of employment

55. The Tribunal accepts that the Claimants worked continuously for the Company and no other employer for more than three years.

Analysis

56. From its findings of fact, the Tribunal concludes from that the rights and obligations of the Claimants and the Company can effectively be summarised as follows. If the gang of which the Claimants were members did the work it had been contracted to do, the Company would pay the gang for that work at the agreed rate, divided between the gang members as directed by a representative of the gang (in practice, Mr Fowler). The Company had no obligation towards them as individuals: the membership of the gang might change, leading to a change in the persons to whom the representative directed payments to be made. The membership of the gang and who was to be paid what for the work it did was a matter for the gang to decide. As the Tribunal concludes that none of the Claimants had an individual agreement with the Company, whether express or implied, to carry out work personally for the Company, none of them was either an employee or a worker.

57. If the Tribunal is wrong about that, and the Claimants did have individual contracts with the Company to carry out work personally, the Tribunal does not accept that those were employment contracts or workers contracts, for the following reasons.

58. Neither Mr Fowler nor Mr Conway were under the Company's control to any significant degree in terms of how and when they worked. The Company monitored the overall quality of the work they were doing but if there were any remedial works to be done, they had no obligation to do them, although they would then lose their "make good" retention. Although they worked a full working week to get the job done, the Company did not require them to be at work at any particular times and any limitations on their working hours coming from the Company were simply due to when the site on which they were working was operating. If they wanted to get paid quicker, they were free to work longer hours and complete more meterage. Mr Agyemang's work was also not under the Company's direct control: due to the division of labour in the gang, if anyone other than Mr Agyemang was controlling his work it was Mr Fowler and Mr Conway.

59. The Claimants' work was of practical necessity integrated with the other work being done on the site, by workers of whatever employment status. There was nevertheless a distinction between the way they worked and the Company's employees, who were under the direct supervisory control of the

site's management and could be required to move sites as needed. The Claimants did not need to get prior approval to take time off but just informed the site management of when they would be away. Unlike the Company's employees, none of the Claimants was paid sick pay or holiday pay or given training or other benefits. They were not subject to the Company's general disciplinary procedure.

60. The Tribunal accepts that the Claimants were subject to various Company requirements in relation to health and safety, including the site induction, health and safety retention and the yellow and red card schemes. It is common knowledge that construction is a hazardous industry. A construction site has many inter-related activities going on at any one time involving many individuals doing different work, some involving hazardous conditions such as working at height or the operation of plant and equipment that could cause serious injury if not done or operated safely. The Company must manage its sites to meet complex legal requirements intended to ensure that safe systems of work are followed. It has a duty to take reasonable care to ensure the safety of everyone who may be affected by the way in which its sites are operated. As a result, the Company needs to ensure that anyone working on the site, whatever their employment status, even those working for third parties, follows its rules for a safe system of operation. The Tribunal does not, therefore, accept that the fact that the Claimants had to comply with the Company's health and safety requirements was evidence of any particular employment status.

61. Neither does the Tribunal accept that the fact that the Company increased the rates of pay of the gang on two occasions indicates that they were employees. Any worker, regardless of their employment status, can negotiate a pay increase with the person they are working for. The text that Mr Fowler sent Mr Gray mentioned in paragraph 52 above was consistent with Mr Conway and Mr Fowler being self-employed and skilled tradespeople in business on their own account who were able to negotiate an increase in the gang's rate of pay by pointing out that a higher rate was on offer elsewhere.

62. The Tribunal does not consider that the length of time for which the Claimants worked continuously and exclusively for the Company is necessarily indicative that they were the Company's employees. This was equally consistent with the Claimants being self-employed individuals who had found a company where the rate of pay and other conditions of work suited them and they saw no reason to look for work elsewhere.

63. The fact that the Company had public liability insurance covering the Claimants' work is unsurprising, given the size and complexity of the operation of a construction site, the variety of people working on it and the

need for the Company to ensure that it is insured for any aspect of its operation. This does not indicate that the Claimants had any particular employment status.

64. Mr Fowler and Mr Conway were also not "workers" within the definition because, even if the Tribunal had found that the Company had an individual contract with each of them, the status of the Company under those contracts would have been a customer of their businesses as bricklayers. The fact that they had worked for the Company as their sole customer for several years did not affect the nature of that relationship. They were, effectively, long-standing and trusted contractors that the Company was happy to continue using on that basis. In doing their work, they were working under their own initiative, not subject to any degree of direction or subordination by the Company once the gang had been allocated its plots. The Company assigned them the work it wanted them to do, but so does any customer employing an individual business to carry out a service. The Company agreed the rate of pay for the work with them, but that was not entirely dictated by the Company: they had power to affect that rate by reference to rates being paid by other companies on other sites. Other than that, the only way in which the Company controlled their work was by requiring them to comply with a safe system of work, which anybody on the site would be required to do, and checking on the quality of their work, which again any customer would be entitled to do when employing an individual business to carry out a service.

65. An individual's status for income tax purposes does not determine their employment status for the purposes of their employment rights. The Tribunal nevertheless considers it a relevant factor in determining whether Mr Fowler and Mr Conroy were in business on their own account when working for the Company that they were content to declare themselves as self-employed during that time and claim the allowances that self-employed status allowed them to claim.

66. Mr Agyemang's situation was different to that of Mr Conway and Mr Fowler. There was no evidence that Mr Agyemang had any part in agreeing the terms on which the work the gangs were doing when he joined them was to be done or that there was any agreement between himself and the Company on what he would be paid. The rate at which he would be paid was agreed between himself and Mr Fowler and Mr Conway (or between himself and the previous bricklayer), not with the Company. The Company paid him, but on the basis of the rate that the gang had agreed and Mr Fowler had told the Company to pay him.

67. Mr Agyemang's ability to earn at all was dependent on Mr Fowler and Mr Conway working. If he had turned up for work on site ready and willing to

work but Mr Fowler and Mr Conway had not turned up on that day for some reason, there was no evidence before the Tribunal to establish that the Company would have been obliged to provide him with any work at all or to pay him. Where the Company made available extra small items of work that Mr Agyemang did, the Tribunal has found that the Company had allocated this work to the gang and Mr Agyemang was paid for it as part of what was claimed by the gang.

68. The Tribunal accepts that, because the work he did was at a lower skill level than that of Mr Fowler and Mr Conway and could not command such a high rate of pay, Mr Agyemang was substantially more economically dependent than Mr Fowler or Mr Conway on the Company continuing to give work to the gangs he worked in. For that reason, it could be argued that the legislative intent was that he should at least have the protections given to those with "worker" status. The Tribunal cannot ignore, however, its finding that there was no evidence Mr Agyemang had a direct and individual agreement with the Company, whether express or implied, to perform any work. The Company had facilitated his placement in the gang, but he was not under the Company's subordination or control while working with the gang and the Company had not agreed to pay him for his work. His right to be paid at all was dependent on (a) Mr Fowler and Mr Conway doing their work and (b) the terms of the agreement between the gang members as to how the proceeds of their work should be split with him.

Conclusion

69. The Tribunal has not been asked to consider whether Mr Agyemang has any legal rights against Mr Fowler and Mr Conway. Nor has the Tribunal been asked to decide whether Mr Fowler and Mr Conway, or all three Claimants, should properly be viewed as a business partnership contracting with the Company as such. The Tribunal has been asked to decide only what the Claimants' employment status is in relation to the Company.

70. As the Tribunal has concluded that the Claimants were not working under employment contracts or workers contracts with the Company, all their claims must fail and be dismissed.

Employment Judge Cox
Date: 22 October 2020