EMPLOYMENT TRIBUNALS

Claimant: Paul Baliszewski

Respondent: David Holmes Construction Limited

Heard at: Manchester (by CVP) **On:** 9 April 2021
(In Chambers 20 April 2021)

Before: Employment Judge Wheat

Representation:

Claimant: Mr. Alex Passman, Solicitor
Respondent: Mr.Callum Peel, Solicitor

RESERVED JUDGMENT after a Preliminary Hearing

1. When engaged by the respondent, the claimant was not an employee as defined by s.230 Employment Rights Act 1996.

2. When engaged by the respondent, the claimant was a worker as defined by both s.230 Employment Right Act 1998 and Regulation 2(1) of the Working Time Regulations 1998.

3. By virtue of 1 above, the claimant's claims for notice pay and backdated pension contributions are dismissed. The holiday pay claim alone proceeds.

REASONS

Claims and Issues

1. This was a Preliminary Hearing to determine the following issues:

(1) When engaged by the respondent:

a) Was the claimant an employee/and or worker as defined by s.230 Employment Rights Act 1996 ('ERA').

b) Was the claimant a worker as defined by Regulation 2(1) of the Working Time Regulations 1998? ('WTR').

(2) If the claimant was an employee of the respondent, what was his period of continuous employment (as defined by Part XIV ERA) as at the date of termination of employment?

2. The claimant, by way of a claim form received 18 August 2020, claims he is owed notice pay and backdated pension contributions which are breach of contract claims. The claimant claims holiday pay under s13(1) ERA and/ or Reg.30 WTR.

Procedure, documents and evidence

3. The Tribunal heard the following evidence:

- The Tribunal heard evidence from the claimant, Mr. Paul Baliszewski.
- The Tribunal heard evidence on behalf of the respondent from Mr. David Holmes, the director of David Holmes Construction Ltd.
- The claimant and respondent both produced witness statements.
- There was a Tribunal bundle of 97 pages. During the course of the hearing the claimant produced physical evidence of two packaged and labelled items of clothing.
- The representatives for the claimant and respondent made closing submissions.

Findings of Fact

4. The claimant, Paul Baliszewski, was engaged by the respondent, David Holmes Construction Limited, for the provision of his services as a skilled, manual groundworker, firstly between 2011 -2013 and then more recently between 2015-2020. His last day with the respondent was the 8 July 2020. The Tribunal is concerned with the latter period of engagement.

5. The respondent company, founded in 1990, specialises in all aspects of building work, new build houses, extensions, renovations and conversions.

6. The respondent has five employees with knowledge and skills of various trades who are paid between £12.50 - £13.50 per hour, with tax and national insurance being deducted by the respondent.

7. In 2015, after a chance meeting, an arrangement was agreed between the claimant and the respondent that the claimant should provide his services as a self-employed subcontractor completing groundwork on projects the respondent undertook. There was no written contract or agreement of any kind. It was verbally agreed that the claimant's rate of pay would be significantly higher than that of the respondent's employees, as the claimant had overheads to cover and was self-employed under the Construction Industry Scheme ('CIS'). By the time the arrangement ceased on the 8 July 2020, the claimant's rate of pay had increased to £21.50 per hour. During the period of engagement, the claimant informed the respondent of increases in his hourly rate, which the respondent agreed to pay.

8. The claimant invoiced the respondent weekly, setting out the hours he had worked. The respondent paid the claimant on a weekly basis, under the CIS.

9. The CIS is a scheme specific to the construction industry under which the subcontractor is registered and given a unique tax reference. It is designed to allow subcontractors responsible for their own tax and insurance to make advanced payments towards their tax liability across the tax year, with payments taken out at source by the contractor and paid to HMRC on their behalf. When the subcontractor submits their annual self -assessment, including offsetting of their running costs, the tax already paid is taken into account in assessing any liability or rebate.

10. The claimant has been registered with this scheme for 25 years, from when he commenced his career as a groundworker.

11. The respondent's involvement in the scheme was to access HMRC online, verify the claimant, and be informed of the percentage rate from earnings to deduct.

12. In the claimant's case 20% was deducted by the respondent from each payment made.

13. The respondent was monitored via HMRC compliance checks to ensure the scheme was operated properly.

14. Between 2015 and 2020, the claimant worked predominantly for the respondent. He did some private work in his own time.

15. In 2018, whilst engaged with the respondent, the claimant set up a profile on 'My Builder', under the name "Pave Way Groundworks" whereby his services in groundwork were advertised and members of the public could request quotes for work. The profile described a business trading for 30 years.

16. The claimant's profile on 'My Builder' was dormant during the period of engagement with the respondent. The claimant set up the profile to keep his options for work open.

