EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100554/2021

Held in Glasgow by Cloud Video Platform (CVP) on 26 July and 2 & 3 September 2021

Employment Judge Murphy

Mr J Fergusson	**Claimant In Person**
Conservation Masonry Ltd	**Respondent Represented by Mr K Gibson - Advocate Instructed by Mr R Dempsey - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(i) the claimant was not an employee of the respondent in terms of section 230(1) of the Employment Rights Act 1996 ("ERA") in the period from 18 September 2019 to 22 January 2021. His complaint of unfair dismissal is dismissed.

(ii) The claimant was a worker engaged by the respondent in terms of section 230(3) of ERA in the period from 18 September 2019 to 22 January 2021. The claimant's claims under Part II of ERA for unauthorised deductions from wages shall proceed.

Case Management Order

The following case management order is made under Rule 29 of the Employment Tribunal Rules of Procedure 2013. It is intended to ensure a fair hearing in accordance with the "overriding objective" set out in rule 2. That includes avoiding delay and expense so far as compatible with a proper consideration of the issues. The complexity and importance of the issues were taken into account when deciding the appropriate and proportionate order.

Further and better particulars

1. The **claimant** shall **within 21 days** of the date of this order send to the Tribunal and to the respondent's representative **further and better particulars of his claims** under Part II of ERA for **unauthorised deductions from wages**.

2. The **respondent** shall **within 21 days** of the date of **receipt** of the claimant's further and better particulars **send** to the Tribunal and to the claimant a **response to the claimant's further and better particulars**, if so advised.

Preliminary Hearing on case management by telephone

3. The parties shall, **within 7 days** of the date of this order, provide details of any **unavailable dates in November and December 2021** to participate in a one-hour preliminary hearing on case management by telephone.

4. **A one-hour preliminary hearing on case management by telephone** shall thereafter be fixed at the earliest available date which can be accommodated in **November or December 2021** to consider further procedure in this case in light of the further particulars and any response including: whether there is any requirement for amendment and whether the case should proceed to a final hearing or whether there are further preliminary issues which warrant a public preliminary hearing.

NOTES

(1) You may make an application under Rule 29 for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. You must confirm when making the application that you have copied it to the other party and notified them that they should provide the Tribunal with any objections to the application as soon as possible.

(2) If this order is not complied with, the Tribunal may make an Order under Rule 76 (2) for expenses or preparation time against the party in default.

REASONS

Introduction

1. This public preliminary hearing took place remotely by video conferencing. The parties did not object to this format. A face-to-face hearing was not held because of the Covid 19 pandemic and issues were capable of determination by a remote hearing.

2. The claimant was a stonemason who undertook work for the respondent. His work for the respondent terminated on 22 January 2021 and he has brought complaints of unfair dismissal as well as unauthorised deductions from wages relating to various alleged underpayments.

3. The respondent denies that the claimant has the employee status required to complain of unfair dismissal and that he has the worker status required to complain of unauthorised deductions under Part II of ERA (Wages). The respondent accepts the claimant was an employee for the purposes of s.230(1) of ERA in the period from August 2015 to mid-September 2019 but maintains that at all other material times the claimant was neither an employee nor a worker.

4. At the outset of the preliminary hearing, it was attempted to clarify the claimant's claims for unauthorised deductions from wages. Mr Gibson reserved the respondent's position in relation to each of the claims both regarding whether amendment was needed by the claimant and in relation to time bar / other potential jurisdictional issues.

5. The claimant gave evidence on his own behalf at the preliminary hearing. The respondent led evidence from John Gibson, Corporate Director. Evidence was taken orally from the witnesses.

6. A joint set of productions was lodged running to 111 pages. On 21st July 2021, the claimant had emailed the Tribunal alleging that the signed contract for services produced by the respondent in the joint set of productions had been falsified by the respondent. The claimant had received the bundle from the respondent's representative on 20 July 2021. He compared the document produced with photographs he alleged he took on his mobile phone of his contract when he alleged he was issued with it in September 2019. The claimant's email of 21 July 2021 was located by the Clerk at the beginning of the hearing and his email to the Tribunal and photographs were added to the productions and allocated page numbers 112 to 117.

Issue to be determined

7. The purpose of the Preliminary Hearing was to determine the status of the claimant in the period from mid-September 2019, when he ceased to be an apprentice, to 22 January 2021, when his engagement ended, and specifically whether he was an employee under s.230(1) or a worker under 230(3) of ERA, or neither.

Findings in Fact

8. The following facts were found to be proved.

Background

9. The respondent is a company which provides stone cleaning and restoration services. In the period between July 2013 and January 2021 the exact size and breakdown of its workforce has varied. Generally, it has tended to employ around 10 to 15 individuals on contracts purporting to be contracts of employment. The respondent deducts tax and NI at source under PAYE for these individuals. Typically, this group of staff has included all the office and accounts staff, a number of apprentices, a few stone restorers and a couple of stone masons. The claimant did not know which two stonemasons were engaged on this basis.

10. Additionally, the respondent has a workforce engaged on what purport to be contracts for service. The respondent deducts tax (only) for these individuals under the Construction Industry Scheme ("CIS"). The number of individuals so engaged has fluctuated over the years. In January 2021, approximately 28 of the individuals who worked for the respondent were engaged on this basis. These were known by the respondent as 'subcontractors' and they comprised around four labourers, three restorers, one or two bricklayers and 19 or 20 stonemasons.

July 2013 – August 2015 (Labourer)

11. The claimant began working for the respondent in July 2013. He had left school that summer and began work as a labourer. The claimant's father was a manager of the respondent. The claimant was not issued with a written contract of any sort at that time. He worked 39 hours per week from 8 am to 4.30 pm, Monday to Friday. He sometimes worked in the respondent's yard and sometimes at client sites. His duties included clearing up, helping to carry stones and breaking out and repointing stonework.

12. The respondent provided the claimant with some PPE. In this period, the respondent provided him with a branded hard hat and vest. The respondent supplied basic ear protectors, safety goggles and masks. The respondent did not supply work boots or general workwear.

13. John Gibson ("JG") was the respondent's Contracts Manager at that time. He told the claimant which site to go to. The foreman onsite told the claimant what to do. The claimant was asked to sign method statements and risk assessments for sites. These set out some guidance on how the work should be performed safely.

14. The claimant was mostly onsite. He was given instructions, typically to clean up, carry things, load up the van, and similar duties. At a more skilled level, he was occasionally charged with repointing stonework for which a particular technique was required. He was taught the technique by the respondent's site foreman or by other qualified stonemasons engaged by the respondent, with whom he was working.

15. When the claimant began as a labourer, he generally used tools provided to him by stonemasons engaged by the respondent with whom he was working. These were tools such as a hammer and teeth tool and a brush and shovel. He was later supplied with a hammer and teeth tool by the respondent. He continued to also use tools provided by his co-workers and sometimes he supplied his own.

16. The claimant was paid for the hours he worked. He was not paid for holidays. The respondent deducted tax at the rate of 20% under the CIS scheme; they did not process him under PAYE payroll. The claimant was paid weekly during his period as a labourer and throughout his working relationship with the respondent.

17. The claimant faced complaints from the respondent if he asked to take time off on the morning of the day in question. Sometimes the respondent asked him to give two weeks' notice but sometimes it accepted shorter notice of time off. The claimant was not told of a strict requirement to provide two weeks' notice but it was suggested to him that he should do so. Any time off was unpaid.

18. The claimant continued to work as a labourer until August 2015. It was not suggested to the claimant that he could send a substitute labourer if he couldn't attend himself or if he preferred to do so. The claimant never attempted to do so. Nor did any of the respondent's workforce of subcontractors at any time in the period between July 2013 and January 2021.

19. To work as a labourer, the claimant required a CSCS card ("Construction Skills Certification Scheme"). The process for procuring such a card was similar to a driving theory test for which there was a fee. The claimant paid the fee himself and studied in his own time the booklet received from CSCS to prepare for the test.

20. The claimant had no insurance and the respondent did not suggest to him he should arrange any or otherwise discuss insurance cover with him.

