EMPLOYMENT TRIBUNALS

Claimant: Mr J Clements

Respondent: MAJ Joinery Limited

HELD AT: Liverpool **ON:** 21 January & 26 January 2021 (in chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr P Grundy, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was not working under a contract of employment and therefore he was not an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996, it does not have the jurisdiction to consider his claim for a statutory redundancy pay, which is dismissed.

REASONS

1. The "Code V" in the page header indicates that this was wholly or partly a remote hearing by video conference call, to which the parties have consented. A face to face hearing was not held because both parties are either professionally represented or able to deal with case management issues wholly or partly remotely.

2. This is a preliminary hearing to decide the employment status of the claimant.

3. In a notice claim received on 19 June 2020 the claimant claims a statutory redundancy payment maintaining he was employed as a joiner from 10 September 2015 to 27 May 2020 ("the relevant period") when he was made allegedly made redundant as a result of the COVID19 pandemic. In the ET1 the claimant sets out why he considered himself to be an employee which is essentially lack of control

which lay with the respondent, uniform provided, fixtures and fittings provided by the respondent and that he had worked permanently for four and half years with periods of “layoffs”.

4. The respondent denies the claimant was an employee, asserting he was self-employed, had a business, and there were periods when the claimant since 11 September 2015 was unavailable for work totalling 46 weeks, which the respondent assumed covered a period when the claimant was working on other jobs including DNA Construction from 13 December 2019 to 10 January 2020. The respondent denied it had control over the claimant and disputed the money earned by the claimant did not vary as alleged by the claimant who pleaded he worked a 40 hours a week.

5. I have been taken to pages in main and supplementary bundles consisting of 80-pages and 77-pages, in addition to Mark Johnson’s witness statement. The claimant has not produced a witness statement, for which he cannot be criticised as there was no case management order to this effect.

6. I heard oral evidence in chief from the claimant under oath, and oral evidence under cross-examination from Mark Johnson director and owner of the respondent. There were conflicts in the evidence between the parties and on balance, I preferred that given by Mark Johnson supported by contemporaneous documents when it came to conflicting evidence, as set out and resolved in the finding of facts below. Many facts in this case are not disputed.

7. I have considered the documentary evidence to which I was taken, the witness evidence and oral submissions, which I do not intend to reproduce but have attempted to incorporate in my finding of the facts as set out below. I have included and dealt with the bullet points raised by the claimant in the Grounds of Complaint which he asserts was evidence of his employment status.

Facts

8. The respondent is a company that carries out joinery work for home building companies. It employs a number of employees, including joiners, who are subject to the express and implied contractual terms found in a contract of employment including a 4-week limit on the holiday entitlement which must split into two weeks to be taken at times convenient to the respondent. The employees, including some joiners, are also subject to the disciplinary procedure, and paid a much lower rate of pay in comparison to the self-employed joiners. Approximately ten self-employed joiners work for the respondent, but I was only concerned with the claimant.

Self-employment agreement between the parties and holiday pay

9. The claimant approached Mark Johnson, the director, in September 2015 inquiring about work for his business, Southwood Building and Maintenance Contractors, who was VAT registered. The claimant admitted when he was giving evidence in chief that from the outset his intention was for him to be self-employed and this was the agreed with Mark Johnson. The claimant provided his UTR number and taxed was deducted at source at the self-employed rate throughout the relevant

period. The Tribunal accepts Mark Johnson's evidence that he had discussed with the claimant at the outset, the possibility of holiday pay being paid to all self-employed contractors as a "good will gesture" including the claimant, and from the outset the claimant made it clear that he wanted the higher rate of pay, had never been paid holiday pay and did not want to start being paid holiday pay. This did not change. The claimant was not entitled to holiday pay and he did not receive it.

10. In oral evidence the claimant stated he received holiday pay in the summer of 2017 for work not carried out. Apart from the claimant's oral evidence there were no supporting documents, and I have difficulties in finding the claimant's evidence credible given the contemporaneous evidence before me in which there was no reference to holiday pay ever received by the claimant. Further, the alleged payment of holiday pay according to the claimant took place on one occasion only despite the claimant's evidence that he took holidays as and when he chose to do so without reference to the respondent or consent throughout the period he worked for which no payment was received.

