5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4112262/2019

Heard at Glasgow on 17 February and 5 October 2020

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Employment Judge: L Doherty

Mr C Baird	**Claimant** **Represented by:** **Ms Morrison –** **Strathclyde Law Clinic**
SBT Builders	**Respondent** **Represented by:** **Mr Smith –** **Solicitor**

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25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that;

(1) the claimant is not an employee of the respondents in terms of Section 230(1) of the Employment Rights Act 1996 (the ERA) and the Tribunal does not have jurisdiction to consider his claims of unfair dismissal, failure
30 to pay a redundancy payment, and breach of contract.

(2) the claimant is not worker in terms of section 230(3) of the ERA and the Tribunal does not jurisdiction to consider the claim for failure to pay holiday pay under the Working Time Regulations 1998.

35 **REASONS**

1. On 5 November 2019 the claimant presented claims of unfair dismissal, failure to pay a redundancy payment, breach of contract in respect of failure to give notice, and failure to pay holiday pay.

2. All the claims are denied by the respondents. An issue arose as to the claimant's employment status, in particular whether he was an employee, failing which a worker, and this Preliminary Hearing (PH) was fixed to determine that issue.

3. It is accepted that all the claimant's claims, other than his claim in respect of failure to pay holiday pay, are contingent upon him establishing employment status. The claimant's claim of failure to pay holiday pay is contingent upon him establishing employment or worker status.

4. The claimant was initially represented by Ms Zydek, of Strathclyde University Law Clinic. The hearing did not finish in the one day allocated to it and Ms Morrison of Strathclyde Law Clinic appeared for the claimant at the continued hearing. The respondents were represented by Mr Smith, solicitor.

5. The claimant gave evidence on his own behalf, and for the respondent's evidence was given by Mr Stephen Mahoney and Mr Thomas Mahoney, both directors of the respondent company.

6. A joint bundle of documents was produced. Mr Smith produced this on the morning of the first day of the hearing, and it contained some information which the claimant's representative has not previously seen. There was a short delay to the start of the hearing to allow Ms Zydek to take instructions, and she was able to confirm that the hearing could proceed with the documents produced.

Findings in Fact

7. The respondents are a company of labour only subcontractors, supplying bricklaying services on a subcontracting basis to the building industry. The company was established in 2004, and has three directors, Stephen, Thomas and Billy Mahoney . The majority of the work which the respondents carry out involves building new homes, but they also carry out a small amount of renovation work.

8. On average, the respondents engage between 30 and 40 bricklayers and labourers. The number of operatives is contingent on the amount of work which the respondents have, and can fluctuate. At its highest the respondents engaged around 60 operatives

9. The respondents regard all their operatives, other than apprentices, as independent subcontractors. The respondents have no obligation to offer work to operatives, and the operatives has no obligation to take work which the respondents might offer them.

10. For new build work, which is the majority of the respondents work, the respondent's bricklayer operatives are paid on the basis of a rate of pay for the number of bricks which they lay; they are paid a rate calculated by reference to the 1000 metreage of the bricks laid, or the number of blocks laid. This method of payment is common for bricklayers within the building industry, and is one which was familiar to the claimant.

11. The operatives work in squads, depending on the requirements of the work. On occasion the respondents will direct who will work in a squad but often the operatives decide for themselves on the composition of the squad. A squad will generally comprise of a number of bricklayers, with a smaller number of labourers. The squad is then paid on a weekly basis, based on of the number of bricks laid. The bricklayer members of the squad will generally know the number of bricks which are required to be laid in constructing the building they are working on.

12. Mr Stephen Mahoney measures the bricks laid on a weekly basis. He then agrees with the bricklayers in the squad the amount which was to be paid. Usually one bricklayer from the squad takes the lead in these discussions. This sum is dependent on the metreage of the bricks laid. From that amount the labourers in the squad is paid first from what was left, Mr S Mahoney splits the money between the bricklayers in the squad as determined by them, and that sum was paid directly into their bank accounts. Mr S Mahoney is not involved in determining how the money was split between the bricklayers in the squad; this was a matter which the bricklayers agreed upon among

themselves. Examples of Mr S Mahoney's calculations, and the splits agreed between the bricklayers are produced at pages 77 to 80 in the bundle.

13. An operative can earn more or less depending on the speed at which he lays bricks and his hours of work. For example, if a squad took two weeks to build a house the bricklayer would earn more per week than he would earn if the squad took three weeks to build the same house. The operative's ability to work, and to consequently earn more money, was limited by restrictions on access to site as work could not be carried out when the site was closed.

14. Payment is made to the operative by the respondent's net of tax in accordance under the CIS scheme. In terms of that scheme the operative remains liable for payment of his own national insurance.

15. Remedial work, which formed a small part of the respondent's business, is paid on an agreed daily rate of pay with the operative.

16. The respondents could not insist that operatives attended work, and it was not uncommon that squads would move elsewhere on short notice for a better rate of pay per metreage of bricks laid. If that happened the respondents would engage the services of other bricklayers who were available to perform the work.

17. As subcontractors the respondents were only paid by the client for work which they did. If they did not do the work, then they were not paid. There was no obligation on the respondents to pay any operative, other than for the work he performed for them.

18. The work carried out by the bricklayers on the squads was not supervised by the respondents, but in order for the respondent's be paid by their client the work had to be approved by the site agent, or a Clerk of Works appointed by their client. If the work done by an operative was deemed by the Clerk of Works to be defective, the operative had to remedy it at his own cost.