17. The respondent's business hours were 8am to 5pm Monday to Friday, and these were the times and hours which the respondent's employees had to adhere to.

18. The claimant did not have to work in accordance with the respondent's business hours. His invoices detailed the start and finish times he worked. His start times varied, frequently commencing between 6.00am and 7.00am and finishing between 3.00pm and 4.00pm, sometimes earlier. The claimant chose to work these hours as it was beneficial to him to do so, arriving on site as early as was feasible.

19. The claimant did not have to give notice to the respondent if he took a day off. The respondent's employees were required to provide a week's written notice requesting time off. Numerous text message exchanges relating to time off for various reasons were exhibited in the bundle. At page 69f of the bundle; there was a text exchange on the 29 August 2019, in which the claimant informs the respondent at 12.11pm of the reason he is not in work that day. I deal with other examples in the conclusion section.

20. The respondent did not provide alternative work to the claimant if the weather was too inclement to carry out his work. On such days the claimant did not work for the respondent.

21. During the course of the engagement between the claimant and the respondent, the claimant left the sites he was working at on several occasions, after disagreements with David Holmes, (the director of the respondent) subsequently reconciling and returning to continue providing his services.

22. The respondent provided the claimant with the details of each project, where the site was and what work was required to be carried out.

23. The claimant was skilled and experienced and was not specifically directed or managed in how he should complete the work provided.

24. The claimant used his own transport to get to the sites, and used his own smaller tools, for example, spades and levels. The respondent replaced any tools affected by wear and tear.

25. The respondent hired and paid for larger machinery as required.

26. The claimant sometimes bought materials, which he invoiced the respondent for, and for which was reimbursed. He made no profit in so doing.

27. For a period of time between 2016 and 2017, the claimant provided at least one other worker to assist on projects and invoiced for this worker himself until his accountant advised that that worker should provide his own invoices.

28. At no time during the period of engagement between 2015 to 2020 did the claimant provide another worker to substitute his own work if he couldn't attend on a particular day or days.

29. It was not compulsory for the claimant to wear branded company clothing whilst engaged in providing his services the respondent. It was compulsory for the respondent's employees to do so. I preferred the evidence of Mr Holmes that branded clothing was readily available to those who requested or needed it, but that it was not a requirement for the claimant to wear it to sites. I took into account that the claimant produced unopened, plastic packaged, branded clothing in evidence. The packaging had labels stuck onto it, handwritten with the claimant's name. The clothing was unworn. I did not find this evidence as compelling as the photographic evidence provided by the respondent of the claimant actually working on a site at which a house was being constructed for the company in non –branded clothing.

30. In April 2020, the claimant approached the respondent and asked to "go on the books" as an employee in order that he could be furloughed due to the coronavirus epidemic. I preferred the evidence of Mr Holmes that this was the first and only time the claimant had asked for this to happen. I found the claimant's evidence that he had previously verbally requested this to be vague, he could not remember with any certainty when he had asked, stating it was brought to his attention by his accountant "one year" and in evidence that it might have been a couple of years ago, or three years ago. I took into account that the claimant continued with the arrangements for payment via invoice/CIS scheme, up to his walking off site on 8 of July 2020.

31. In April 2020 the claimant claimed an SEISS (Self Employed Income Support Scheme) grant designed to financially assist the self- employed during the coronavirus epidemic.

Law

32. I considered the definitions of employee and worker as set out in the Employment Rights Act 1996 (ERA):

> 'Employee'
>
> S.230(1) ERA defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.
>
> S.230(2) provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.
>
> No further definition of 'contract of service' or 'contract of apprenticeship' is provided in the ERA.
>
> 'Worker'
>
> S.230(3) of the ERA defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under):

(a) a contract of employment (referred to as 'limb (a)'), or

(b) any other contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party 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 (referred to as 'limb (b)').

33. The definition of 'worker' used in the ERA is replicated in Reg 2(1) of the Working Time Regulations 1998 SI 1998/1833 ('the Working Time Regulations'), therefore I considered this same definition when determining the second question for consideration at the preliminary hearing.

34. Neither representative for either party referred me to any specific legal authorities.

35. I referred to the recent judgment in the case of *Uber BV and ors v Aslam and ors 2021 UKSC 5, SC* in that it is the most recent consideration of the provisions for workers and highlights the importance of the purpose of the provisions in deciding who is covered by them.