21. In this period of labouring from July 2013 to August 2015, the claimant never undertook work for any client or contractor other than the respondent

and did not ask the respondent if he could do so. He understood from the respondent, however, that the respondent would not complain were he to undertake work for others at the weekend. During the working week, he believed that the respondent would not have had a difficulty with him occasionally taking a couple of days off by prior agreement to undertake work for another entity or individual, though it never arose.

August 2015 – mid-September 2019 (Apprenticeship)

22. After two years as a labourer, in or about August 2015, the claimant asked the respondent if he could do an apprenticeship with them in stonemasonry. Around this time, the claimant signed a written contract confirming his status as an employee or apprentice (the document was not produced but both parties accepted such a document was signed).

23. From this time until on or about 18 September 2019, the respondent ceased to apply the CIS tax regime and instead made deductions from the claimant's pay under the PAYE scheme. In the first year of his apprenticeship, the claimant split his time, spending two weeks in college then two weeks on site in rotation. In the early stages, he learned how to do basic surface finishes, using hand tools and a melt point. He was given instructions on how to carry out tasks when in the respondent's yard by banker masons of the respondent.

24. On one occasion when employed as an apprentice, the claimant was allocated so-called "price work" by the respondent on the Isle of Bute. He and a small team including one or more qualified stonemasons were sent to the island to perform this work. Instead of being paid an hourly rate in the usual way, the respondent paid each of the individuals in the team a fixed price per monument worked on, regardless of how long the work took to complete.

25. The claimant was given 28 days' paid holiday per annum as an apprentice. When it came to the procedure for requesting these, there was no strict requirement for the claimant to give a minimum period of notice. He was not expected to ask for annual leave on the day itself, but he did not always give as much as two weeks' notice. Nor was he asked to.

26. The respondent supplied the claimant with full PPE. On one occasion the respondent attempted to charge the claimant for the provision of a mask while he was working as an apprentice. The claimant refused to pay, and the respondent did not insist.

27. On beginning his apprenticeship, the claimant was provided with a full set of hand tools by the respondent worth approximately £250 to £300, including Tungsten chisels which he used throughout his apprenticeship. The claimant won a college competition in 3rd or 4th year of his apprenticeship and, by way of a prize, received more tools from the college. He used these tools in addition to those provided by the respondent in his work.

28. No staff handbook was issued to the claimant or drawn to his attention. The claimant was not the subject of any disciplinary procedure during the period of his apprenticeship (or at any time). Nor did he initiate any grievance procedure during his apprenticeship or otherwise. He was not aware of any disciplinary or grievance procedure operated by the respondent.

29. As the claimant progressed through his apprenticeship, he became more skilled. He was introduced to the use of small angle grinders and took instructions directly from his site foreman and other stonemasons engaged by the respondent.

30. By the time he finished his apprenticeship in or about September 2019, the claimant was working largely autonomously on tasks with occasional guidance from co-workers.

31. The claimant had no sickness absence during the period of his apprenticeship. A fellow apprentice did have sickness absence and the claimant knew he received some sick pay from the respondent.

18 Sep 2019 – 21 Jan 2021 (Stonemason)

32. Following the completion of the claimant's apprenticeship, the respondent offered him work as a stonemason. They issued him with a document which purported to be a contract for services on or about 9 September 2019. The claimant was working onsite at St Aloysius Church in Glasgow

at the time. The site foreman, John Watson, handed the claimant the document. The claimant photographed the document on 9 September 2019, before it was signed either by him or by the respondent. Along with the document headed 'Contract for Services', Mr Watson handed the claimant a form titled "Employee Information Form". The form stated "This must be completed immediately", and the claimant had already handwritten in some of his personal details, including his address, when he photographed it on 9 September 2019.

33. Shortly thereafter the claimant signed the written contract for services which appears at pages 113 – 116 of the productions. He completed the remainder of the Employee Information Form. He handed both documents back to Mr Watson who took them back to the respondent's office. Mr Watson did not give the claimant a copy of what he had signed. Nor did anyone from the respondent's office send him a copy for his retention.

34. The claimant did not receive or sign the document of which the production at pages 61 – 64 purports to be a photocopy. The respondent lost the Contract for Services signed by the claimant and returned to John Watson in or about September 2013**.**

35. The claimant made no protest at the time about the terms of the contract he signed. He did not allege at that time that a contract for services did not reflect the reality of his working relationship with the respondent. No meeting was held or offered by the respondent to discuss the written terms it had issued or to invite feedback.

36. The contract included clauses as follows:

> ***3. Provision of Services***
>
> *3.1 Both parties agree and intend that if the Subcontractor is engaged, he does so as an independent business in its own right under a Contract for Services and not under a contract of employment or any other kind of contract.*
>
> *3.2 The Subcontractor is under no obligation to provide any Services to the Company whatsoever and is free to decline to provide any Services at any time, both in respect of any current work or services it is undertaking and any future work it may be*

offered by the Company. The Subcontractor also retains the right to refuse work at any place or location.

3.3 The Subcontractor is under no obligation to, and provides no guarantee it will, provide the Subcontractor with any work whatsoever.

3.4 While the Subcontractor's method of work is his own, The Subcontractor agrees to observe any applicable health and safety requirements imposed by statute on the Company or the Subcontractor and any applicable security and site hours at the locations where the Services are performed in so far as they are reasonably applicable to independent contractors.

3.5 The Subcontractor is free to provide services to any other party at any time.

3.6 The Subcontractor may utilise any such persons as it considers appropriate in the performance of the services including any replacements of helpers thereof provided any such persons possess the necessary skills and expertise to provide the services to a high standard.

3.7 Where additional or replacement people are engaged by the Subcontractor, the Subcontractor will remain responsible and accountable for the Services provided and for any payments due to such persons. The Company will not have a direct contractual or financial relationship with any such persons unless it has been agreed in writing between the parties.

3.8 The Subcontractor will provide its own hand tools and equipment.

3.8.1 The company may be able to provide certain items if necessary, and reserves the right to charge any costs to the Subcontractor.

3.9 The company's insurance policy will cover the Services provided by subcontractor, but the Subcontractor accepts that he is responsible for the Services provided and should take out and maintain insurance for the services provided.

3.10 The Subcontractor should provide the Services to the best of its ability and to the standard expected of a competent tradesman. If in the Company's opinion the Subcontractor (or any other people

is engaging) [sic] has provided defective or substandard provision of services.

3.10.1 Require the Subcontractor to rectify any defective or substandard provision of services in its own time at its own expense; or;

3.10.2 Require the Subcontractor to pay the costs of rectifying any defective or substandard provision of Services.

4. Payment

……

4.2 The Services are governed by the Construction Industry Scheme and any payment for services will be subject to deductions as notified to the Company during the verification process.

…..

4.2.2 Deductions under the Construction Industry Scheme are for income tax purposes only and do not relate to National Insurance.

…

4.4 The Company is under no obligation to make any payment to the Subcontractor. The Subcontractor will not receive payment for any period where Services are not provided and the Subcontractor will not receive payment for any cancelled works regardless of any reason as to why the works are cancelled.

4.5 The Subcontractor is engaged as a self-employed subcontractor and understands and agrees it is not entitled to any statutory payments such as sick pay, maternity / paternity pay or any other payment of any kind or other employment rights.

…

4.7 The Company operates a self-billing system and the Subcontractor will be under no obligation to raise invoices for the services for the Services rendered.

5. Termination

5.1 Either party may terminate this Contract for Services at any time without notice and without financial penalty.

6. Other

6.1 The Subcontractor is responsible for its own travel to and from any site and any associated expense incurred. The Company is under no obligation to reimburse any expenses.

….

6.3 The Subcontractor will not hold itself out to be an employee or representative of the Company, save as both parties acknowledge for health and safety or security purposes the Subcontractor may need to be identifiable as a subcontractor of the Company.