19. The claimant has worked as a bricklayer for a number of years. For the majority of his working life the claimant has not regarded himself as being employed, with the exception of a spell when he worked for a company, which subsequently went into liquidation. Other than this spell of employment he

has regarded himself as self-employed. He is a member of the Inland Revenue's CIS scheme.

20. Around mid- July 2005 the claimant received a call from an ex workmate, who told him that Stephen Mahoney was looking for bricklayers. The claimant understood the respondents to have contracts with Persimmons Homes and Miller Homes, and therefore to have a lot of work for bricklayers. The claimant telephoned Mr Mahoney and told him that he was looking for work. Mr Mahoney told the claimant he could go to a site in Yorker the following Monday where work was available.

21. Mr Mahoney explained to the claimant that he would be paid on the basis of the meterage of bricks which he laid, and he gave him the rate of which applied at that time. The rate of payment for meterage of bricks laid changed from time to time dependant on the work the respondents were carrying out.

22. Thereafter, the claimant provided bricklaying services on a regular basis, to the respondents. The respondents were not under any obligation to provide the claimant with work, even when they had work available, and the claimant knew this. The claimant was not under any obligation to accept work which was offered to him. The claimant took the view that in the main it was better for him to accept work when it was offered as he considered that this made it more likely that he would be offered work in the future by the respondents. When the claimant finished working on a site he would generally ask if other work was available, and he was regularly offered work if it was available. The respondents however did not rely on the claimant to perform this work, and had the claimant not accepted the work they offered, or he did not accept it, they would have engaged another bricklayer,

23. In the period from July 2005 until around the end of July 2019 the claimant worked regularly for the respondents. The extent to which he worked was significantly influenced by his financial imperative of earning money.

24. When the claimant attended work on site, he reported to one of the respondent's directors, if a director was on site, failing which he would report to the site agent. He had to sign in on the site when he arrived and sign out

when he left. For health and safety reasons this sign in process has to be undertaken on building sites. When he reported for work on site the claimant would be told what work was required to be done by the Director or the Site Agent, for example, he would be told what plot to build on. His performance of that work was not overseen to any degree of detail by the Director or the Site Agent.

25. In the main the claimant worked in a squad with other bricklayers and labourers. He understood the basis on which he was paid, which was that the squad was paid on the basis of a measurable number of bricks laid by them in the period of week; from that amount the labourer(s) in the squad had to be paid first, and after that there was a split of what was left over, which was agreed between the bricklayers themselves dependant on the work which they had each done. That split could be affected, for example by the number of days each bricklayer had worked in the week. The agreed split was then paid directly by the respondents into the claimant's bank account. The respondents did not decide upon how payment was split between the bricklayers in the squad. The monies which the claimant received were referred to as wages. The claimant frequently received the same or a similar amount of pay, but it did also fluctuate.

26. For the duration of the time when he worked with the respondents, the claimant was responsible for his own national insurance payments, and he submitted a self-assessment tax return to the Inland Revenue. The claimant received statements from respondents three or four times a year confirming the amount he had been paid. He did not engage an accountant.

27. The claimant did not have to tell the respondents if he wished to go on holiday. He did not have to tell the respondents if he did not intend to come into work on a particular day, or if he was going to be late for work or leave work early. The claimant however often did as a matter of courtesy advise the respondents if he did not intend to work, when work had been offered.

28. The claimant did not require to work any fixed hours, although as a matter of practicality the hours which he could work was limited by when he could obtain access to the site. For example, a site might not be open before 8 am. The

claimant could work on after the other members of the squad left the site if he wished to do so.

29. Had the claimant wished to substitute another worker to the respondents in place of his own labour, he would have been able do so provided the individual was a trained bricklayer, who could have provided bricklaying services. Had the claimant exercised his right to substitute, the respondents would have paid the claimant, who in turn would have had responsibility to pay the worker whom he had supplied to the respondents.

30. The claimant did not realise he could have substituted his labour. The respondents have only had one instance of a bricklayer substituting labour; in that instance the operative arranged for his brother to attend work in his place. It would have been unexpected or surprising for the respondents had the claimant offered a substitute, but if he had provided a substitute who was suitably trained, they would have accepted this.

31. The claimant had his own public liability insurance, until approximately three years ago. He cancelled this on the advice of a financial adviser. The claimant did not tell the respondents that he had cancelled this insurance.

32. The claimant supplied his own tools for carrying out his work. He was provided with a high viz vest, branded with the respondent's logo. The main contractor insisted that sub-contractor operatives wore vests branded with the subcontractor's logo on site for health and safety reasons, as it allowed the Site Agent to identify personnel working on site.

33. The claimant was not supervised in the performance of his work, albeit the final product of his work had to be approved by the respondent's client or their agent. Mr Tomas Mahoney worked on the sites as a bricklayer and he was generally the first port of call for the Site Agent or Clark of Works , in the event they were not satisfied was a piece of work. Mr T Mahoney would inspect the work if there was a problem. He wanted the respondent's operatives to carry out work to a good standard to ensure the respondents had a good reputation. Had work performed by the claimant not met the standards of the main contractor, he could be required to redo it at his own expense.

34. The respondents did not provide the claimant with training, although on occasion the claimant was provided with training by clients of the respondents. The claimant has no line management responsibility for other workers.

35. The claimant did not receive sick pay, or holiday pay. He was not entitled to a pension, or any other benefits from respondents. He was not subject to a disciplinary procedure at the instance of the respondents. He or the respondents were not subject to any notice requirements.