11. The claimant gave evidence in chief confirming he was not required to give the respondent notice or ask for any consent to take a holiday. He would see Mark Johnson on site and tell him he was taking a holiday. As the claimant was self-employed it was irrelevant to Mark Johnson why the claimant did not accept work, and he did not question him with the effect that he was unaware if the claimant worked for another company or was on holiday or doing anything else when he was not working for the respondent.

12. On the 14 September 2015 the claimant emailed Mark Johnson via southwoodbuild@gmail.com and attached his details, including the UTR number for HMRC purposes and personal bank account details.

<u>Negotiating prices for work "daily rate and price work set by the respondent."</u>

13. In oral evidence in chief the claimant confirmed that from the outset during the relevant period, he would be offered the work by Mark Johnson, accept the offer and carry out the work following which he would text Mark Johnson for details of the work carried out so that he could be paid. The claimant's evidence that he was not informed of any prices or the amount of payment was not credible. The claimant stated that once he texted Mark Johnson with details of the work carried out he "would be paid what Mark Johnson decided to pay me," in other words, the claimant had no control or say over the remuneration received for work carried out, and did not know how much he would be paid prior to carrying out the job. I preferred Mark Johnson's evidence to the effect that he negotiated the price with the individual building companies, and then prepared a price list for individual works which he provided to the claimant who could then decide whether he wanted to work for the amount offered or not.

14. It is undisputed the claimant negotiated at least on two occasions during the four and a half years he carried out work for the respondent. The claimant received a £100 increase on one job and his hourly rate was increased form £15 per hour to £19.50 per hour, when a number of other self-employed joiners remained on the lower rate. Mark Johnson's evidence was that the sum of £15 per hour was

incrementally increased through negotiations over time, the claimant's evidence was that there was one increase from £15 to £19.50, but he was unable to recall precisely when. Neither party were able to refer to contemporaneous documents, and on balance I accepted Mark Johnson's evidence that the agreement to increase the rate was an oral one, reached over a period of time following discussions with the claimant on site, and after the agreement was reached the claimant would insert the increased rate in the "Booking Forms" he sent to the respondent detailing the work carried out and the price agreed with the total owned for payment by the respondent. A number of the Booking Forms sent by the claimant were included within the trial bundle evidencing this process.

15. The claimant gave evidence that at Christmas 2017 Mark Johnson offered the claimant a 7.5 percent increase in the prices they had agreed, and daily rate went up to £156 per day to keep the prices up with other self-employed contractors not provide by the respondent, on the building sites who were receiving holiday pay. In direct contrast to the claimant's evidence, I found on the balance of probabilities the rates increased over a period following negotiations with Christmas 2017 being one of them.

<u>Leaving site and re-negotiating.</u>

16. In oral evidence the claimant stated that after he left the site at Blackburn on 17 July 2018 because he did not agree the price for a "second fix" finishing work someone else had started. He gave disputed evidence that Mark Johnson contacted him the next day and "this was the only time I negotiated price" when an increase of £100 was agreed. Mark Johnson disputes he contacted the claimant the next day, maintaining it was three-days later when he was told by the site manager and not the claimant that he had left site earlier that week. It is undisputed the claimant negotiated an increase of £100 whereupon he went back to the site and finished the job. At no stage was the claimant subject to or threatened with disciplinary action for (a) dropping tools and leaving site, and (b) not telling Mark Johnson that he had done so,

17. A number of matters arise out of the claimant's decision to leave site, and on the balance of probabilities I concluded:

17.1 The claimant had no issue leaving the site because he knew he was self-employed and could chose when to go on site or not.

17.2 For the same reason the claimant did not inform Mark Johnson.

17.3 The claimant was not subject to a disciplinary procedure, and had he been one of the respondent's employed joiners he could not have left site without authority and could not have kept the fact he had left site hidden from Mark Johnson in the same circumstances as the claimant had, without facing possible disciplinary proceedings.