37. The contract did not stipulate a commencement date from which it was effective. It was signed at some time in September 2019 after the 9th of that month. On 18 September 2019, the respondent's Geri Whitley emailed the claimant, attaching a pay slip for that week. She advised this would be his last payslip under PAYE as the claimant was being paid as a subcontractor with a start date the previous week. In the period thereafter until he ceased working for the respondent, the claimant was paid under the CIS. Income tax was deducted monthly from his pay and paid by the respondent to HMRC where it was treated as a payment to account. The claimant filed annual self-assessment tax returns. No national insurance contributions were deducted from his pay.

38. In her email, Ms Whitley indicated the claimant would not get a payslip under the Construction Industry Scheme and told him that instead of giving out monthly CIS certificates, twelve certificates would be provided at the financial year end on 5 April to enable the claimant to submit his own self-assessment online HMRC. In the event the respondent never provided the claimant with the monthly CIS certificates whether at year ends or otherwise. The claimant arranged to register with HMRC as self-employed and obtained a Unique Taxpayer Reference ("UTR").

39. On 25 September 2019, Ms Whitely emailed the claimant his P45. This recorded the claimant's leaving date from his employment with the respondent as 13 September 2019.

40. Until the arrival of the lockdown in response to the Covid 19 pandemic, the claimant's working pattern of hours continued as it had throughout his time with the respondent. He continued to work 39 hours per week between 8 am and 4.30 pm at sites to which he was allocated by the respondent. Until March 2020, the respondent always allocated him full time work, and the claimant always accepted the work. The site supervisor would direct the

claimant to the tasks required on the site. Occasionally, in the event of inclement weather conditions which made the work unsafe or untenable, the claimant's hours were cut short. He would not be paid for any such hours where the work was "rained off". The claimant was never offered "price work" during his time working as a qualified stonemason for the respondent. He was always paid an hourly rate.

41. If the claimant was sent to work at a site in Edinburgh, the respondent paid extra hours to reflect his travel time. JG told the claimant what site to attend. There was no discernible difference in the way JG interacted with the stonemasons classed by the respondent as subcontractors and those classed as employees. JG would issue instructions regarding where they were to work in the same way and generally interact with them on company business without drawing a distinction.

42. As far as holidays were concerned, the claimant was able to arrange these with prior notice but was not paid for them. The respondent closed all operations for a two-week period at Christmas each year and the claimant required to take these weeks off (unpaid).

43. Having completed his apprenticeship, the claimant was able to work with relative autonomy although, not being long time-served in his trade, he occasionally took guidance on tasks from the foreman or other stonemasons engaged by the respondent. He required to carry out his work in accordance with the Method Statements and Risk Assessments prepared by the respondent. These were bespoke to the respondent's different sites. He required to sign these before beginning work at any particular site.

44. The claimant never provided services to other clients or customers apart from the respondent. His working week was taken up with the respondent's work. He believed, however, that the respondent would not have objected had he chosen to carry out work for others outside of his working hours for the respondent. He believed that the respondent would likely have objected if he had requested a week off in order to provide services to another customer or client. However, the scenario never arose.

45. The claimant at no time sought to send a substitute or to use helpers he had sourced on the respondent's sites. In all the time that he worked for the respondent in any capacity, nobody categorized as a subcontractor attempted to do so. The claimant believed any attempt to do so would have elicited a negative reaction from the respondent. He believed he would have been told by the site foreman to 'jog on'.

46. At a practical level, given the number of qualified stonemasons in Scotland, it would be difficult for him to source someone who was both available and who held a gold CSCS card and could offer the level of skill the respondent would insist upon. However, had he managed to locate such an individual, that person would not have received the respondent's site induction. The site foreman would require to carry out a site induction whenever a new substitute was sent which would cost the respondent the foreman's time. Further, any substitute would require to be provided with, read and sign the method statement and risk assessment for the site before they could begin to undertake any work. The respondent published no protocols for how such a scenario might be managed. The claimant and the respondent's other stonemasons required to wear a branded vest and hat onsite. Any substitute would not have been issued with such items. The claimant believed that, given these practicalities, had he attempted to send a replacement, the site foreman would not have been willing to accommodate the arrangement.

47. During his period as a qualified stonemason, the claimant still had the hand tools the respondent had provided him with as an apprentice. He had not been asked to return these and continued to use them in his work as a stonemason, as well as the tools he had personally procured. Power tools and heavy machinery such as generators were provided by the respondent. The respondent ensured such electrical items were appropriately PAT tested.

48. As far as PPE was concerned, in the period when the claimant was a qualified stonemason, the respondent provided filters for masks, gloves, safety specs, basic ear defenders, and the branded vest and hat. The claimant purchased his own higher quality ear defenders. He supplied his

own boots and workwear. The respondent never charged the claimant for such PPE as it provided to him.

49. The claimant did not take out insurance and the respondent never asked him about his insurance situation.

50. The claimant was never asked to rectify any substandard or defective work he had carried out in his own time. It did occasionally arise that something required to be fixed. The claimant attended to it during his usual paid hours.

51. It was previously the case that the respondent asked the claimant and the others categorized by it as subcontractors to complete time sheets and hand them to the site foreman. This practice ceased around December 2019. Thereafter, the site foreman prepared time sheets for all of the respondent's operatives on the site and submitted them to the respondent's office to process their pay.

52. At some time between September 2019 and January 2021, the claimant was absent through illness for a couple of days. He did not receive any sick pay.

53. As the claimant lived in the city, some of the respondent's sites were within walking distance. If he was asked to work at a site in Edinburgh, he was given a lift by another of the respondent's stonemasons. (The claimant had not passed his driving test throughout the period he worked for the respondent). He didn't travel between sites on the same day but occasionally travelled between a site and the respondent's yard in the course of a working day. When this happened, he was given a lift in one of the respondent's vans and incurred no personal cost for the journey.

54. The claimant finished at St Aloysius Church in the city centre in November 2019 and began working for the respondent at the Johnnie Walker Experience site in Edinburgh. He continued working there until February 2020 when he was allocated to a site in Jordanhill, Glasgow.

The Pandemic and Lockdown (March – June 2020)

55. On or about 28 March 2020, the respondent ceased its onsite operations. The Government had ordered a national lockdown in response to the Covid 19 pandemic. The respondent offered the claimant no work during this period. The respondent provided the claimant with no pay in this period by way of furlough or otherwise. A senior manager of the respondent sent a message to all site foremen in the days leading up to the lockdown, advising that the respondent would not be subsidizing any weekly payments to self-employed or sole trader parties and advising them to check the government helpline or website to see what assistance might be available.

56. During this period, the claimant sought to claim monies under the Government's scheme to assist those in self-employment.

57. On 18 June 2020, the respondent's office administrator, Charleen Hooper, sent the claimant and others risk assessments and method statements for the site in Jordanhill. Covid safety measures had been implemented. The claimant was to read and sign these in preparation for his return to work for the respondent at that site on 22 June. The method statement described among other matters:

a. the task,
b. the sequence in which activities were to be carried out,
c. the number of operatives required,
d. the PPE to be worn, a stipulation that loose clothing must not be worn, and that operatives be clean shaven,
e. the requirement for operatives to be trained in the use of the grinder / saw,
f. the minimum number of operatives to undertake certain tasks such as the removal of stone,
g. the certification required for operatives erecting scaffolding,
h. the requirement to remove off cuts and debris regularly.

58. Before the pandemic struck, the claimant used to take the bus to the Jordanhill site each day. When he returned on 22 June 2020, he did not want to use public transport. His mother, with whom he lived, was at high

risk from Covid 19 due to her underlying health conditions. The claimant had been learning to drive but not yet managed to sit a test. When he returned to work from June 2020, the claimant would drive to Jordanhill each morning, accompanied by his mother who held a full license. His mother would drive the car back home each day after the claimant was dropped at the site.

59. In December 2019, the claimant exchanged messages with the respondent's JG regarding a transfer from the site in Jordanhill site to a site in Helensburgh (Cairndhu House). JG wanted the claimant to go there after the Christmas break. The claimant had a driving test booked for 6th January 2021 and indicated he should hopefully be able to make his own way to the Helensburgh site on 7 January.

