



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101072/2022

Held in Dundee on 18 May 2022

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Employment Judge M Sutherland

**Dariusz Brewinski**

**Claimant  
In person**

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**Interpreter  
Ms B C Kubikowska**

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**William Grossart**

**Respondent  
In person**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant did not have worker status when he performed work for the respondent and his claim for unlawful deduction from wages and for an itemised pay statement is accordingly dismissed.

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### REASONS

1. The claimant has lodged complaints for unlawful deductions from wages and for failure to issue a pay statement.
2. The claimant appeared on his own behalf. The respondent also appeared on his own behalf. English is not the claimant's first language and the services of a Polish interpreter were engaged.
3. The parties had not lodged any documentary or other evidence prior to the hearing. During the course of the hearing parties relied upon text and whatsapp messages which had been exchanged between them.

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4. Neither party made closing submissions of note.

### Findings of Fact

5. The respondent is a sole trader who at the relevant time had contracted to provide works to a main contractor who installs bathrooms. The respondent further subcontracts that work to various plumbers, joiners, electricians and tilers. These subcontractors are generally paid upon completion of the job following which payment is conditional upon payment by the main contractor to the respondent. However where a subcontractor has cash flow problems the respondent sometimes makes advance payments commensurate with progress on the job.
6. The claimant works as a joiner and will also undertake some basic plumbing and electrical work but not any tiling work. He works at times for private individuals which he described as self employed work. He also works at times for companies which he described as being employed because he has 20% tax deducted under the CIS scheme. The CIS scheme applies to sub-contractors (and not to employees) who pay 20% tax if payment is deducted by the contractor and 30% tax if not.
7. In or around November 2021 the respondent subcontracted a job to Mr S Herman. A fixed payment was agreed for the job. Mr S Herman undertook that work as a self employed contractor in partnership with the claimant (who was to be paid half of the proceeds). Whilst it was initially agreed that the work would be paid upon completion, in recognition of cash flow problems, the respondent made advance payments broadly commensurate with progress. The contract was terminated by Mr S Herman before completion. The respondent then discussed with the claimant the possibility of subcontracting future jobs directly to him. Both parties saw this an opportunity for them.
8. Having had some preliminary discussions, the claimant and the respondent arranged to meet on 6 December 2021 at the start of the first job. The parties discussed and agreed what work that was to be done. The shared expectation of the parties was that the claimant would start the work immediately and would undertake these works personally rather than subcontract further.

9. A few days later the claimant and the respondent met to agree the rate for the job which was £180 a day. The work was part of a bigger job and it was not therefore considered appropriate to agree a fixed rate for the job. Whilst there was no agreement regarding hours or days of work, it was understood between the parties that the work would take about 1 week to complete. The shared understanding of the parties was that the daily rate was a gross figure which was to be paid on completion of the job. There were no discussions around the start of the contract regarding CIS card, or payslips, or making payment net of taxes.
10. The works were undertaken by the claimant using his own tools. The respondent either provided the materials for the work directly or were to reimburse the claimant for the materials he had purchased. The respondent undertook some supervision of the works to ensure that they were progressing according to the plans (i.e. drawings). The respondent is a tiler and not a joiner to trade. Whilst the supervision was greater than would be undertaken by a private individual it was still at a fairly high level.
11. The claimant started work on the job on Monday 6 December 2021. On Wednesday 8 December 2021 the claimant asked for and was given by the respondent an advance of £100 to pay for petrol because he was travelling from the West to a job in the East of Scotland.
12. There was to be a gap of a few days around Thursday 9 December 2021 in the works to be undertaken by the claimant. The respondent offered the claimant work on another job for a few days to fill that gap.
13. On Monday 13 December 2021 the claimant asked for and was given by the respondent an advance of £400.
14. On Friday 17 December 2021 the claimant asked for and was given by the respondent an advance of £500.
15. Works on the jobs ceased during the Christmas period between 22 December 2021 and 2 January 2022. The claimant was not paid for holidays and did not expect to be paid when he did not work.

16. On 27 December 2021 the claimant sent an invoice to the claimant seeking payment of £740 (for 15 days' work done between 6 and 22 December minus the advance payments) and £70.87 in respect of materials bought.

17. On 29 December 2021 the respondent raised with the claimant an issue with his work which the respondent considered had not been done to a reasonable standard and for which he been put to the cost of remedial work.

18. On 31 December 2021 the claimant advised the respondent that he considered himself to be his employee. The respondent replied advising that he was a subcontractor. The claimant advised having sent an invoice seeking "net" payment. The respondent asked for and the claimant agreed to provide his national insurance and unique tax reference number.

19. The respondent did not pay the invoice under explanation that the remedial work had cost him more money.

15 **Observations on the evidence**

20. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.