17.4 The claimant as a self-employed worker was in a position to renegotiate when he was unhappy with the amount of monies on offer.

17.5 The claimant's evidence that this was the only occasion when he negotiated cannot be correct. It is not credible Mark Johnson increased the claimant's hourly rate from which a day rate could be calculated from £13 per hour to £19.50 per hour without any agreement or negotiation when other self-employed joiners remained on the rate of £13 throughout the relevant period.

Where and when to work.

18. The claimant alleges the respondent decided where he was to work and it is undisputed between the parties that where the claimant's work location depended on the site where the work was available. This is a neutral factor in my analysis.

19. The claimant also alleges when he worked was decided by the respondent, which on the balance of probabilities I found not to have been the case as the claimant was free to reject any offers of work and under no obligation to accept work when Mark Johnson made contact describing the job and asking him if he wanted to so it.

Mutuality of obligation

20. It was the practice of Mark Johnson to offer work to the claimant, and I accept on the balance of probabilities that he was under no obligation to do so. For example, in a text message sent to the claimant he was offered work for two and a half days with a description of the work. In another text Mark Johnson wrote "Hi John are U OK going to Millers Clitheroe and do a couple of final fixed on Monday/Tuesday…" to which the claimant responded "OK." The claimant was offered work by text, telephone or on site and he was aware of price of the work being offered, and could accept or reject the offer which he had no obligation to accept.

21. In oral submissions the claimant indicated if he did not accept the work offered Mark Johnson would not offer him any other work. The evidence before me did not support the claimant's position. It is uncontroversial the claimant did not work for lengthy periods of time totalling 46-weeks from 11 September 2015 to 5 April 2020. The claimant attributes this to time off he had from work following an operation and 3-week absence in 2015, a further operation and 8 weeks absence 2017-2018 and holidays. The claimant's evidence was that he received sick pay, but not through the respondent. It is undisputed the claimant worked for another joinery company, DNA Construction, over the Christmas period in 2019. This work came about when the company approached Mark Johnson and asked if he could recommend self-employed joiners and he recommended the claimant and colleague S. As a result, both worked for DNA construction. The respondent did not offer them work during this period, and it is clear from the documents, including the booking forms before me, contrary to the claim made in the ET1 that the claimant worked an average of 40-hours per week and received £580 that this was not the case, and under cross-examination the claimant conceded that the time he spent working for the respondent and the monies received in payment varied throughout. Even taking into account the claimant was a litigant in person, and had completed the ET1 form himself, I found he had exaggerated in order to bolster up his claim that he was an employee.

22. The "Booking Forms" to which I was taken to in the bundle set out the site the claimant and his work colleague "S" jointly worked on, detailing the individual jobs they carried out, for example, "Plot 93 10 castings £162" in the Booking Form week commencing 1/12/19. The Booking Forms were produced by the claimant and sent to Mark Johnson for payment. It is notable the work set out was not attributed to either the claimant or colleague S but totalled at the end with the cost of £1693 divided, £846 for the claimant and the same amount for colleague S. The undisputed evidence is the claimant and colleague S were friends for some 36 years, experienced joiners with colleague S being prepared to work on roofs which the claimant was not and he refused to do so. The claimant started working for the respondent before colleague S, and when colleague S started they worked together on different sites. Mark Johnson gave undisputed oral evidence that he would offer work to say the claimant on occasions and only colleague S would turn up to do it, and vice versa. There was no independent documentary evidence to substantiate this and Mark Johnson was unable to give specific examples. The Booking Forms reflect the claimant and colleague S frequently worked together and there were occasions when the claimant worked without colleague S, for example on the week commencing 15 March 2020 when the claimant confirmed colleague S had not worked. It is also notable that when the claimant and colleague S worked together all of the Booking Forms sent by the claimant to the respondent show a fifty-fifty split between him and colleague S.