36. The claimant could have worked elsewhere, had he chosen to do so. The claimant on occasion carried out 'homers' for family and friends, but other than that he chose not to work elsewhere. He did not market his services elsewhere.

37. Generally, the claimant travelled to work by his own means, although on a small number of occasions he was collected and taken to work in the respondent's van .

38. The Claimant was supplied with a contract by the respondents, in or around 2012 (pages 26 to 28 of the bundle).

39. The contract provides, the following;

    1 that the claimant will provide bricklaying services;

    2 he will not be entitled to holiday or sick pay;

    3 he will be entitled to substitute or delegate at his absolute discretion to undertake the services to be provided;

    4 he is entitled to hire assistance at his own expense;

    5 SPT will not control or have any right of control in any detailed manner how the claimant fulfilled his bricklaying services;

    6 SPT would not set the hours worked by the claimant, and that the claimant could choose how and when to complete the services rendered so long as his performance was satisfactory.

7 the claimant would be paid on a basis to be reviewed from time to time

8 that the claimant will be able to benefit from his own effort and sound management and may freely undertake work from other parties;

5 9 that both parties considered and intended their business relationship to be one of self-employment and not of master and servant. The contract provided specifically the both parties acknowledged that the 'contract of service' did not give rise to a contract of employment. It provided that both parties considered the claimant to be on business
10 on his own account.

10 that the claimant is responsible for his own income tax and national insurance liabilities ;

11 that both parties acknowledged that this contract for services could be terminated at any time without notice, and will be periodically
15 reviewed in any event. The claimant was not under an obligation to provide bricklaying services and SPT were not under an ongoing obligation to contract for such services.

12 that the claimant will be responsible for providing equipment and materials as appropriate;

20 13 that the claimant will responsible for providing his own public liability insurance;

14 that the claimant will responsible for correcting any defective work in his own time, without payment;

15 that the claimant will not be entitled to company benefits.

25 40 The contract provided that both parties acknowledged that they had been advised to take independent legal advice on the contents of the 'Contract for Services'.

41 The claimant signed the contract, but it was not dated. The contract was signed on behalf of the respondents in 1 June 2012. A copy of the contract
30 was made available to the claimant.

42 The claimant regarded himself as being self-employed, and he wished to be regarded as self-employed. This was his position in 2012 when he signed the contract with the respondents. He later began to question his employment status when he was told by HMRC that he could not claim travel expenses to work, as the statements issued by the respondents showed his place of work as Cumbernauld, rather than noting all the sites which he travelled to.

43 In November 2019 Mr Robin Mackay (page 81 of the bundle), the assistant site manager for Mactaggart Construction, a client of the respondents, emailed the respondents complaining about the claimant's work, and the fact that he was constantly late and failed to show up on many occasions. Mr Mackay states in that email that he was told by Mr Stephen Mahoney the claimant was self-employed and was able to work when it suited him.

Note on Evidence.

44 The Tribunal heard from the claimant, and from Mr Stephen, and Mr Thomas Mahoney, directors of the respondent company. In the main the Tribunal found the respondent's evidence to be credible and reliable.

45 While the Tribunal did not form the impression of the claimant sought to deliberately mislead, it did form the view that his evidence was on occasion unclear, and contradictory, that on occasion he sought to embellish the position, and that his position on some matters lacked credibility.

46 Mr Stephen Mahoney gave a convincing explanation of the basis upon which the claimant was paid, and the basis upon which the claimant and other bricklayers were engaged by the respondents. Support for Mr S. Mahoney's evidence was found in an email from Mr Robin Mackay (page 81 of the bundle), the assistant site manager for Mactaggart Construction. In that email Mr Mackay complains about the claimant's work, and the fact that he was constantly late and failed to show up on many occasions. Mr Mackay states that he was told by Mr Stephen Mahoney the claimant was self-employed and was able to work when it suited. The fact that Mr Mackay recorded this as being Mr S Mahoney's position tended to suggest that as far as Mr S Mahoney was concerned this was the reality of the situation, and he could not

insist that the claimant attend work, or attend work at any particular time, as he said in evidence.

47 This position was in fact also supported by the claimant's evidence. The claimant accepted that the respondents were under no obligation to offer him work even when they had work available, and equally he has no obligation to accept work. He explained that he regularly accepted work, as he considered this would increase his chances of being offered more work by the respondents. He also explained that as a matter of courtesy he tended to advise the respondents if he was unable to work when work was available to him. The claimant accepted that he could or simply not work, whatever he chose, and did not require to inform respondents of this.

48 The most significant conflict between the claimant's evidence and that of Mr Stephen Mahoney was in relation to how the claimant was paid. It was the claimant's evidence that when he initially spoke to Mr Mahoney, he was told by him that he would receive around £450 for five days work and that Mr Mahoney consider this to be a fair wage. It was the claimant's evidence that he did not know from week to week what he would be paid. The claimant denied all knowledge of being paid on the basis of measurable bricks laid. He stated he was only asked on a few occasions to provide a note of the bricks he had laid, and that measurements were not taken of this by the respondents.

49 Mr S Mahoney on the other hand gave convincing evidence as to how bricklayers, including the claimant, were paid, the details of which are set out above in the findings of fact. The Tribunal preferred this evidence over that given by the claimant. The Tribunal considered that it lacked plausibility that the claimant, as he claimed had no notion of how his wages were calculated each week but, as he said, he surmised he may have been paid more for some weeks than others because the respondents were happy with his work. Furthermore the claimant gave evidence about working in a squad, and the need to pay for the labourer first, which was consistent with the evidence given by Mr Mahoney as to how bricklayers were paid, and on balance the Tribunal was satisfied that his evidence about how the claimant was paid was

to be preferred over the claimant's evidence. The fact that the payments which the claimant received were referred to as 'wages' and that he was often paid a similar amount was not inconsistent with this conclusion.