Events in January 2021

60. In the event the claimant's driving test, scheduled for 6 January 2021, was cancelled. There was no further contact at that time about the claimant working in Helensburgh. On 9 January, however, he had a call with JG to discuss one of his classmates from College who was looking for work as a stonemason to see whether the respondent might be interested in offering him work. JG said there was work available and the claimant put the two in contact. JG went on to ask the claimant if he'd talked to Sean Harkness (stonemason) about arrangements for Mr Harkness to take the claimant to the David Livingstone site in Hamilton the next day. The claimant confirmed Mr Harkness had not been in touch but that the claimant could not travel in a vehicle with Mr Harness because of the Covid risk to the claimant's mother. The claimant explained he had, since March 2020, been avoiding any use of public transport or sharing a car or van with anyone outside his own household.

61. The claimant was ready and willing to work at any site of the respondent that did not entail travel in a shared vehicle or by public transport. JG replied words to the effect that the claimant was pencilled in for the David Livingstone site and that he had to go where the work goes. JG told the claimant how clean Mr Harkness' van was. The claimant persisted in his refusal. JG eventually agreed that the claimant could continue at the

Jordanhill site and sent another stonemason to David Livingstone in Hamilton.

62. The claimant continued to work at the Jordanhill site in the following weeks. On Friday 22 January 2021, the claimant arrived at that site. Jim Smith, the site foreman, told him to link up with Chris McCann (a stone cleaning specialist of the respondent) regarding arranging a lift from Mr McCann to the respondent's Helensburgh site. There was at the time, substantial work for stonemasons at the Jordanhill site. The claimant phoned JG and asked him why he was asking him to travel in a van with Mr McCann despite the claimant previously informing him of his circumstances. The claimant told him he could not go to Helensburgh in Mr McCann's van. JG told the claimant, "it's Helensburgh or the house". The claimant repeated his mother's circumstances to JG. JG responded along the lines: "Are you just going to pack up the day then? Ok, just pack up today".

63. The claimant believed JG intended him to go home and not return to work for the respondent. He told the foreman and his fellow operatives at Jordanhill he'd just been sacked. Nevertheless, the claimant continued working at the Jordanhill site, believing that, if he did so, he would be paid to the end of the day. JG called the claimant back later in the morning. He asked the claimant if he'd reconsidered. The claimant said he was not going to the Helensburgh site. JG advised that he would send another operative called Stephen Picken to Helensburgh instead. The claimant asked JG why he was backtracking, and JG became angry. He said, 'do you want to remain employed by Conservation Masonry or not?' The claimant asked, 'did you just use the word employed?' JG responded angrily, "Right, I'm coming up there," or words to that effect.

64. JG arrived at the Jordanhill site. He could not enter as he had not received the site induction. He had a conversation with the claimant at the site gates. The claimant greeted him "Right, mate?" and JG responded words to the effect: "there's going to be no fuckin' 'mates'. If it was up to me you'd have been long gone. Who the fuck tells you where to go? Does Jim tell you where to go? No, I tell you where to go. Back in the day, we'd have dealt with you." The claimant complained he believed himself to be an employee and that he had lost out on furlough. JG began to ask him why,

then stopped short and said, “actually, I don’t give a fuck”. He told the claimant: “just finish up now.” While still in the claimant’s presence, he phoned Jim Smith to say “Jamie’s finishing up now; make sure he doesn’t steal anything”. JG then left Jordanhill and the claimant walked back on site. He told his co-workers what had happened and gathered his things. He left the site with his belongings.

65. That afternoon, the claimant sent a message to the respondent’s Charleen Hooper, asking her for a copy of his contract. She told him she couldn’t see it on file. She pointed out she had not been with the respondent when the contract had been attended to and she was struggling with her predecessor’s filing system.

66. The claimant messaged his father, Ross Fergusson, who was at the material time a senior manager of the respondent. The claimant did not live with his father. He and his father had fallen out and had not spoken for over a year. He told his father some of the things JG had said in the message. His father replied that he was meeting JG on Monday (25 January). On that date, Ross Fergusson sent a message to the claimant after trying to contact him a few times. He said:

> *“the best solution I believe to maintain employment is that you move entirely to Andrew Watson’s control and you stay at Jordanhill before moving to Glasgow University to do a number of jobs with Tam McKay…”*

67. The claimant told his father that he would not be returning after the way he’d been treated by JG.

68. The respondent’s company website, as at 26 January 2021 was returned by a Google Search with the following text:

> “*Conservation Masonry have grown to be one, if not the largest stonemason contractors in Scotland employing 60 operatives specialized in cleaning, carving …”*

69. The claimant followed up regarding his contract with a further message to Ms Hooper on 1 February 2021 to Ms Hooper, asking if it had been found yet. Ms Hooper said she hadn’t come across it. This was the truth. She

had not found it. The respondent had lost the only hard copy contract which the claimant had signed in September 2019 and did not find it at any stage. The document produced to the Tribunal at pages 61-64 of the productions was prepared by the respondent, using its template contract for services. This was in materially the same terms as the document which had been provided to the claimant in September 2019. It was, however, differently formatted and the layout of the clauses relative to the page numbering didn't quite correspond**.** The respondent 'pasted' the claimant's signature and date from a different document he had signed to give the document produced by the respondent at pages 61-64 the appearance of a photocopy of a signed contract.

Observations on the Evidence

70. The claimant was found to be a credible and reliable witness. He gave his evidence in a straightforward manner that was not evasive or self-serving. JG's evidence on behalf of the respondent was troubling in a number of respects. His recall of the sequence and detail of events was often weak. There were also concerns over the credibility of aspects of his evidence.

71. Two key areas of factual conflict were:

a. a dispute over the provenance of the written contract for services produced by the respondent in the bundle at 61 – 64 and that produced by the claimant at 113-117; and
b. the contents of the conversations on 22 January 2021 between the claimant and JG.

The Written Contract for Services

72. The Tribunal did not find JG's evidence on the events surrounding the signature and retrieval of the purported contract for services at pages 61-64 to be credible. There was a lack of detail and of consistency. When first asked during his evidence in chief if he'd seen that document before, he answered "yes, during these proceedings". He was asked again whether he had seen it before and responded "I would have, because I've signed it, yes". When Mr Gibson asked JG when the photocopy of the signed contract was found, he said: "Eh, when we submitted it to our solicitor."

Later, in response to a question from the Employment Judge, JG suggested Ms Hooper had actually found it before her message of 1 February 2021 (in which she told the claimant she had not managed to locate it).

73. JG's evidence on this issue was also characterized by vagueness. He couldn't remember whether he had added the handwritten details on the first page at the same time as signing the last page or another time. He was vague on when the contract was given to the claimant. He was not certain about who took it to the site to give to the claimant; he said "it would have been me or it would have been John Watson".

74. The claimant's evidence was more detailed and more compelling. He remembered John Watson, the site foreman saying: "Here, sign your life away" when he handed him the hard copy contract at St Aloysius Church. He remembered looking at it in the canteen. He remembered photographing the document and produced a series of photographs of the individual pages taken on his old smart phone.

75. The photographs are tagged with the date and location where the photos were taken. They show that they were taken on 9 September. Though the year is unspecified, that date in the year 2019 fits the chronology of the transition to categorization by the respondent as self-employed which on or about 18 September 2019. The tags show the photos were taken at Cowcaddens, where St Aloysius Church is located in Glasgow city centre. That is the site at which the claimant was working in September 2019. The claimant produced a message to Ms Hooper which it was not disputed he sent on 22 January 2021. In that message, the claimant told her, on the subject of the missing document, "…*It was a hard copy and it got taken back to the yard. I don't know where they would've put it. I'm sure I've got it on an old phone somewhere but I'm unsure where that is either*." This supported the claimant's account that the smart phone photos he produced were what they purported to be.