23. I concluded from the evidence the claimant claimed money for colleague S in addition to himself for work they jointly carried out, the amount of time spent by them working for the respondent varied which points to lack of mutuality of obligation as either Mark Johnson did not offer the claimant work or the claimant did not accept the work offered or the work may have been carried out by colleague S.

24. Contrary to the claimant's evidence, I found he did not work 40 hours a week on a regular basis. It was a matter for him when he turned up for work and when he left. It is undisputed the claimant was an "early bird" and trusted by the site manager to work early in the mornings, and he could choose when to leave site. Mark Johnson did not control the hours worked by the claimant and had no interest in them as the work rates had been agreed and all that was required was for the claimant to undertake work he had agreed to do. It was entirely up to the claimant how he did it. The claimant's oral evidence that he could only work when the site was open does not denote employee status. He did not work Monday to Friday as alleged, and he confirmed whilst there were no set hours he worked 8 hours a day "nobody told me, I've just done it for 45-years."

Substitution

25. In oral evidence in answer to a question put by me on the issue of substitution, Mark Johnson stated that substitution had never been discussed with the claimant as there was no need given the claimant and colleague S either both or one would turn in to work. Mark Johnson's evidence was that he sent to either the claimant or colleague S the sheet of work and they would agree to do it or not, with one or both turning up on the relevant day. Mark Johnson did not mind who turned up if the work was carried out.

26. The claimant in closing submissions dealt with Mark Johnson's evidence on this point, arguing that it was impossible for substitution to take place as trades people were required to undertake health and safety inductions and site managers would not accept people coming into the site without them, and would not agree to carry out health and safety inductions whenever they were needed. This point was not put to Mark Johnson in cross-examination.

27. I concluded that the right to substitution was never discussed and no express agreement was reached. In practice the claimant, if he did not want to carry out a job offered to him and accepted by him, could ask colleague S to undertake the work and there would be no issue over this with the respondent.

28. Turning to the difficulties of the site manager undertaking health and safety inductions this was not down to the respondent, and the claimant cannot say whether a site manager would refuse to induct anybody he put in place to work on his own behalf because the claimant never asked or attempted to do so. On balance I am satisfied that the claimant, had he wished to substitute a qualified joiner, there would have been no issue with Mark Johnson whose concern was to get the job done. In short, the claimant was not required to provide personal service although he chose to do so, and at the very least colleague S could have worked on any jobs the claimant agreed to undertake and vice-versa with the exception of roofing as colleague S was experienced and the claimant did not want or like roofing jobs. In short, I found in practice the claimant had the right of substitution on the balance of probabilities.

<u>Subject to supervision by the respondent</u>

29. The claimant's evidence was unsatisfactory on this point. He maintained Mark Johnson and the site manager checked his work to make sure it was satisfactory. Reference was made to an email sent by Mark Johnson to the claimant on the 5 June 2020 confirming a payment date "which gives us more time to check on the work completed." The claimant has not disclosed this email and it is not in the trial bundle, nevertheless, Mark Johnson in oral evidence when cross-examined by the claimant accepted the email had been sent and clarified it was to make sure the work had been done before payment, and it had nothing to do with supervision. The claimant in his oral evidence had confirmed when answering a question, I asked that the 5 June 2020 email was the full extent extend of the supervision he was subjected to.

30. On the evidence before me I am satisfied the claimant was not supervised by the respondent. His work was checked by a site manager employed by the building company and any issues and mistakes were resolved by the claimant in his own time and at his own expense. The claimant confirmed he had corrected his work "intermittently." He also maintained that if on day work rate he would do more hours that day to put the work right. As the claimant was paid a day work rate, whatever hours he worked, the number of hours the claimant worked on site was irrelevant to the respondent and Mark Johnson's evidence that he did not know when the claimant corrected his own work was credible; the claimant was a self-employed

joiner and as the respondent never paid for the corrections either in cash of time allocated it was of no interest to him.

Uniform supplied by the respondent.

31. In cross-examination the claimant conceded the Hi Viz vest provided by the respondent with its name on the back when working on a building site was not a uniform. This is a neutral factor.

