



EMPLOYMENT TRIBUNALS

Claimants: P Koscielniak (1)
D Zbijowski (2)
M Leja (3)

Respondent: Thermoglaze UK Manufacturing Ltd

Heard at: East London Hearing Centre (video hearing)

On: 13 February 2023

Before: Employment Judge Housego

Representation

Claimants: M Wiencek

Respondent: Did not appear, was not represented and sent no submissions

JUDGMENT

1. The Claimants were employed by the Respondent.
2. The address of the Respondent is amended to 50 Princes Street, Ipswich, Suffolk, IP1 1RJ, for the personal attention of Robert Mallon.

REASONS

Introductory and procedure

1. This hearing was to decide the preliminary issue of “*Were the Claimants employees or workers of the Respondent or were they independent contractors?*”.
2. The Respondent did not appear and had failed to provide witness statements or documents as ordered by case management orders.
3. At a hearing on 10 January 2023 (the Case Management Order in error states 2022) the Respondent did not attend. It was noticed that an incorrect

email address may have been given. EJ Massarella adjourned the hearing and made the following orders:

Confirmation of active participation in these proceedings

2. By no later than 4 p.m. on Friday, 13 January 2023, the Respondent shall write to the Tribunal, copying in the Claimants' representative,

2.1. confirming whether it is still actively pursuing its defence of these claims;

2.2. providing the name and direct line telephone number for the individual within the Respondent who is responsible for conducting this litigation on its behalf; and

2.3. confirming that it has received the Claimants' bundle of documents. Preparation for the hearing by the Respondent

Preparation for the hearing by the Respondent

3. If the Respondent intends to pursue its defence of the proceedings, it must take the following steps by the following dates:

3.1. by no later than 20 January 2023, prepare a supplementary bundle of documents, strictly relevant to the issue of employment status which it wishes to rely on and which are not already in the Claimants' bundle (there must be no duplication) and send it to the Claimants' representative;

3.2. if the Respondent intends to call a witness or witnesses - and the Tribunal would normally expect an employer to do so at a hearing about employment status - it must serve its statement(s) on the Claimants' representative by no later than 4 p.m. on 27 January 2023;

3.3. also on 27 January 2023, the Respondent shall send their supplementary bundle and their statements in PDF form to the Tribunal, marked for the attention of EJ Massarella.

4. The notice of a final hearing listed for 11 October 2022 was sent to an email address that it appeared was out of date. A bounce back gave a new email address, as below. Notice of the hearing of 10 January 2023 was sent to that address. After the hearing of 10 January 2023 the Case Management Order of EJ Massarella was also sent to that email address (and sent in no other way).

5. The Claimant's representative, Michael Wiencek office@eurolexpartners.co.uk sent the bundle of documents email sent to dan@solarthermuk.co.uk but received no response, and the Respondent did not appear at this hearing or contact the Tribunal.
6. I enquired who this person was. The 1st Claimant informed me that this was Dan or Danny Bailey who he said owns both Thermoglaze and Solartherm. I checked at Companies House. There is no Dan or Danny Bailey at the Respondent, and the only current director is Robert Malcolm Mallon, whose address is given as 50 Princes Street Ipswich IP1 1RJ.
7. The registered office of the Respondent was changed to that address on 11 October 2022. On that date Danny Bovill of Silver Rose Unit 21 East Lodge Village East Lodge Lane Enfield EN2 8 AS resigned as a director, and his address was the registered office prior to the change to the address of Robert Mallon on the same date.
8. In evidence it emerged that while they worked for the Respondent:
 - 8.1. the Claimants were always directed by someone called "Dan" or "Danny";
 - 8.2. that he is the person whose email this is;
 - 8.3. that he is the person they thought was called Danny Bailey, but who must be Danny Bovill, and:
 - 8.4. in text messages he is referred to as "Dan Okna". The word "Okna" is Polish for "windows", and this is again the same person.
9. There are a large number of companies registered with the word "Solartherm" in them, most dissolved and no extant company appears to be in the right geographic area. There is only one company named "Solartherm UK Ltd" and it was dissolved some years ago.
10. Danny Bovill has one company directorship registered. It is with Silvercrest Scaffolding Ltd. The Claimants knew of this company, which Danny Bovill had while they worked for the Respondent.
11. I decided to proceed, under Rule 47. It was not possible for me to make enquiries of Robert Mallon today. This is now the third hearing date, and it is not appropriate to adjourn to a fourth, nor in accordance with the overriding objective, particularly when the documentary evidence is overwhelmingly supportive of the Claimants' case.
12. It may be that Danny Bovill has sold his interest in the Respondent to Robert Mallon, and that Danny Bovill has not passed on anything about the case to