50 The Tribunal also accepted that the majority of the work which the respondents did was new build construction, and therefore the work performed by the claimant and other bricklayers subcontracted by them was measurable in the way described by Mr Mahoney. The claimant claimed that he also did remedial work which could not be measured in the same way. Mr S. Mahoney accepted that a very small percentage of the work done by the respondents was remedial work, and the Tribunal accepted this. It also accepted Mr S Mahoney's evidence that on the occasions when the claimant did remedial work he was paid at an agreed daily rate.

51 The claimant was taken in cross examination through each of the terms of the contract produced in the bundle. His position was not entirely consistent on this. In answering the questions in cross -examination it was explained clearly to him that he was not just been asked to confirm what was said in the contract, but was being asked to confirm if the terms of the contract reflected the reality of his position vis-à-vis the respondents. The claimant accepted that the majority of the terms did reflect the reality of the situation. He sought to move away from this position somewhat on some points in re-examination however the Tribunal formed the view that the contract terms did reflect the reality of the situation.

52 The Tribunal considered the clause in the contract which stated that the claimant would be entitled to substitute a delegate at his sole discretion to undertake the services provided. The claimant claimed that he was unaware that he could have substituted his labour with that of another bricklayer. The Tribunal accepted that the claimant may not have thought about offering a substitute, but it was satisfied that in terms of the contract which he had signed, he was entitled to do so, and that had he elected to do so the respondents would have accepted a substitute subject to him being a trained bricklayer.

53 In reaching that conclusion the Tribunal takes into account that the claimant never in practice invoked the power of substitution, and that the respondents could give only one example of an operative who substituted his labour for that of his brother. It also takes into account Mr Mahoney's evidence to the effect that he would have been surprised at the claimant offering a substitute and it would have been unexpected, because, as he put it of 'the way he was'. Mr S Mahoney's evidence was however that had the claimant wished to send a substitute, provided they were a trained bricklayer, then the respondents would have accepted this, and on balance the Tribunal accepted this was the case. In doing so it takes into account the flavour of the evidence generally was that respondents needed operatives to carry out bricklaying services, and it was the provision of the service, rather than the identity of the individual who provided it which was important to them. This emerged from Mr S Mahoney's evidence to the effect that teams or squads of bricklayers sometimes moved off site because the pay per meterage for bricks was higher on another site; there was nothing the respondents could do about this and if this occurred the respondents replaced them with other bricklayers. It also emerged from the fact that the respondents did not seek to exercise any control over whether the claimant worked or not. The Tribunal did not conclude, as suggested in cross examination that the respondents relied on the claimant personally. Lastly the Tribunal takes into account that although very infrequent, the respondents had allowed an operative to exercise the power of substitution.

54 In submissions it was suggested that a substitute would need to have been somebody from within the respondent's organisation. There was no evidence however to support this , and it was conjecture on the part of the claimant, who said in evidence that he thought that would be the case. The Tribunal was satisfied that as said by Mr S Mahoney the only condition imposed by the respondents imposed was that the substitute was a trained bricklayer able to provide bricklaying services. This was also supported by the evidence of Mr T Mahoney who said that it needed to be someone who could do the job safely.

55 The claimant accepted in evidence in chief and in and cross examination that he signed the contract. On re- examination he suggested that he may not have seen the terms of the contract on the basis that it was not dated, and he could not understand why that was; the Tribunal did not find this to be convincing. The claimant accepted when he signed the contract he wished to be regarded as self-employed. Nor did the Tribunal find the suggestion which emerged in cross examination of Mr T Mahoney and submissions, that the claimant had signed some other contract at some other point convincing. It found Mr Thomas Mahoney's denial of any involvement in having the claimant sign a contract convincing on the basis he explained his brother Stephen took to do with contracts. Further, no other documentation was produced for the Tribunal and there was no convincing evidence about what was contained the alleged earlier contracts.

56 The Tribunal was also satisfied that the respondents made a copy of the contract available to the claimant. The claimant denied having been given a copy of the contract. It was Mr Mahoney's evidence that a copy of the contract was available for the claimant to take away, and it appeared to the Tribunal that this was plausible. The claimant may not have taken the contract or retained a copy of it, but there was no plausible reason as to why a copy of the contract would not have been made available to the claimant. There was nothing adverse in the contract to the respondent's which would have suggested that it was not in their interests to let the claimant have a copy of it.

57 The claimant claimed that he received company sick pay on one occasion, and that he had responsibility for apprentices working on site. The Tribunal was not persuaded that the claimant had any management responsibility for any member of staff or worker on site worker on site, and accepted Mr Stephen and Mr Thomas Mahoney's evidence that they had responsibility for the apprentices.

58 It was Mr S. Mahoney's evidence that the claimant had never received any payment of sick pay, and the Tribunal accepted this. The Tribunal did not

consider it plausible that the respondents would have paid the claimant sick pay in view of the working arrangements which existed between them.