Materials and fittings supplied by the respondent

32. The claimant agreed that he provided all of his own tools, which was usual for tradesmen. However, he could set off the cost of tools against tax as business expenditure which he would have been unable to do had he been employed by the respondent.

33. The claimant's issue was not that materials were provided by the building contractor and the nails, screws and glue by the respondent, but he had not made a profit on them which he believes he would have done if self-employed.

34. The claimant accepted materials were not supplied by the respondent, contradicting his claim in the ET1. Both parties agreed that nails, screws and glue was provided by the respondent and that was the limit of the fittings.

"Permanently with the respondent for 4.5 years and was paid on a weekly basis all of this time."

35. In his evidence in chief the claimant explained how he had worked for no other business except for DNA Construction and had worked only for the respondent, and taking into account the two sickness absences stated out of the 46 weeks he did not work for the respondent (during which period the claimant was not paid sick pay by the respondent) 35 weeks was left on holiday which as far as the claimant was concerned was "quite standard." Had the claimant been employed by the respondent he would not have been entitled to the equivalent of over 8 weeks holiday per annum even if bank holidays were taken into account.

36. The respondent does not dispute the claimant was paid weekly, as were "all the lads." The claimant was paid depending on whether the had worked and sent to Mark Johnson a list of all work he and colleague S had carried out with the amounts to be paid as listed in the booking forms. In oral submissions the claimant argued the fact he was paid weekly "proved" he was an employee ignoring the fact that there were a number of weeks totalling at 46 when he did not work and was not paid. It cannot therefore be said the claimant was paid weekly throughout the four-and-a-half-year period contrary to his pleaded case that he was "paid on a weekly basis all of the time."

Tax, national insurance and the claimant's application under the COVID 19 Self Employed Employment Income Support Scheme.

37. The claimant had an agreement with HMRC that he would be taxed and pay national insurance contributions as a self-employed person, and he provided the respondent with his UTR number. The respondent did not pay national insurance contributions in respect of the claimant, who was responsible for making his own payments.

38. Prior to issuing these proceedings the claimant claimed and received money under the COVID19 Self Employed Employment Income Support Scheme. In oral evidence he confirmed he made a declaration to the effect he was self-employed and eligible for the payment was made, and £5748 was received from the HMRC. I warned the claimant when answering questions about this payment against self-incrimination, explaining he had the right not to answer questions or give evidence about any matter that could result in criminal prosecution.

39. Mr Grundy in oral submissions made it clear the respondent's case was that when the claimant completed the application and made a declaration that he was self-employed he believed this to be the case and was entitled to receive the grant. In an email sent by the claimant on the 24 December 2020 replies to questions asked by the respondent's legal representative are set out, including confirming of the position concerning the COVID19 Self Employed Employment Income Support Scheme which clearly indicated that the claimant by December 2020 at the latest believed his self-employed was "bogus" and as the respondent had failed to pay his national insurance contributions he had no choice but to make the claim under the scheme.

40. HMRC has developed an online 'Check Employment Status for Tax' tool, which gives the user HMRC's view on whether a worker should pay tax through the PAYE system, and whether the off-payroll rules in the private and public sector apply to a particular working engagement. While the scope of this online tool is currently limited to tax, the claimant was cross-examined on the answers given by Mark Johnson. Under cross-examination on this point the claimant stated that if the "Inland Revenue want to say I'm self-employed then I'm self-employed." The claimant was not found to be a credible witness and Mr Grundy's submission that the claimant "wanted to have his cake and eat it" had some force.

Law

41. The statutory redundancy pay scheme, which is set out in Part XI of the ERA applies only to employees — i.e. those working under a contract of employment— Ss.135 and 230:

(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 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 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 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.

42. Mr Grundy submitted the Tribunal's starting point was the passage from the judgment of Mr Justice MacKenna in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*. He stated: '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.' The Tribunal was also referred to other passages, which it has taken into account.