76. In his evidence, when considering how the difference in the documents might be explained, JG speculated that the claimant might have taken a template contract from the respondent's office and photographed it. Mr

Gibson did not ask more about this theory which had not been raised in the cross examination of the claimant. The Tribunal did not find this potential explanation to be credible. The claimant had no reason to take a template contract from the respondent which was in materially identical terms to the one he signed in order to photograph a slightly differently formatted document. The photographs were dated 9 September. The Tribunal has accepted the claimant's account that they were taken on that date in the year 2019. The only possibilities were that they were taken on 9 September 2019 or 2020. September '21 had not arrived when the documents were lodged, and the hearing began.

77. In September 2019 or indeed 2020, the claimant was not yet aware that his engagement with the respondent would be terminating acrimoniously in January 2021. With no knowledge of the termination or the ensuing Tribunal proceedings, the claimant had no reason in September of either year to find and photograph an alternatively formatted but substantively identical version of the contract he had signed. No credible explanation was put forward by the respondent to account for the discrepancies of formatting between the document the claimant photographed in September 2019 in Cowcaddens and that which they allege he signed.

78. The respondent was aware before the hearing of the claimant's allegation that it had falsified his signature on the document it produced at p.61-64. The respondent did not call Charleen Hooper as a witness. She is alleged by JG to have found the photocopy produced at 61 - 64 and to have misled the claimant about having done so in her message dated 1 February 2021. The only evidence to contradict the claimant's account was, therefore, JG's.

79. The Tribunal accepts on the balance of probabilities the claimant's account that he signed the version of the document which he photographed on 9 September 2019 and returned that signed version, and only that signed version to the respondent. The respondent lost this document, exactly as Charleen Hooper's messages in Jan / Feb 2021 indicate.

Conversations between the claimant and JG on 22 January 2021

80. The Tribunal preferred the claimant's evidence in relation to events on 22 January 2021. The Tribunal's concerns over JG's credibility for the reasons given above as well as the documentary support for the claimant's position in the contemporaneous messages he sent to his mother and father around that time influenced the Tribunal's finding.

81. JG's evidence to the Tribunal was sparing on the detail of the conversations. The claimant produced text messages between himself and his mother on 22 January 2021 which were consistent with the evidence he gave about the nature of his conversations with JG that day. He also produced messages he sent to his father which attributed alleged quotes to JG from the conversation the claimant had recently had with him. The claimant's father replied to the claimant after speaking to JG "to get his take on Friday's events", In that message, the claimant's father, a senior manager of the respondent, did not deny the account of the conversation the claimant had given. Ross Fergusson commented, "I get that your [sic] annoyed and feel aggrieved but arguments happen quite often in the construction industry where people lose there [sic][temper".

82. On the evidence before it, the Tribunal was satisfied, on balance, that the conversations on 22 January 2021 were as the claimant described them.

Relevant Law

83. Section 230 of the Employment Rights Act 1996 provides:

> *"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
> *(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
> *(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)*
> *(a) a contract of employment, or*
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual*

undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act 'employment'—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and 'employed' shall be construed accordingly."

Submissions

84. Mr Gibson and the claimant cited the following authorities to the Tribunal:

- **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] All ER 433
- **Autoclenz v Belcher and others** [2011] UKSC 10 41
- **Uber BV and ors v Aslam & ors** 2021 ICR 657
- **James v Redcats Brands Ltd** 2007 ICR 1006, EAT
- **Bates van Winkelhof v Clyde & Co LLP** [2014] ICR 730
- **Medical Group Ltd v Westwood** [2013] ICR 415
- **Byrne Bros (Formwork) Ltd v Baird** [2002] ICR 667
- **Redrow Homes (Yorkshire) Ltd v Wright** [2004] ICR 1126
- **Pimlico Plumbers Ltd and anr v Smith** [2018] ICR 1511
- **Gorman v Terence Paul (Manchester) Limited** 2410722/2019 (Manchester Employment Tribunal) 18 June 2020

The following cases are also mentioned in this judgment:

- **White and anr v Troutbeck** SA UKEAT/0177/12/SM, EAT
- **Consistent Group v Kalwak** [2008] IRLR 505
- **Nethermere (St Neot's) v Taverna and Gardner** [1984] IRLR 240
- **Hall v Lorimer** [1994] IRLR 171
- **O'Grady v Saper Ltd** [1940] All ER 527
- **Singh v Bristol Sikh Temple** [2012] All ER (D) 68
- **Nursing and Midwifery Council v Somerville** UKEAT/0258/20/RN
- **Clark v Oxfordhshire HA** 1998 IRLR 25
- **Airfix Footwear Ltd v Cope** 1978 ICR 1210, EAT

Respondent's submissions

85. Mr Gibson gave an oral submission on behalf of the respondent. The following is a summary; it is not reproduced verbatim.

86. He invited the Tribunal to make a certain findings of fact, and to prefer the respondent's evidence in areas of factual dispute.

87. As to the law, Mr Gibson referred the Tribunal to the multiple test established in the **Ready Mixed Concrete** case. He identified the irreducible minimum elements which required to establish employment status as control, personal performance and mutuality of obligation. Just because these three elements were present, did not, however, inevitably indicate employment status. In contrast if any of them were absent, employment status cannot be established.

88. Mr Gibson acknowledged the dicta of the Supreme Court in the **Uber** case to the effect that status is primarily a question of statutory, not contractual interpretation but submitted that this does not render the written contract irrelevant. The written terms are not determinative, but remain part of the whole factual matrix to be considered. Regardless of the dispute over the versions produced, Mr Gibson said the parties agreed that a contract was signed and the substantive terms it contained.

89. Mr Gibson disputed that here was sufficient control to indicate employment.

a. It was clear, he said, that the claimant couldn't be ordered to go to a particular site
b. **Redcats** was authority for the proposition that where an individual is free to work or not on a whim or fancy, that is not consistent with him holding worker status (and by extension, employment status).
c. There was little evidence, in his submission, of detailed control of how the claimant did his work. He referred to the possibility of the claimant receiving fixed price work where the respondent would exercise no control over the speed with which the work was carried out.
d. There was no evidence, said Mr Gibson, that the claimant required to turn up at a particular time or leave at a particular time, so long as his time sheets were accurate. He might notify the respondent if he wished to take time off, but such notification was a courtesy and not required.
e. The respondent did not exercise control through the appliation of a disciplinary procedure.

90. With regard to personal service, Mr Gibson relied on clauses 3.6 and 3.7 of the written contract which indicated the claimant could utilise "replacements or helpers" in the performance of the services. The fact the right had never been exercised did not mean it did not exist.

91. There was, he argued, no mutuality of obligation which was a barrier to employment status. To establish mutuality Mr Gibson asserted the claimant would need to show a right to a retainer during periods when work was not offered. The respondent was not obliged to offer work, he said, and the claimant was not obliged to accept it. Nor did Mr Gibson accept that there might be mutuality of obligation for each individual assignment to a site by the respondent whereby once the work had been offered at the particular site and the claimant had agreed to go, he was obliged to attend and carry out the work. There was no evidence, he said, to suggest this was so. The claimant could take holiday or time off for medical appointments as requested and there was no evidence that once he's agreed to work at a particular site, he was obliged to turn up there for any particular length of time.

92. Mr Gibson turned to other factors that may be considered as part of the overall picture.

a. He pointed out there was no exclusivity and the claimant was entitled to work for others if he so wished. Again, it was observed that just because he didn't exercise that right didn't mean it didn't exist;
b. The claimant was paid according to hours worked as opposed to being salaried. He wasn't paid when he didn't work, including during the lockdown. He was taxed under CIS, not PAYE.

93. These matters, he said, supported a view that the claimant was running a business undertaking on his own account and that the respondent was his customer.

94. On the question of worker status, Mr Gibson referred to the dicta of Lady Hale in **Bates van Winkelhof** where she agreed with **Maurice Kay LJ** in **Hospital Medical Group** that "there is not a single key to unlock the words of the statute in every case". In Lady Hale's words, there is "no magic test other than the words of the statute themselves". Mr Gibson acknowledged that a limited power of substitution is not inconsistent with an obligation of personal service (**Byrne Bros**). In the present case, however, the limitation, namely the requirement for the necessary skills to provide the services to a high standard, was a small and understandable one. It was argued that the claimant failed on the first leg of the test for worker status which requires an undertaking to perform the work personally. The fact the claimant did work personally was not the real isssue. Nor was the fact that the respondent was his only customer determinative. In **Redcats** J Elias observed that a small business may be genuinely independent but may be dependent on a key or only customer.