59 The Tribunal also considered the evidence as to the degree of control which the respondents exercised over the claimant's work. It was suggested in the submission that the claimant was required to work Monday to Friday from 8 am to around 4 pm, finishing early on Friday, and he had no discretion over his working hours. While the Tribunal was satisfied that these were the normal working hours on the sites in which the claimant worked, it was not persuaded the claimant was required to work those hours by the respondents. It accepted Mr S Mahoney's evidence that the respondent had no control over when the claimant turned up for work. If he was late for work or did not attend the consequence for him was would not be paid less, or not be paid at all, but that was a matter for the claimant, not the respondents. He was not disciplined for being late or failing to attend. Support for this is found in that Mr S Mahoney's email to to Mr Mackay underlines that there is nothing which he can to about the claimant's turning up for work late.

60 Ms Morrison also submitted that the respondents exercised control over how the claimant performed his work, submitting his work was instructed by either Stephen or Thomas Mahoney or one of the respondent's representatives or a site agent, and was supervised by Stephen or Thomas Mahoney if they were on site and checked by them.

61 The Tribunal accepted the evidence of Mr Stephen and Thomas Mahoney that they had directed the squads as to where to work on site, to the extent that they told them where bricklaying was required. It accepted the evidence of thereafter it was a matter for the squad to get on with the work, and there was a requirement that the work met the standards of the main contractor. Mr Thomas Mahoney said in evidence that he would be approached by the Clerk of Works if work was not up to standard, and if on site he would inspect it, and if required by their client, the work would have to be redone at the bricklayer's own expense. Mr Thomas Mahoney also said that he wanted the respondent's operatives to perform work of a good quality so that the respondents would have a good reputation. That aspiration however is not

the same as him supervising the work which the claimant carried out. The Tribunal accepted Mr Thomas Mahoney's evidence on these matters, and it was not persuaded that he exercised any detailed supervision or control over how the claimant performed his work.

5 **Submissions**

Claimant's Submissions

62 Ms Morrison helpfully produced written submissions. She took the Tribunal to the applicable law in the Employment Rights Act 1996 (the ERA), and firstly addressed the issue of employment status as an employee. She submitted that the minimum requirement to establish an employment contract where personal service, control, and mutuality of obligation. She also addressed the Tribunal on whether the claimant was integrated within the company, whether he was in business on his own account, and whether he was paying his own tax.

63 Ms Morrison took the Tribunal to the terms of the claimant's contract of employment, and made submissions to the effect that the tribunal was entitled to look behind this, and find that it was a sham. She submitted that the Tribunal was in any event entitled to look beyond the contract to determine the true relationship between the parties.

64 Ms Morrison referred the case of *Ready Mixed Concrete (South East) ltd v Minister of Pensions and National Insurance ICR QB 67*, in which it was decided that the master had to have control over the servant in order for the servant to perform personal service.

65 Ms Morrison submitted that the respondents did have control over the claimant consistent with the contract of employment. She submitted that the claimant has regular hours of work that he was required to sign in and out of work to report to officials on site and that his work was instructed by one of the respondent directors or a site agent and that his work was supervised. He had to redo work if2 the required standard was not met.

66 Ms Morrison submitted that the respondents set the claimant's rate of pay and she asked the Tribunal to accept the claimant's evidence that he had no

knowledge of how his rate of pay was calculated and therefore could not anticipate what he would receive. She submitted that the evidence shows that payments to the claimant were described as wages, consistent with the contract of employment.

5 67 Ms Morrison referred to the clause in the contract which provided for right of substitution. She submitted the claimant was never provided with a copy of the contract, and due to the nature of the arrangements it was impossible for him to exercise this. In reality the claimant did not have an unfettered right of substitution. Ms Morrison referred the case of *Leyland and others v Hermes*
10 *Parcelnet Ltd 2018 WL 03145778* where it was held that the right to substitute does not change the nature of the work relationship; if in reality no one seriously expects to that a substitute would actually be provided, the fact that the clause expressly provides for this unrealistic possibility will render it meaningless, even though the mere fact that right was never exercised would
15 not suffice.

68 Ms Morrison submitted the claimant had regular hours, which she submitted was indicative of a lack of control over his own work. The respondents decide what site the claimant would be placed at. Ms Morrison referred to *Pimlico Plumbers Ltd v Smith 2107 EWCA Civ 51* in support of the proposition that
20 this power was indicative of an employment relationship. Ms Morrison submitted that the claimant said that the respondents did not have to offer him work, in reality the claimant was expected to continue to be offered work on a weekly basis by the respondent, and the respondent relied upon to accept that work and be available.

25 69 Ms Morrison submitted that the claimant was obliged personally to provide service, she referred to the cases of *Autoclenz v Belcher* and *Redrow Homes (Yorkshire) Ltd v Mr B Wright,* where it was held that the contract must be construed in light of the circumstances in which it was made including the party's intentions.

30 70 Ms Morrison also submitted that the claimant was integrated within the company and she referred the case of *Cotswold Development Construction Ltd v Williams*. She also referred the case of *James Redcats (Brands) Ltd,*

and submitted that the dominant feature was for the claimant to personally perform services which indicated his worker status.

71 The claimant submitted that the economic reality test if applied, suggested the claimant was an employee. He was not in business on his own account, and did not offer his services to others with the exception of family and friends. He never publicly advertised services. Ms Morrison referred to the case of *Jivraji v Hashwani* and submitted that the fact that the claimant performed services under the direction of another in return for payment. The relationship between the claimant and the respondents was one of the subordination, rather than one characterised by the claimant's independence.

72 Ms Morrison accepted that the claimant paid his own tax but did not consider too much weight should be attached to that. She submitted that the manner in which the claimant was paid was indicative of having no control over how he was paid, which was consistent with employment status.