Submissions

36. In summary, Mr Passman for the claimant submitted as follows:

- The claimant was an employee, if not found, he was clearly a worker.
- The claimant was obliged to provide services himself.
- There was no suggestion he provided a substitute, there was no evidence he provided a substitute, he wasn't asked to send a replacement.
- The respondent had almost complete control over when and where work was carried out and the respondent provided the work, the tools and the materials required for the claimant to do his job.
- The claimant was required to wear a uniform. He had possession of uniform and it was inconceivable that he would take two bags with jumpers in them.
- The claimant worked for the respondent for 5 and a half years with only an estimated period off between 13 August 2018 and 14 September 2018, which was a holiday period during which he undertook work for his brother.
- A mutuality of obligation arises during the contract itself, work was regularly offered and accepted.
- The 'irreducible minimum' is met.
- The claimant had no financial risk, could not profit from work done efficiently and did not profit from a mark-up of materials he purchased.

- Any professional indemnity claims would be dealt with by the respondent.
- The very fact the claimant was part of the CIS and had 20% deductions made at source indicated worker status.
- Whether he applied for a SEISS grant was a matter of how he was categorised – not the reality of the engagement.
- The parties agreed the rates of pay.
- The claimant's 'My Builder' profile was not activated.
- It is not for the parties themselves to agree the concept of employee/worker status, it comes down to an assessment of the facts.

37. In summary, Mr Peel, for the respondent, submitted:
    - The respondent was not obliged to provide work.
    - Although there was a mostly unbroken period of engagement in which the claimant was well paid, this was not determinative, why would he not accept paid work?
    - The respondent didn't take the CIS to the claimant, the claimant took that to the respondent.
    - It was quite clear that the claimant was seen as self -employed by HMRCS.
    - In claiming the SEISS grant during the pandemic it was clear the claimant saw himself as self -employed.
    - The Claimant set his own rates of pay and varied them which the respondent accepted – an employee or worker can't do that.
    - There was a significant difference in the rates of pay between the claimant and the respondent's employees, which showed self-employment as it was to cover overheads.
    - The claimant has an accountant.
    - The claimant's 'My Builder' profile suggested he had been in business for 30 years.
    - The claimant was marketing his services.
    - The claimant chose his own working days and hours and gave no notice if he wasn't working.
    - In contrast, the respondent's employees worked fixed hours and gave notice of holidays.
    - The claimant didn't provide a substitute, but the respondent would have accepted one if offered. It is common for the self -employed to provide work themselves.
    - There was no intention on either side to create an employer/employee relationship and no evidence to show this had been raised as an issue.
    - It only became a concern when there was an argument and the claimant left, not to return.

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Conclusions

Was the claimant an employee?

38. Taking into account the statutory definition as outlined above, I am required to identify if there was a contract of service entered into by the claimant.

39. There is a wealth of decided cases on what will amount to a contract of service, beginning with the well-known summary in *Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497:*

40. "The contract of service exists if these three conditions are fulfilled:

(1) 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.

(2) 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.

(3) The other provisions of the contract are consistent with it being a contract of service."

41. That remains the starting point even though, of course, the language of master and servant is something from which the law has moved on.

42. A line of more recent authorities has confirmed that there is an "irreducible minimum" necessary to create a contract of service without which it will be all but impossible for a contract of service to exist. If a contract of service cannot be identified, then there is no contract of employment and the individual is not an employee. It is widely recognised that a contract of service entails three elements: control; personal performance, and mutuality of obligation.

<u>Control</u>

43. The respondent, by virtue of the nature of their business, instructed the claimant as to the location of the site and the work that was required to be carried out. The respondent did not control the way in which the work was actually carried out, recognising the skill and experience of the claimant to get on with the work unsupervised. The respondent did provide the heavier machinery necessary to complete the groundwork, which was hired in, a standard procedure in the industry. The claimant used his own van and smaller tools for each job. The claimant was not obliged to adhere to the respondent's business hours of 8am to 5pm. He set his own hours of work, which were beneficial to him, in arriving on site as early as was feasible and finishing early. He was not required to provide a written request to take days off, he simply informed the respondent by text message if he was not coming in. He could leave the site after a disagreement

and return to work subsequently without repercussion. He was not under the same obligation as the respondent employees to wear company branded work clothing. Taking into account all these elements, I conclude that the respondent had some control over where and when the claimant worked, but it was limited. The claimant enjoyed significant flexibility in his working arrangements.

Personal Performance

44. Throughout the period of engagement between 2015 and 2020, the claimant performed the work personally. Although in his evidence Mr Holmes, as director of the respondent company, stated he would have accepted a substitute, this was purely hypothetical. The claimant was not ever asked to send a replacement and did not ever provide one as a substitute when he didn't work. I conclude he provided an exclusive personal service.