Robert Mallon. If so, Robert Mallon will have no personal knowledge of the circumstances of the Claimants, and will benefit from the determination of the issue, which is clear from the documentation. The Tribunal has relied on contact details from the Respondent. Any issue with the consequences of non-appearance would appear to be a matter between Messrs Bovill and Mallon.

13. The oral evidence of the Claimants was limited to clarifying detail and confirming the truth of their witness statements.
14. I was provided with a large bundle of documents (which had also been emailed to the email address above).

The Facts

15. The Respondent sells double glazing to the public. The Claimants installed the Respondent's products in the homes of its customers or worked in its warehouse/workshop.
16. The Claimants say they were employees (or for holiday pay at least that they were workers). The Respondent said in its Grounds of Resistance that they were self-employed contractors.
17. The reasons set out in the Grounds of Resistance were that the Claimants started on an 8-week trial as weekly paid subcontractors. At the end of that period, they would either become employees, paid monthly by PAYE, or become CIS independent subcontractors registered under the Construction Industry Scheme ("CIS"). The Respondent's Grounds of Resistance say that at the end of 8 weeks the Claimants declined to move to a monthly pay regime and so remained weekly paid and self-employed, and failed, despite requests, to provide their HMRC unique taxation reference or national insurance numbers, and so tax and national insurance could not be deducted and paid.
18. The 1st Claimant joined the Respondent first. The Respondent needed workers, and the 1st Claimant spoke to the 2nd and 3rd Claimants, and they also joined the Respondent, soon afterwards. Sometimes they made up a team, led by the 1st Claimant, sometimes they worked separately.
19. On the day they stopped working for the Respondent (18 January 2022) the 1st and 3rd Claimants went to see Danny Bovill. This was in the workshop in Benfleet. They asked for payslips and for confirmation that their tax and national insurance was being paid. They were told they would not get payslips as they were self-employed as they had not moved to monthly pay, and it followed that the Respondent had not paid income tax or national

insurance on their earnings. The 1st and 3rd Claimants immediately told the 2nd Claimant, who that day was working in the workshop manufacturing windows. All 3 decided to leave immediately and did so. Their reasons were that this was not the way their pay should be dealt with, so that they were worried about the legality of this, and because if they needed medical treatment they would be liable for large NHS bills as they were not making national insurance payments.

20. The Claimants were employees for the following reasons:
 - 20.1. The job taken by the 1st Claimant was advertised on the recruitment website of the recruitment business "Indeed" as a permanent full-time job, and a salary range was given. The 2nd and 3rd Claimants' circumstances were as the 1st Respondent's, and although they did not get their jobs by responding to this advertisement they were recruited, and were not in business on their own account.
 - 20.2. The 1st Claimant was given an email address - [name]@thermoglaze.com.
 - 20.3. They were told when and where to work.
 - 20.4. They worked full time.
 - 20.5. They worked for no one else.
 - 20.6. The Respondent set the pay rate.
 - 20.7. No invoices were requested or provided.
 - 20.8. None of the Claimants were not registered under the CIS scheme.
 - 20.9. The Respondent provided references for all 3 Claimants (dated 03 November 2021) which stated "*[Name] has worked for Thermoglaze since week commencing [the date for each Claimant], as a full time site operative. [Name] is in stable employment with a stable income which is sufficient to meet his needs. [Name] has been a reliable employee.*"
 - 20.10. Asked about working at Christmas, the office manager replied "*Our last working day will be Friday 17.12.21. However some staff may choose to work 20-23 December.*"
 - 20.11. On 04 January 2022 the 1st Claimant messaged his manager, Dan Okna, to ask about holiday pay over Christmas. The manager