43. The continuing relevance of this passage was confirmed by the Supreme Court in *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*, where Lord Clarke called it the 'the classic description of a contract of employment'. The *Ready Mixed Concrete* formulation of the multiple test can be boiled down to three questions which I have dealt with in the conclusion:

(1) did the worker agree to provide his or her own work and skill in return for remuneration?

(2) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

(2) were the other provisions of the contract consistent with its being a contract of service?

44. Mr Grundy also referred the Tribunal to *Carmichael and anor v National Power plc 1999 ICR 1226, HL*, in which it was held that a lack of obligations on one party to provide work and the other to accept work would result in 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service' and *Montgomery v Johnson Underwood Ltd 2001 ICR 819, CA*, in which Lord Justice Buckley considered that Mackenna J's formulation in the *Ready Mixed Concrete* case contains 'the irreducible minimum by way of legal requirement for a contract of employment to exist' and this also requires a sufficient degree of control.

Conclusion

45. I have evaluated and balanced against each other the factual circumstances of the working relationship between the claimant and respondent ranging from the lengthy period of four and a half years through to the self-employed grant, not giving one factor precedent over any other concluding right from the very outset of the relationship both parties intended it to be a self-employed contract and in the years that followed this did not change. There exists an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist, which are control, personal performance, and mutuality of obligation. The claimant has failed to establish an irreducible minimum and in arriving at this conclusion I have taken into account the factual matrix covering the entire period as set out above, when the claimant carried out work as a self-employed joiner on and off over a period of some four and a half years.

46. Mark Johnson carried out a HMRC developed 'Check Employment Status for Tax' tool, after the claimant had issued these proceedings which gives the HMRC's view on whether a worker should pay tax through the PAYE system. The online tool is currently limited to tax, and it is notable when taken through the checklist under cross-examination the claimant answered in the affirmative for most of the questions with the exception of substitution. I am not bound by the result provided to Mark Johnson that the claimant was self-employed, but the fact the claimant did not dispute the answers given was an indication that he was self-employed, and the factual matrix as found above reinforces this. There was no written contract or any document that could be interpreted to be written terms agreed at the outset of the working relationship, and the way the work was carried out is pivotal without one fact outweighing the other including the position concerning tax and national insurance and the claimant's claim under the COVID19 Self Employed Employment Income Support Scheme.

47. Considering the full history of the working relationship there was no obligation on the respondent to offer the claimant work and no obligation on the claimant to do at least some work. Once the work offered had been agreed and undertaken by the claimant or colleague S, only then was a correlative obligation on the respondent to pay for it. The claimant did not need to provide any reason if he refused work offered, and as far as the respondent was concerned it was irrelevant whether the claimant was absent ill, on holiday or working for other companies. In short, the claimant had an unfettered right to refuse any offers of work. It suited both parties for the claimant to be self-employed, despite the claimant now arguing he could have earned more had he "genuinely been self-employed" as he had when working on that basis for the NHS as a sub-contractor. Mark Johnson's evidence that had the

claimant wished to work as an employee they could have discussed this as he employed other joiners on less pay, holiday entitlement and they were subject of express and implied contractual terms when the claimant was not (i.e. disciplined for leaving site without prior consent and not informing Mark Johnson when they had done so) was not disputed.

48. The claimant appeared to argue that as he had worked for the respondent four and a half years there existed an implied contract arising from a course of conduct. The fact the claimant chose to accept work from the respondent for a period of 4.5 years does not denote he was an employee. In some circumstances it can be evidence of an employment relationship, but not in the claimant's case given the factual matrix taken as a whole.

49. I have taken into account when balancing all of the information set out in the factual matrix the length of time the four and a half years worked by the claimant, acknowledging this fact alone may have pointed to a contract of employment. However, if all the other factors are considered, for example, in direct contrast to the claimant's pleaded case he did not work 40 hours 5-days per week with holidays and sickness, relying on the period of four and a half years does not assist the claimant in establishing his case There are a number of gaps totalling 46-weeks and the documents reflect weeks when the claimant worked one or two days only and not a week. The claimant's position was that the periods of time when he did not work correlated with holidays, sick pay and days/weeks when he was not offered work by Mark Johnson, reinforcing the fact there was no obligation on the respondent to offer him work and there were periods when it did not. In short, there was no mutuality of obligation; Mark Johnson was free to offer the claimant work whenever he wished and the claimant was free to work whenever he wished and for whatever reason and this was the case throughout the entire term of the working relationship.