95. In relation to the second leg, (namely whether the respondent was a client or customer of a business undertaking carried on by the claimant), Mr Gibson cited **Byrne Bros.** Determining worker status involved many of the same considerations as determining employment status, but with the bar being placed further in the individual's favour. Even if the bar is pushed further in the claimant's favour, Mr Gibson submitted, he still does not meet the test on the facts.

Claimant's submissions

96. The claimant made submissions on his own behalf. Again, these are summarised.

97. He reiterated his position on the version of the contract received and that he received it from John Watson. He noted inconsistencies in JG's evidence on the question of when the respondent found the document.

98. The contract did not, in the claimant's submission, reflect the reality of the working relationship. He required, he said to work shifts from 8-4.30. As far as mutuality of obligaiton was concerned, work was always provided and he always did it. Had he obtained his driver's license he would have agreed to go to Hamilton and Helensburgh in January 2021 but his protest was down to safety concerns.

99. He was subject to the respondent's method statements. This amounted to a description by the responent of how to do the job. Though he acknowledged he would be permitted to work for other parties outside his hours for the respondent, this, he said, was the case for most employment.

100. As far as the scope to send a replacement went, the claimant pointed out that this right was never invoked despite there being 35 – 40 subcontractors. If someone wasn't at work, it was the respondent who would arrange and send an alternative operative.

101. With regard to tools and PPE he pointed out he had received certain PPE with the respondent's logo; they weren't permitted to wear their own logo. They were not charged to use the respondent's equipment.

102. The claimant said clause 3.9 of his contract, concerned with insurance, was contradictory, but in any event no one asked him to purchase this or requested proof he was insured. JG was aware he didn't have cover.

103. Nobody raised any issue with this standard of work or competency. He repeated his evidence that he only ever rectified defective work in his normal working hours and was remunerated at the normal rate for doing so.

104. His hours of work were recorded on a time sheet by the site foreman – not by him. He was never offered fixed price work after the conclusion of his apprenticeship.

105. The claimant acknowledged that he was taxed under CIS. He was never required to issue invoices.

106. He asserted that JG's evidence that he had no authority to terminate the claimant's contract posed a contradiction, given that JG said he had signed the claimant's contract with full authority to do so.

107. He submitted the respondent exercised control over him. JG would instruct him on where to go. The commercial prices of work agreed between the respondent and their clients or head contractors were kept from his knowledge. He was paid hourly and an 8 hour shift was required. The wording of the website returned by the Google search talked about the respondent "employing 60 operatives".

108. He claimed mutuality of obligation was indeed present. Work was always provided and accepted except in relation to Hamilton and Helensburgh due to his concerns about sharing transport. He worked full time unless prevented by inclement weather and was absent only by agreement.

109. No substitution was used and there was no protocol for this.

110. The claimant referred the Tribunal to the judgment of the Manchester Employment Tribunal sitting in **Gorman** in which it was determined that the claimant, a hairdresser, was an employee of the respondent. The claimant submitted there were many similarities with the facts of his own case.

Discussion and Decision

111. The essential test for employment status was set out in **Ready Mixed Concrete**, which referred to the need for an irreducible minimum of personal service, mutuality of obligation and control. In **Autoclenz,** the Supreme Court has held that Tribunals should examine the working relationship between the parties, how that operated and what was the reality of the situation. The true agreement has to be gleaned from all the

circumstances, of which the written agreement is only a part. Contractual terms which are inconsistent with the findings of the tribunal regarding the reality of the situation may be disregarded.

112. The Tribunal requires to assess the situation on a holistic basis, considering all relevant factors. The irreducible minimum factors of personal service, mutuality of obligation and control are discussed first.

Control

113. The test for control must be applied in modern circumstances where many employees have substantial autonomy in how they operate and are left to an extent to exercise their own judgment. According to the EAT in **Troutbeck**, '*It does not follow that because an absent master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them…. The question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right to control resided* ' (paras 41, 45).

114. As a qualified stonemason, the claimant was able to work with relative autonomy although, not being long time-served in his trade, he occasionally took guidance from the site supervisor or other stonemasons engaged by the respondent. He was required to carry out his work in accordance with the Method Statements and Risk Assessments prepared by the respondent which were bespoke to each site. JG agreed the claimant required to follow these to the word or as close as possible to it.

115. The claimant was also required to use the respondent's PAT tested power tools and generators (though he used some of his own hand tools). He was required to wear the respondent supplied vest and hard hat, bearing its logo when performing the work. His working day was governed by the respondent's site hours.

116. In terms of the respondent's structure, JG gave evidence that he would always give the site supervisors their position. In practical terms, one way in which this manifested was that if he wished to speak to one of the operatives, he would contact the supervisor who in turn would instruct the operative to contact JG. The site supervisor would direct the claimant to

the tasks required. The site supervisors were also responsible for recording the hours of the operatives and relaying them back to the office for pay processing purposes.

117. In cross examination, JG was asked how, in practice, he treated the stonemasons engaged as subcontractors from the stonemasons engaged as employees. He said the employees would get full PPE which the subcontractors would not, but that otherwise he would not treat them any differently in practice. In re-examination, he was probed on differences, and repeated earlier evidence about differences in holiday pay, taxation, and PPE. However, he reiterated that "*If they were stood side by side, I'd request them to go to site and carry out the required works in the same way. In that respect, there was no difference*."

118. JG suggested in re-examination that he could only ask a subcontractor to go to a particular site whereas an employee would be obliged to go. The Tribunal does not accept that his evidence on this issue reflected the reality of the relationship. JG was unhappy when the claimant declined, due to Covid concerns, to agree to go to Hamilton on 9 January 2021. On 22 January 2021, JG came to the site gates to discuss the claimant's refusal to go to the Helensburgh site. During this exchange, he said words to the effect: "Who the fuck tells you where to go? Does Jim tell you where to go? No, I tell you where to go. Back in the day, we'd have dealt with you." Though JG denied the profanity, he accepted in his own evidence that he'd said to the claimant that it was he, not Jim Smith who told him where to go.

119. The respondent did not operate a formal disciplinary procedure in respect of the claimant, but it is clear on the facts that perceived insubordination had serious consequences. JG considered the claimant had stepped out of line in refusing his instruction to attend a particular site. He referred threateningly to the fact that, 'in the past, we'd have dealt with you.' As it was, the refusal, which on the written terms and JG's evidence was the claimant's prerogative, provoked an unpleasant altercation and culminated in JG telling him to leave and withdrawing all work.

120. As discussed further below in the context of mutuality of obligation, the Tribunal does not accept JG's suggestion that the reality of the agreement

was that the claimant could refuse to go to a particular site or that he was free to work or not work for the respondent at his whim or fancy.

121. As a qualified stonemason, it is accepted that he was not subject to detailed control, but the Tribunal is satisfied there was some degree of control as to how he went about his duties exercised both by site supervisors and through the method statements. The Tribunal does not accept that the claimant's relative autonomy as a skilled workman was inconsistent with the reality that the ultimate right of control resided with the respondent. The ultimate right to control resided with the respondent, and this was very much the understanding of both JG and the claimant.

Personal Service

122. The Tribunal has considered the provisions of the contract which the claimant signed as well as the factual circumstances in which he performed work for the respondent. A finding of fact has been made that the claimant always provided personal service to the respondent. As Langstaff commented in **Byrne Bros** at 672 paragraph 11 in the context of labourers and carpenters, '*As a matter of common sense and common experience, where an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work*.' Such was the experience of the claimant and his fellow operatives engaged by the respondent in this case to do specialist stonemasonry work at the respondent's sites.