messed the 1st Claimant, telling him there was no holiday pay unless on monthly payroll, which he was not. He said that the accounts department said that he was not yet PAYE and they were not making CIS deductions so he was still *“in temporary employment status”*, and later *“But they will kill me soon if we don’t get you on the PAYE scheme”*.

- 20.12. The 1st Claimant submitted expense claims for himself and his team (it was mainly expenses for his vehicle).
21. The Respondent seems to have thought that for an 8-week period they could employ people with no status at all, and then decide whether to keep them in the business or not, and if yes then either as monthly paid employees or as CIS registered subcontractors. People who work for a business have one status or another. It seems that the Respondent regarded *“temporary employment status”* as somehow different to employment. There is nothing contemporaneous to support the assertion in the Grounds of Resistance that the Claimants were temporary subcontractors for the 8-week period. Employment may take different forms, but all people employed under any form of employment are employees.
22. There was a failure to put the Claimants on the PAYE system when they joined. That they could subsequently move to CIS subcontractor status is not to the point. When they started they were not intended to be self-employed, because they were not put on the CIS scheme, and it was expressly intended that consideration would be given at 8 weeks to moving them to that scheme. That means they would not be self-employed before being moved to the CIS scheme. They were never moved, and so they remained employees. Whether paid weekly or monthly is not to the point. The Respondent treated only monthly paid people as employees and so as the Claimants were never monthly paid they were never treated as employees. This is a syllogism.
23. There are some pointers towards the 1st Claimant running his own team – he introduced the 2nd and 3rd Claimants and they often worked with him, and he refers to someone as *“my labourer”*, and there was some discussion between the 1st Claimant and Danny Bovill about the 1st Claimant sourcing materials from Poland for the Respondent. However, the 1st Claimant did not pay the 2nd and 3rd Claimants, the Respondent did. For this reason, the indicator is not of self-employment but of employment - because if the 1st Claimant was a self-employed contractor with his own team he would invoice the Respondent and pay his team himself.
24. For these reasons it is clear that the Claimants were all employees.
25. Their claims are for

- 25.1. holiday pay,
- 25.2. notice pay,
- 25.3. failure to provide a statutory statement of terms and conditions (S1 Employment Rights Act 1996),
- 25.4. and failing to provide payslips (S8 Employment Rights Act 1996).
- 25.5. The Claimants also claim as an unlawful deduction from wages (S13 Employment Rights Act 1996) the amount of tax and national insurance which should have been paid. This is on the basis that they say that they were told that the money paid into their bank accounts weekly was net of deductions, and so they seek the tax and NI that would be payable on their grossed up weekly pay (presumably on the basis that they will seek to pay this over to HMRC).
26. The Claimants' schedules of loss contain a heading of "*Basic Award*". No claim for unfair dismissal is set out in the ET1, although there is reference to claimed loss for risk arising from non-payment of national insurance. There is no jurisdiction to hear such a claim.
27. It would appear that notwithstanding the fact that the Claimants were employed for less than 2 years this could be a claim for unfair dismissal for asserting a statutory right (S104 Employment Rights Act 1996, the statutory right being payslips), but no claim was made to this effect, and leave to amend would be required to bring such a claim out of time.
28. I have directed that the address for the Respondent be amended to the current registered office of the Respondent, marked for the personal attention of the sole director of the Respondent, Robert Mallon, and that no email address is to be used, unless he so requests.

**Employment Judge Housego
Dated: 13 February 2023**