50. With reference to the 'control test' the only control the respondent had over the claimant was to make sure the work was carried out in order that it would be paid by the building company client and the claimant paid by it. The building company's client's site manager alone checked quality. I have factored in to my analysis the fact the claimant is a specialist tradesman with over thirty-years of experience and can be trusted to get on with the job without interference. On the balance of probabilities, I am satisfied the contractual position between the respondent and claimant was such that there was no control other than the requirement that the work agreed be carried out on the relevant site; the claimant was not subject to the same disciplinary procedures as the respondent's employees, he worked unsupervised, and could decide whether to accept or reject offers of work and did taking lengthy holidays in excess to holidays which employees were contractually entitled to, he left site when a job offered was below the acceptable rate of remuneration and did not inform the respondent, he was not required to wear any uniform and could come and go on site as he pleased. The claimant argued that if he failed to turn up to work or did a bad job he was no longer be dismissed i.e. no longer offered work. This did not arise as the claimant put right at his own time and expense work he had carried out and he with colleague S, either together or individually attended site when agreement had been reached following the offer made by Mark Johnson. The clear evidence is the claimant did not work for 46-weeks during the relevant period and yet the respondent continued to offer him work.

51. The other requirement of the test for a contract of service laid down by Mr Justice MacKenna in Ready Mixed Concrete cited above, was that the employee must have agreed to provide his or her own work and skill in exchange for a wage or other remuneration; 'Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not be.'

52. As there is no written contract there is no express substitution clause, and according to both parties no discussion had ever taken place concerning the claimant substituting his services with that of another, and an inference may the drawn that substitution was not intended. However, on the facts before me it appears that in practice the claimant had a right to limited substitution when either he or colleague S could turn up to do the job and either one of both would receive payment through their bank accounts by transfers from the respondent. If colleague S worked when the claimant did not, the respondent and not the claimant paid colleague S. On the balance of probabilities, I find the claimant had 'limited or occasional power of delegation' as mentioned in Ready Mixed Concrete and this was but one of the factors taken into account when analysing whether the factual matrix fell into a contract of service or a contract for services.

53. A contract of employment cannot exist without the irreducible minimum mutuality of obligation, an obligation to perform the work personally and a sufficient degree of control. Ready Mixed also sets down a third condition: that the other provisions of the contract are consistent with it being a contract of service.

54. As submitted on behalf of the respondent where the irreducible minimum of control, personal performance and mutuality of obligation are not present, other factors should not shift the Tribunal from the conclusion that a contract is not a contract of employment. The fact the claimant carried no financial risk except for having to remedy work in his own time and cost does not assist, and in any event this factor points away from him being an employee and the fact that he was regularly in receipt of remuneration may point in the direction of him being employee but leaving site and negotiation an extra £100 for a job points away from it. The fact the claimant provided his own tools and the respondent glue and screws is neutral. The respondent taxing the claimant on a self-employment basis at the claimant's request with HMRC agreement and the claimant certifying to HMRC he was self-employed in order to receive a grant during COVID is not conclusive, but highly relevant taking into account the factual matrix as a whole, including the evidence that the claimant was not integrated in to the business. Unlike other employees he was not entitled to sick pay or holiday pay or subject to disciplinary and grievance procedures.

55. Finally, the parties had intended the relationship to be one of self-employment from the outset, and neither resiled from this position during the entire term of the period when the claimant worked.

56. In conclusion, the claimant is not an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996, and the Tribunal does

not have the jurisdiction to consider the claimant's claim for a statutory redundancy Payment which is dismissed.

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26.1.21 Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 February 2021

FOR THE TRIBUNAL OFFICE