73 In connection with determining worker status Ms Morrison took the Tribunal to the statutory test. She referred to the period of work, which was from July 2005 to July 2019 for which she submitted the claimant was paid a weekly amount. This Ms Morrison submitted was indicative of an employment relationship which was at best and an employee and at lest a worker. She referred to the case of *Pimlico Plumbers Ltd and another v Smith* and submitted the overall picture clearly points away from the claimant being truly an independent contractor. Ms Morrison referred the case of *Windle v Secretary of State for Justice (2016)EWC Civ 459* and submitted that if the tests of mutuality of obligations were passed to a lesser standard, the individual was a worker. The contract required personal service, the claimant did not undertake business on his own account. He was therefore a worker.

Respondents Submissions

74 Mr Smith also helpfully provided written submissions which he supplemented with oral submissions.

75 Mr Smith also took the Tribunal to the relevant law, and referred to the case of *Carmichael and another v National Power plc(1999 UKHL 47).*

76 He submitted that the evidence clearly pointed to there being no mutuality of obligations. The respondents were not under an obligation to provide work, or the claimant to undertake it. In the absence of this, the irreducible minimum necessary for a contract of employment was not present, the claimant was not employee.

77 Mr Smith also referred to the case of *McCafferty v Paisley Christian Social Action Centre (2004 UKEAT 0106 30)* , and took the Tribunal to the facts of that case. Mr Smith submitted it was fatal that the claimant was not bound to accept work offered to him and that is hours were not guaranteed. That, he submitted was the case here.

78 Mr Smith also referred to the case of *Thomson v Fife Council (2005 UKEAT 0064 40)* which he submitted underpinned the necessity of a mutuality of obligation between the parties.

79 Mr Smith then turned to the test of whether the claimant was a worker in Section 230 (3) (b) of the ERA.

80 Referred firstly to the case of *Premier Groundworks ltd v Joza 2009(EAT 0494 08*) which dealt specifically with the right of substitution. What was said in that case was that the position would be different if the right not to perform the contractual obligations depended on some other event as to where the party was unable to perform his or her obligations. That submitted Mr Smith, was not the case here. The claimant was at liberty to substitute, and that effectively was an unfettered right. The fact that the respondents would have required the substitute to be able to carry out bricklaying work did mean that the claimant did not have an unfettered right to substitute.

81 Mr Smith also referred to the case of *Community Dental Centres Ltd v Sultan – Darmon UKEAT 0532-09*. He referred in particular to the judgement of Mr Justice Sibler at paragraph 14 which made clear that the tribunal could not simultaneously include that there was no mutuality of obligations, and that the claimant was under an obligation to provide personal service. Mr Smith drew attention particular to paragraphs 14 to 17 of that judgement.

82 Mr Smith also referred to *Pimlico plumbers v Smith*, pointing out that neither *Joza nor Sultan- Darmon* had been overruled in that case.

83 Mr Smith submitted that the claimant was neither an employee or a worker and the Tribunal lacked jurisdiction to consider any of the claims.

5 **Consideration**

84 The first issue for the Tribunal is to consider if the claimant is an employee.

Section 230 (1) of the ERA states;

(1) In this Act 'employee' means an individual who has entered into our works under (or, where the employment has ceased, worked under) a
10 *contract of employment.*

85 There is no single test to determine employment status. The issue of whether an individual is an employee is determined by examining a range of relevant factors, which is commonly known as the 'multiple test'.

86 In the well-known case of *Ready Mixed Concrete (South East) Ltd v Minister*
15 *of Pensions and National Insurance 1968 1ALL ER 433 QBD* the following three questions were identified;

87 Did the worker agreed to provide his or her work and skill in return for remuneration?

88 Did the worker agree expressly or impliedly to be subject to a sufficient degree
20 of control for the relationship to be one of master and servant?

89 Whether other provisions of the contract consistent with it being a contract of service?

90 That is not however to say that a checklist approach should be adopted to the question of whether the claimant is an employee. Rather the Tribunal has to
25 consider all the relevant factors, giving appropriate weight to each, and to reach a conclusion from the accumulation that detail.

91 The Tribunal firstly considered the degree of control which the respondents exercised over the claimant and the degree to which he was integrated into the business. The Tribunal was satisfied that the respondents had only limited

supervision and control over the claimant in the day-to-day performance of his work. He was not required to attend site during appointed hours. He reported to one of the respondent's directors if they were on site, or the site agent, and thereafter performed his work either as part of a squad or on occasion alone. While the claimant was directed by the respondents as to what was required to be done, and on occasion as to the make-up of the squad, there was no supervision or control over how he did his bricklaying work. The respondents were under obligations to their clients who could approve or disapprove of the work which the claimant carried out, and if the work was not done to the standard of the main contractor, it had to be redone at the claimants expense, but there was no direct control by the respondents over how the claimant did his work.

92 The claimant had to sign in and out of the Sites on which he worked. The tribunal accepted that this was necessary, so there was a record of who was on site, and did not conclude that it suggested any significant degree of control or integration into the respondent's business. Nor did the fact that the claimant had to wear high viz vest branded with the respondent's logo suggests a high degree of integration into the respondent's business. This was a health and safety requirement imposed respondents by their clients for operatives working on site.

93 The claimant was not subject to a disciplinary procedure. He was not subject to a notice requirement. He was not entitled to any company benefits including sick pay, or pension. These are all factors which are inconsistent with the existence of a contract of employment.