Mutuality of Obligation

45. The claimant worked predominantly for the respondent during the period 2015 to 2020. Work was offered by the respondent and accepted by the claimant on most weeks during that period. However, if work was not available on occasion, for example because of inclement weather, the respondent was not obliged to find alternative work for the claimant. Similarly, the claimant was under no obligation to take the work offered on any given day. On the 4 April 2019, he texted the respondent at 07.11am to say he wouldn't be in as "got meeting at lads college" (page 69c). I also had regard to the text message exhibited in the bundle at page 69e on the 16 July 2019, which shows the respondent enquiring if the claimant is coming in and states "Not bothered if you arnt "(sic). I conclude that despite the length of time the claimant and respondent engaged with each other, the length of engagement alone was not determinative of a mutuality of obligation, in light of the other factors outlined above.

46. I am unable to conclude therefore, that the three factors required to identify a contract of service (the 'irreducible minimum') are all present in this case.

Other factors taken into account

47. The claimant carried no financial risk and he could not profit from the work being done efficiently or concluding early. He made no profit on any materials he purchased. However, he did set his rate of pay, and informed the respondent when this increased. His rate was significantly higher than the other workers who were classed as employees, to reflect that he had overheads. I had regard to the claimant's tax status and his participation in the Construction Industry Scheme. In *Apex Masonry Contractors Ltd v Everritt EAT 0482/04,* the EAT found that the use of this scheme, although not conclusive of the status of independent contractor rather than employee, was highly relevant. I considered it to be equally relevant in the case of the claimant.

48. In all the circumstances of the case, I determine that the claimant was therefore not an employee as defined in S230(1) of the ERA.

49. As I have concluded that the claimant was not an employee. I did not go on to consider the next question regarding employee status, namely the period of continuous employment until termination.

Was the claimant a worker?

50. I next considered the definition of worker as set out above under 'limb (b)'.

'Limb (a)' is not relevant as I have determined that the claimant was not an employee.

51. For an individual to be a worker under 'limb (b)' there must be a contract, whether express or implied, and, if express, whether written or oral. Whilst there were no written terms of agreement between the claimant and the respondent, it was agreed verbally that the respondent would offer work, which if the claimant accepted and performed, he would be paid for.

52. There is also the requirement that the individual undertakes to do or perform the work personally. I have already found that the claimant provided a personal service to the respondent throughout the period of engagement of over 5 years and that he did not provide, nor was he asked to provide, a substitute on any days when he could not or did not want to undertake the work offered. It was a dominant feature of the verbal agreement that the claimant performed the groundworks himself as a skilled and experienced worker.

53. Furthermore, to qualify as a worker under 'limb (b)', the work or service provided must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

54. In *Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT*, the EAT held that a number of carpenters who had worked exclusively for their employer for a significant and indefinite period and had been paid on a time basis were "workers" for the purposes of the Working Time Regulations 1998, notwithstanding that they had been labelled as "subcontractors" and had been taxed on a self-employed basis. There was no obligation on the company to offer work and the workers were not obliged to accept an offer of work. They were workers within the meaning of the Working Time Regulations 1998 because they were obliged to perform work or services personally and they were not, as individuals, business undertakings.

55. In the *Byrne Brothers* case, the EAT made clear that the considerations in determining whether an individual was an employee could apply also to the considerations in determining worker status, but with the boundary pushed further in the individual's favour — such that the effect of 'limb (b)' is to 'lower the pass mark', so that cases which failed to qualify for protection as employees might nevertheless qualify for protection as workers.

56. I consider that there were clear similarities between the facts in the *Byrne Brothers* case and the individual status of the claimant. As with the contractors in

the *Byrne* case, the claimant, although taxed as self- employed through the CIS, performed a personal service for the respondent for over five years. Although the elements of control and mutual obligation were not sufficient to show employee status, the claimant accepted work almost exclusively and without any significant breaks for over five years from the respondent. He was directed as to where the work would take place and was provided with the main tools (heavy machinery hired in) he required to complete the work assigned to him.

57. In these circumstances, the features of the claimant's engagement by the respondent were sufficient to satisfy the definition of a worker under 'limb (b)'.

58. I therefore find that the claimant, as an individual, was not a business undertaking, he undertook work for the respondent, was paid by the respondent and the respondent was not his client or customer.

59. I conclude that the claimant was a worker, as defined in s230(3) ERA ('limb (b)') and in Reg 2(1) of the Working Time Regulations, during his period of engagement with the respondent. This is consistent with the approach in *Uber*, as the claimant, being economically dependent on the respondent during the period of their engagement, requires protection.

Employment Judge Wheat
Date: 20 April 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.27 April 2021

FOR EMPLOYMENT TRIBUNALS

The "Code V" in the heading indicates that this hearing was held by way of the HMCTS "Cloud Video Platform". Neither side requested an in person hearing and it was in accordance with the overriding objective to conduct the hearing by video conference call.

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