21. The claimant was not wholly credible or reliable in his evidence.

22. His testimony was at times inconsistent. For example, he asserted in his claim "because I can't speak English all of our conversation was done by text message" and this was initially maintained in evidence. He stated that they did not discuss either CIS status or payslips around the start of his contract. When it was raised with him that there were no text or whatsapp messages around that time regarding net pay, CIS status or payslips, he then advised that they did in fact discuss CIS status and payslips around the start of his contract. He stated "I informed Mr Grossart that he was to pay my taxes for me because as a builder I've got CIS" and further "I told him I got CIS so he had to pay 20%." When these inconsistencies were pointed out he said he couldn't remember but that Mr Grossart should have inferred this from him referring to a "net" payment.

23. The claimant's testimony was at times based upon what he expected a reasonable employer to do rather than what was agreed between them. For example, he asserted an expectation that he would be paid on a Friday weekly in arrears but was unable to advise when this had been agreed and there was no evidence that he complained when he was not paid in this way.
24. The claimant advised that at the time the going rate for a builder was £12 to £20 an hour and that he offered the respondent a lower rate because of the promise of more work. The reference in the claimant's text message "When you have a job for me after the new year let me know" supports the respondent's assertion that there was no obligation to either to offer or to accept future work.
25. The respondent was wholly credible and reliable in his evidence. He was entirely reasonable and consistent. He readily proffered testimony even where it was contrary to his own interests – that there was a contract between them, that the claimant had undertaken the work, and that the claimant's calculations were correct. The claimant expressed concern that the respondent had not worked the hours he had claimed (10 hours a day every day 6 days a week) but he was prepared to accept this given he could not be certain of the hours he had worked. The references in the claimant's own text messages asking "Did you count my work?" supports the respondent's assertion that he was making advance payments commensurate with progress on the job. The respondent advised that at the time the going rate for a joiner was £15 to £25 an hour, that the claimant's daily rate of £120 was commensurate with £15 an hour (£120/8 hours) and that the claimant had offered a rate at the lower end because of the possibility for future work.
26. The respondent was entirely credible in his evidence that there were no discussions around the start of the contract regarding making payment net of taxes, or CIS card, or payslips. The claimant's evidence in this regard was inconsistent. It is therefore considered more likely than not that there were no discussions around the start of the contract regarding making payment net of taxes, or CIS card, or payslips.

## Relevant Law

### *Itemised pay statement*

27. Under Section 8 of the Employment Rights Act 1996 ('ERA 1996') a worker has the right to be given by his employer a written itemised pay statement at or before the time of payment of wages.

### *Unlawful deduction from wages*

28. Section 13 ERA 1996 provides that an employer shall not make a deduction from wages of a worker so employed unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

29. Under Section 13(3) ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

### *Worker status*

30. Under Section 230(3) ERA 1996 a worker means an individual who has entered into or works under 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".

## 25 Discussion and decision

31. The first issue to be determined is whether the claimant had the status of being a worker when he performed work for the respondent. If not he is unable to make a complaint of unlawful deduction from wages or failure to provide a pay statement.

32. It is not in dispute that there was a contract between the claimant and the respondent whereby the claimant undertook to do or perform personally work for the respondent. Accordingly the focus is on whether the respondent's status was by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
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33. A person may have a different status under employment law (which recognises employment, worker and sole trader status) than under tax law (which only recognises employment and sole trader status). The claimant's registration under the CIS scheme, which indicates sole trader status for tax purposes, is not determinative of whether he is a worker for employment law purposes.
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34. The claimant at times carried on a business of providing joinery services to customers. The issue is whether the respondent was a client of that business when he performed work personally for the respondent.
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35. A multi-factorial approach should be adopted including consideration of the degree of control, the exclusivity of the engagement, its duration, the payment arrangements, the equipment supplied, the level of risk and the exclusivity of the arrangements (*Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, Employment Appeal Tribunal*).
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36. The contract between the respondent and the claimant was informal and ad hoc – there were no written terms; work was offered as jobs arose; it was of very short term duration aligned to the jobs offered. The agreed rate of pay was daily but the claimant sought payment based upon the hours he had worked on each job as decided by him. Payment was conditional upon completion of the job, although the respondent agreed to make some payments in advance based upon progress on the job. The claimant supplied his own tools and the respondent supplied or met the cost of the materials. The respondent exercised some control over the work by engaging in supervision of progress according to the plans but that supervision was high level. The claimant was not paid when he did not work – for holidays or otherwise. There was no exclusivity in the arrangement – the claimant was free to work for others, although there was limited time to do so when he was on a job. When work on a job ended
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there was no mutuality of obligation to offer and to accept further work but worker status does not require such an irreducible minimum obligation (*Nursing and Midwifery Council v Somerville, Court of Appeal, 2022 EWCA Civ 229*).

- 5 37. Having regard to the various relevant factors it is determined that the respondent was a client or customer of the joinery business being carried on by the claimant and accordingly the claimant did not have worker status when he performed work for the respondent. His claim for unlawful deduction from wages and an itemised pay statement is therefore  
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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**M Sutherland**  
**02 June 2022**  
**06 June 2022**