123. Was there a genuine right of substitution that belied the presence of personal service? The inclusion of a substitution clause in the claimant's contract only makes sense against the background of an understanding that, subject to its provisions, the services were to be provided by the claimant personally. An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally (**Pimlico Plumbers** at para 84). One which is limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, likewise be inconsistent with personal performance (*ibid*.).

124. Before coming to the clauses 3.6 and 3.7, the Tribunal reminds itself of the Court of Appeal's guidance in **Kalwak** where Smith LJ stressed that the correct test is whether the clauses in question reflect the true intent of the parties. It is not enough *per se* to show that the clause in question was never activated. The Tribunal must seek to determine the true agreement between the parties, acknowledging that the relative bargaining power must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed (**Autoclenz**, para 25). The primary question is one of statutory, not contractual interpretation.

125. The terms of Clause 3.6 and 3.7 are these.

> *3.6 The Subcontractor may utilise any such persons as it considers appropriate in the performance of the services including any replacements of helpers thereof provided any such persons possess the necessary skills and expertise to provide the services to a high standard.*
> *3.7 Where additional or replacement people are engaged by the Subcontractor, the Subcontractor will remain responsible and accountable for the Services provided and for any payments due to such persons. The Company will not have a direct contractual or financial relationship with any such persons unless it has been agreed in writing between the parties.*

126. Clause 3.6 is unhappily drafted. It is not clear whether the 'replacements' referred to in that clause extends to replacements of the Subcontractor or only to replacements of 'helpers' of the Subcontractor. It was undisputed by the respondent's only witness, JG, not only that the clause had not been invoked by the claimant, but that in the 11 or 12 years JG had been with the respondent, it had not been invoked by any of the operatives with whom the respondent entered these written terms. Though this evidence is not *per se* sufficient to demonstrate that the right to send a replacement set out in clause 3.6 did not exist, in all of the circumstances the Tribunal is satisfied that the clauses do not reflect the reality of what the parties agreed.

127. The Tribunal did not accept JG's evidence that a substitute would have been accepted had one been sent. He was hesitant in his answer and he went on to note that they would only have done so if the quality remained high and said, '*that's why they [the respondent] give their stone masonry work to certain individuals - because of the quality …*'. The claimant's belief was that he would have been told by the site foreman *'to jog on'* had he attempted to send a replacement stonemason.

128. He gave a number of reasons for his view. Any replacement would require to be inducted on the site by the foreman which would cost the respondent time and labour (both the replacement's and the foreman's). The replacement would require to be provided with copies of the respondent's method statement and risk assessment for signature. The respondent required operatives to wear vests and hats bearing the respondent's logo and such PPE would require to be sourced for the replacement and any 'helpers' arriving at site. The respondent would also require to verify the credentials of any replacement. There was no protocol for how any of these things might be managed.

129. Assuming for present purposes that clause 3.6 should indeed be read as conferring a right to send a replacement of the claimant (defined the written agreement as the Subcontractor) as opposed to a replacement of a helper, the only proviso to the substitution right is that such replacements possess the necessary skills and expertise to provide the services to a high standard. In theory, based on these terms, the claimant – or any of his fellow subcontractor stonemasons - could send replacements without any prior notice for short bursts of time or work - potentially an hour here or there. The Tribunal is not persuaded such an entitlement reflects the true agreement, given the practical and economic implications this would entail for the respondent.

130. In practice, absences, including holidays, were covered by other operatives engaged by the respondent as subcontractors on similar terms to the claimant. They were paid direct by the respondent and not via the claimant.

131. The call between the claimant and JG on 9 January 2021 began with the claimant discussing one of his classmates from College, now a qualified stonemason, who was looking for work. JG had work available and the claimant put the two in contact. In the very same call, JG asked the claimant to work at the respondent's site in Hamilton the following day. When the claimant said he could not do so, JG's initial response was that the claimant had to 'go where the work goes.' That it did not enter the contemplation either of the claimant or of JG that the Hamilton issue could be resolved by the claimant simply invoking clause 3.6 and sending his classmate in his place encourages the Tribunal's in its view that the reality of the parties' intent is not reflected by that clause.

Mutuality of Obligation

132. In the context of employment status, a requirement has been expressed for an 'irreducible minimum of obligation on each side.' (**Nethermere (St Neot's)**). The precise formulation of the obligation on the employer's side has varied in the caselaw. It may often be to provide work and pay for it, but if a retainer is paid during periods when no work is provided, that may suffice (**Clark** at para 41). It is possible for the obligation to provide work to be implied. In **Airfix,** the EAT upheld a tribunal's decision, implying a contract of employment over a period of seven years, with the employee normally working five days a week, notwithstanding an ostensible lack of obligation on the company to continue to provide work. The minimum obligation on a putative employee, on the other hand, is that they must be obliged to accept and do work provided, though an obligation to do a certain minimum amount of work may suffice (**Nethermere**).

133. When it comes to worker status, in contrast, the question of mutuality relates to only whether there is sufficient mutuality of obligation to found a contract at all (i.e. whether there was an intent to create a legally binding relationship - **Singh**). In **Somerville**, the EAT notes that the term 'mutuality of obligation' had been used in two senses in the caselaw:

    (i) Denoting the exchange of promises or consideration from each party of a kind necessary to create any form of bilateral contract (referred in the decision to 'mutuality of obligation'; and

(ii) Referring to an obligation on a putative employee to accept and perform some minimum amount of work for the putative employer who is obliged to offer and / or pay for the same (referred to as the 'irreducible minimum obligation').

134. For worker status, there is no need for mutuality in the second sense described, only in the first.

Did the claimant have an irreducible minimum obligation to accept work?

135. The Tribunal finds on balance, that contrary to the written terms, the reality of the relationship was that the claimant did have a minimum obligation to accept work offered by the respondent.

136. His contract provides that:

> *3.2 The Subcontractor is under no obligation to provide any Services to the Company whatsoever and is free to decline to provide any Services at any time, both in respect of any current work or services it is undertaking and any future work it may be offered by the Company. The Subcontractor also retains the right to refuse to work at any place or location.*

137. Until January 2021, the claimant had never declined work offered by the respondent as a labourer, an apprentice or a stonemason. In that month, there were two occasions when the claimant declined to attend the site at which Mr Gibson asked him to work. Both times, his reason was a concern about the implications of the proposed travel arrangements for the health and safety of his mother who was particularly vulnerable to Covid 19. He was ready and willing to work at any site of the respondent that did not entail the risk of Covid he perceived from van sharing.

138. The response the claimant obtained to such refusals offers insight into the true nature of the agreement between the parties. On the second occasion, on 22 January 2021, the claimant's continuing refusal resulted in an angry tirade and an instruction to "just finish up now". This passage of evidence tends to indicate that Clause 3.2 did not reflect the reality of the agreement between the parties. In truth, the claimant was not really entitled to refuse to work at any time, or to refuse to work at any location.

139. On the previous occasion on 9 January 2021, when the claimant refused to attend the Hamilton site, it is acknowledged that JG ultimately capitulated and sent someone else. The Tribunal considered whether, in all the circumstances, JG's capitulation on that occasion evidenced a genuine right to refuse work on the claimant's part that was incompatible with the minimum obligation on employees to accept work. It was not considered that this sequence rendered impossible the presence of a minimum obligation on the claimant to accept work. The claimant was ready and willing to work on both occasions. There are limits on the obligation to serve. For example, an employee who cannot serve through illness is not to be regarded as in breach of their obligation (**O'Grady**). Employees have certain statutory protections under sections 44 and 100 of ERA from detriments and dismissals where they leave a place of work or take steps to protect themselves in certain circumstances of danger. The Tribunal is not concerned with those statutory provisions in this case, other than to observe that Parliament has contemplated that an employee departing his workplace without permission in certain prescribed circumstances shall not be incompatible with his employment status.