94 The Tribunal was satisfied that for the majority of the work which the claimant did for the respondents the manner in which the claimant was paid meant that he had a degree of control over what him he earned. Albeit the respondents set the price for meterage of bricks, the more bricks the claimant laid, or the more hours he worked, the more he was paid. His earning capacity was constrained by virtue by the hours he could access sites, but within that the respondents did not seek to limit his hours of work, or impose hours of work on him.

95 The Tribunal took into account that the claimant was responsible for his own national insurance, and completed a self-assessment tax return, however it did not consider that this factor was determinate of his employment status, or one to which too much weight can be attached.

96 The Tribunal considered, although not determinative, some weight could be attached to the fact that the claimant did have public liability insurance, which was in line with his contractual obligations with the respondents, and that although he cancelled that insurance he did not inform the respondent that he had done so. It also considered that, again although not determinative, some weight could be attached to the fact that the claimant wanted to be regarded as self-employed.

97 The claimant agreed to provide bricklaying services. On the occasions when work was offered to him and he accepted it, he was paid. The claimant accepted work from the respondents on a regular basis over a number of years. However, the Tribunal considered that it was significant in this case that that the respondents were under no obligation to offer the claimant work, and that he was under no obligation to accept it. The claimant himself accepted this to be the case in his evidence. He accepted that the respondents were under no obligation to given him work, even if they had work available, and the equally he could choose not to work. The fact that this was the case is underpinned by the claimant's evidence to the effect that he accepted work in the hope that he might get more, which highlights the lack obligation on the respondents to provide work.

98 The Tribunal takes into account that the history of the relationship between the claimant and respondents demonstrates the claimant did work for the respondents on a regular basis, was paid for that work, that his income was referred to as 'wages' and that he was often paid the same or similar amounts each week. However, that has to be considered against the clear evidence of the claimant, and the respondent's witnesses that there was no obligation on the respondent to offer the claimant work, even if it was available, or on the claimant to accept offers of work made. The Tribunal did not accept that as suggested in submissions, the respondents relied upon the claimant. The

claimant accepted that he could work or not as he chose. There was no measure of commitment on either side in relation to the offer or acceptance of work. The Tribunal therefore concluded that there was no mutuality of obligations between the claimant and the respondent in relation to the offer or acceptance of work.

99 The Tribunal also had regard to written terms of the contract between the parties. Ms Morrison referred to the case of *Ministry of Defence HQ Dental Service v Kettle UKEAT/0308/06* and the circumstances in which a Tribunal is entitled to look beyond the terms of a written agreement when deciding an individual's employment status. She submitted that if the Tribunal finds that it was not the party's intention that the document is a record of the agreement it may look at other relevant material to determine an individual's employment status. Ms Morrison also referred to the Supreme Court decision in *Autoclenz Ltd v Belcher and others 2011 UKSC 41 WL 2747836* in which the court held that the Tribunal was entitled to look at the true agreement between the parties. This raises the question of whether a contract is a sham, and Ms Morrison referred to *Protectacoat Firthglow Ltd v Szilagyi 2009 EWCA Civ 98* which set out the following conclusions in relation to a sham contract. That was that it is the Tribunal to determine the legal relationship between the parties. If it is alleged that the contract does not represent or describe the relationship, the Tribunal has to decide what the true relationship is by considering the evidence of the parties.

100 If the evidence establishes that the true relationship differs from that established in the contract, then it is a true relationship, not the document alone, that defines the relationship.

101 Ms Morrison submitted that the evidence supported the conclusion that the reality of the claimant's employment by the respondent was not accurately reflected in the contract produced by the respondents.

102 The Tribunal, faced an allegation that the contract term is 'sham' must consider whether or not the words written in the contract represent the true intentions or expectations of the parties, and therefore the implied agreement and contractual obligations, not only at the inception of the contract, but at a

later stage where the evidence shows that the parties expressly or impliedly varied the agreement between them.

103 The true agreement has to be gleaned from all the circumstances of the case, of which the written agreement is only part. The approach which the Tribunal adopted was to examine all the relevant evidence including the terms alleged to be a sham itself, in the context of the whole agreement, and consider the evidence of how the parties conducted themselves in practice.

104 For the reasons given the findings and the fact, the tribunal was satisfied as to the following. The claimant provided bricklaying services; he was not entitled to holiday or sick pay; the respondents did not have control in a detailed manner over how he fulfilled the bricklaying services which he provided; the respondents did not set the claimant's hours of work and the claimant could choose how and when he completed the services to be rendered as long as performance was satisfactory. He was paid on a basis which was reviewed from time to time depending on the price per meterage for laying bricks. The claimant was able to benefit from his own efforts and sound management, in that if he worked mote hours or laid more bricks he would be paid more. The claimant was able to undertake work for other parties and on occasions did so, even if he did work regularly for the respondents. The claimant did intend relationship to be one of self-employment, and he was responsible for his own tax and national insurance. Neither party was a under an obligation to provide work or do work, and the contract for services could be terminated at any time without notice. The Claimant did provide his own equipment. The respondents are labour only subcontractors and therefore did not provide materials. The fact that the claimant had to wear a high viz vest with the respondent's logo for health and safety purposes did mean that this clause did not reflect the reality of the situation. The claimant had implemented its own public liability insurance, and had cancelled this without telling the respondents he had done so. The claimant was responsible for correcting defect work in his own time without benefits, and he did not receive any company benefits. The Tribunal was satisfied that the written agreement which dealt with these matters was not a sham.