140. In any event, once the claimant agreed to go to any particular site he was asked to attend, the Tribunal was satisfied that the reality was that he was obliged thereafter to attend that site during the site hours until such time as the respondent asked him to attend a different site. Mr Gibson said that the claimant's ability to agree time off for medical appointments or unpaid annual leave and the absence of any specification on commencement at a particular site regarding the duration of the assignment precluded such an analysis. The Tribunal does not agree. The taking of annual leave by prior arrangement is not inconsistent with the minimum obligation to perform work required for employment and nor is the taking of time off by prior arrangement to attend medical appointments.

141. The Tribunal finds on balance that the reality of the relationship was that the claimant's right to seek time off was not an unfettered one. There was, in truth, a requirement for prior notice of time off. This was described as a 'courtesy' but the Tribunal accepts in reality it was as much a requirement as it had been when the claimant was acknowledged by the respondent to be an employee, during his apprenticeship. Nor did the tribunal accept that

the reality of the agreement was that the claimant had the right to take time off frequently or whimsically for any or no reason. When asked about the claimant's right to decline work, JG repeatedly referred in his evidence to there being no problem with the taking of time off for a medical appointment. The Tribunal was satisfied that if the claimant had sought to decline hours or reduce his hours to some subset of the standard site hours for no reason other than personal preference, this would not have been tolerated.

142. The true agreement between the parties was not that the claimant had a right to refuse work. Any limitation on his obligation to serve where he perceived a risk to his mother's health was compatible with the minimum obligation for employment. In any event, once he had agreed to go to a site, he was in reality obliged to continue there, working the relevant site hours until told to go elsewhere, subject to time off taken for reasons and arranged in a manner compatible with employment status.

Did the respondent have an irreducible minimum obligation to provide work and / or pay?

143. The written contract sets out that '*The Company is under no obligation to, and provides no guarantee it will, provide the Subcontractor with any work whatsoever*.' Nevertheless, with two exceptions discussed below, throughout the claimant's engagement with the respondent as both a labourer and a stone mason, the respondent has provided the claimant with, and paid him for, work on a full-time basis. The Tribunal considered whether, despite the contrary written terms, the reality of the agreement was that there was an implied obligation on the respondent to provide work.

144. The first exception was that when it rained, the respondent sent the claimant and other operatives home without work or pay. The Tribunal did not consider this fatal to the possibility of an implied obligation on the respondent to provide work. A qualification on the obligation that it was subject to permissive weather conditions did not, in the Tribunal's view, bring it below the irreducible minimum requirement.

145. The second exception is was the period of the first Government lockdown when, from 28 March to 22 June 2020, the respondent neither offered the claimant work nor pay for. The Tribunal was mindful that many companies whose staff were engaged as employees will equally have omitted to offer work during this period owing to the restrictions imposed by the lockdown. However, a difference is that those companies broadly continued to pay their 'employees' a wage which was often reduced with their agreement, albeit largely funded with furlough grant monies. In that scenario, the minimum obligations subsisted.

146. In the present case, the experience in spring 2020 when, for nearly three months, the respondent provided neither work nor pay, militates against the implication of an obligation to provide work or pay through the course of conduct between the parties. In the absence of such a minimum obligation on the respondent's part, the claimant cannot succeed in establishing employment status. However, the absence is not necessarily fatal to a determination that the claimant was a worker (**Somerville**).

147. It has been found that, subject to the limitations acknowledged above, the claimant was obliged to accept work when offered and that when he did agree to go to a site, he was obliged to continue working there until he was sent elsewhere or the work ceased. It was agreed that where work was provided, the respondent would pay for it at an agreed hourly rate. There were legal obligations on each side sufficient to create the necessary contractual relationship in the context of worker status. The first limb of section 230(3)(b) which requires the existence of a contract whereby the claimant undertakes to do or perform personally work or services for the respondent is, therefore, met.

Was the respondent a client or customer of a business undertaking carried on by the claimant?

148. It remains for the Tribunal to determine whether the respondent's status by virtue of the contract between the parties is that of a client or customer of a business undertaking carried on by the claimant for the purposes of the second limb of the worker test in section 230(3)(b). Useful guidance is provided by **Byrne Brothers:**

> *… the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's length and independent position to be treated as being able to look after themselves in the relevant respects. Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services — but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.*

Other Factors

149. The claimant and others in his category worked full time for the respondent. The claimant did not offer his services to other customers or clients but acknowledged he could have done 'homers' for consideration for others at the weekends. In line with the Tribunal's earlier conclusions about the reality of the relationship and the claimant's obligation to accept work save in limited circumstances, it is found that the respondent would not have objected to the claimant working for others, but only insofar as such work was outside the hours the respondent expected the claimant to work for it.

150. The claimant was taxed as self-employed under the CIS. He registered with HMRC as self-employed and obtained a UTR. The label in the written contract ascribed to the claimant was that of an 'independent business'.

151. The claimant provided some, but not all, of the tools used to do the work. He also provided some, but not all, of the PPE he used.

152. He was paid only for hours worked and not for holidays or sick pay.

153. There was no system of performance management appraisals nor were there any grievance or disciplinary procedures in place for operatives classed as subcontractors such as the claimant.

154. The claimant did not actively market his services to the world in general or to the respondent. He and he and the other operatives classed internally by the respondent as subcontractors were held out to third parties as representatives of the respondents, in that they required to wear branded hats and vests. The respondent's dominant purpose was to provide stonemasonry services and its workforce of stonemasons, including the majority of those who were categorised as subcontractors, were essential to the delivery of those services. This body of workers were integral to the respondent's business and highly integrated into its workforce.

155. In terms of the labels used by the parties, the written terms refer to 'self-employed subcontractor' and an 'independent business'. However, the respondent was not always consistent in applying this label. It marketed itself on its website as '*employing 60 operatives'* although as mentioned, internally, it classified a majority of those as subcontractors. JG said to the claimant on 22 January 2021, '*do you want to remain employed by Conservation Masonry or not?*' Ross Fergusson also made reference to employment. He said in his message in January 2021 '*the best solution I believe to maintain employment is that you move entirely to Andrew Watson's control'.*

156. The respondent, not the claimant, set the prices to be charged to the respondent's clients and the claimant was remunerated at an hourly rate for the work he undertook with no visibility of the pricing arrangements between the respondent and its clients.

157. The claimant did not require to submit invoices or, latterly, even timesheets. These were attended to by the site foreman.

158. The claimant did not take out insurance and the respondent never asked him about his insurance situation. He was never asked to rectify any substandard or defective work he had carried out in his own time. When something required to be fixed, the claimant would attend to it during his usual paid hours.

159. The claimant required to perform the work personally and was subject to control by the respondent with respect to where and when the work would be carried out, as well, to an extent, as how it would be carried out.

160. As said by Mummery J in **Hall v Lorimer,** it is necessary to '*stand back from the detailed picture which has been painted by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole*.' Though said in the context of employment status, it is equally applicable in assessing whether the second limb of the worker status test is met.

161. Standing back from the picture and appreciating the whole, the Tribunal concludes that, in reality, the respondent was not a client or customer of a business undertaking carried on by the claimant. The claimant was engaged to perform work personally for the respondent pursuant to a contract, the reality of which was not reflected in many of the written terms. This is a case of the sort alluded to in *Byrne Bros* where, on assessing the overall picture, the claimant does not qualify for protection as an employee but does meet the 'lower pass-mark' needed to do so as a worker.

Conclusion

162. The claimant was not an employee of the respondent, as defined in s.230 (1) of the 1996 Act in the period between mid-September 2019 and January 2021 because the irreducible minimum obligation on the respondent to offer work and / or pay was not present. Nevertheless, there was a bilateral contract between the claimant and respondent whereby he undertook to perform work personally. On evaluating the overall picture, the Tribunal concludes that the claimant meets the bar set by the second limb of the worker test as defined in section 230 (3) (b) of ERA. He was, therefore, a worker but not an employee in the period starting on or about 18 September 2019 and ending on 22 January 2021. The claimant's complaint of unfair dismissal is, therefore, dismissed. His claims for unauthorised deductions from wages, for which worker status suffices, can proceed.

Employment Judge: Lesley Murphy
Date of Judgment: 26 September 2021
Entered in register: 01 October 2021
and copied to parties