105 Clauses 4 and 5 of the contracts provided respectively the claimant will be entitled to substitute a delegate at its absolute discretion to undertake the services to be provided, and that the claimant is entitled to hire assistance at his own expense. The Tribunal considered Ms Morrison's submission to the effect that the contract term did not reflect the reality of the relationship between the parties.

106 The claimant never sought to offer a substitute to the respondents. That was the case throughout the entire period of the claimant's long relationship with the respondents. Stephen Mahoney accepted that it would have been unexpected for the claimant to send a substitute, and the claimant did not realise, despite having signed the contract, that he had the right to do so. The respondents have only ever had one instance of an operative sending a substitute.

107 The Tribunal takes into account however that the mere fact that parties conduct themselves in a certain way does not of itself mean that conduct accurately reflects the legal rights and obligations. The Tribunal was satisfied, for the reasons given above under Note on Evidence, that the right to substitute was available to the claimant had chosen to utilise it, and the Tribunal did not conclude that this term of the contract was a sham. The fact that the power was not utilised is not a sufficient basis in which to conclude that the contract term is a sham.

108 Ms Morrison submitted that the claimant in any event would be unable to effectively substitute his labour, because he had limited discretion when it came to determining who would be able to cover a shift due to the skill level and knowledge of the respondent's business which was required. This she submitted, meant that the claimant would have to find another colleague within the respondents company to cover the shift and not an external bricklayer of the claimant's own choosing which meant that the intention of the parties was the claimant personally perform the service. There was however no evidential basis for the conclusion that a substitute would have had to come within the ranks of a colleague within the respondents company,

and for the reasons given above the Tribunal was satisfied that the only requirement was that was the substitute was a trained bricklayer.

109 There was nothing to suggest that the right of substitution was contingent on the claimant not be able to perform the work.

5 110 The Tribunal also considered whether as suggested by the claimant, he did not have an unfettered right of substitution, and if so, what effect that had.

111 It is correct to say that a substitute would have had to be a trained bricklayer. The Tribunal was assisted in its consideration of this by the case of Premier *Groundworks v Joza,* referred to by Mr Smith in which it was said (Lord Justice 10 Silber- paragraph 25);

> '*In conclusion, we consider that where a party has an unfettered right for any reason not to personally perform the contractual obligations under contract but can delegate them to someone else, he cannot be a 'worker' within the meaning of the WTR even though the person actually performing 15 the contractual obligations has to meet certain conditions. The position will be different if the right not to perform the contractual obligation depended on some other event such as where the party was 'unable' to perform his or her obligations (see* ***McFarlane*** *and* ***James*** *supra).'*

112 Applying *Joza*, the right to substitute limited only by the need to show that the 20 substitute was suitably qualified to perform work, which was the only qualification imposed by the respondents, is inconsistent with personal performance.

113 The Tribunal was satisfied that the contract terms , including the contract term in relation to substitution was not a sham. The effect of this conclusion is that 25 the claimant was not bound to provide personal performance to the respondents.

114 In considering where the claimant was an employee the Tribunal has to balance and consider the conclusions which it reached including the fact that the claimant did as a matter of fact provide work on a regular basis for which 30 he was paid what were referred to as wages, the minimal degree of control, and that there was no mutuality of obligation between the parties in relation

to the provision of work or for the claimant to accept that work, and that the claimant was not under an obligation to provide services personally. Taking into account the conclusions which it had reached, and the picture which emerges from them, the Tribunal was not persuaded that the irreducible minimum which is necessary for the existence of a contract of employment was present in this case, and therefore concluded that the claimant was not an employee of the respondents.

115 The effect of this conclusion is that the Tribunal does not have jurisdiction to consider the claimant's claims of unfair dismissal, failure to pay a redundancy payment, or breach of contract.

Worker Status

116 Having reached that conclusion Tribunal went on to consider whether the claimant was a worker. Section 230 (3) of the ERA states;

> 3. *In this Act 'worker' (except in the phrases 'shop worker' and ' betting worker') mean an individual who has entered into our 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.*

117 There are three conditions to be satisfied in order to be a worker within the meaning of Section 230 (3) (b) of the ERA. Firstly, there has been contact between the parties. Secondly the contract has to be one in which an individual undertakes to perform work personally for another, and thirdly the other must not be by virtue of the contract be a client or customer of the profession or business carried out by the individual.

118 The Tribunal did not understand there to be a dispute as to the first of the test. The claimant and respondents had entered into a contract.

119 In relation to the second limb of the test, for the reasons set out above the Tribunal did not conclude that the claimant had undertaken to do or perform work personally for the respondent. The claimant was at liberty not to work, and the respondents were at liberty not to offer him work; there was no mutuality of obligation. Further the claimant had a power of substitution, fettered only by the need to provide a substitute who was suitably trained to perform the work. That right is inconsistent with the obligation to perform work personally as required by Section 230 (3) (b).

120 The Tribunal also considered the third limb of the test. The Tribunal did not conclude that the contract was a sham. In terms of the contract the claimant acknowledged that he was free to undertake work for other parties, and that he considered himself to be self-employed. The contract provided that the claimant considered he was in business on his own account. These are factors which are consistent with the claimant being regarded as an independent contractor.

121 For these reasons the Tribunal concluded the claimant was not a worker in terms of section 230(3)(b) of the ERA.

122 The effect of the Tribunal's conclusion is that it does not have jurisdiction to consider the claim of failure to pay holiday pay.

Employment Judge: Laura Doherty
Date of Judgment: 29 October 2020
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and copied to parties