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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107154/2023

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Preliminary Hearing held by CVP (Edinburgh) on 25 March 2024

Employment Judge R Mackay

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Mr David Russell

**Claimant
Represented by:
Mr Paterson, Solicitor**

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Zenith SAS Ltd

**Respondent
Represented by:
Ms Cunningham, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant was engaged by the respondent from 3 October 2022 to 21 June 2023 as an employee, working under a contract of employment, as those terms are defined in Section 230 of the Employment Rights Act 1996 (“**ERA**”). The Tribunal accordingly has jurisdiction to consider all of the claims brought by the claimant.

REASONS

Background

1. The claimant has raised a number of claims, some of which require “employee” status and some “worker” status. In its response to the claims,
5 the respondent’s position is that the claimant held neither status, and was at all times a self-employed contractor. This preliminary hearing was fixed to determine whether the claimant had either of the two statuses.
2. The claimant gave evidence on his own behalf. For the respondent, evidence was heard from Mr David Kelly (Contracts Director), and Mr Kelvin
10 Layton (a supervisor engaged by the respondent).
3. The respondent’s solicitors co-operated in the production of a joint bundle of documents which was lodged before the Tribunal.
4. Much of the evidence was not in dispute. The claimant was a credible and reliable witness who gave his evidence in a clear and consistent way. The
15 evidence of Mr Kelly was broadly credible and reliable. In one respect, as detailed in the Findings in Fact section which follows, however, he sought to present information in a somewhat implausible way with a view to bolstering the respondent’s position. The evidence of Mr Layton had less direct relevance. In one material respect, he gave evidence which was not
20 foreshadowed in the respondent’s pleadings, was not put to the claimant in cross-examination, was not supported by the documentary evidence, and was highly implausible. This is also addressed in the Findings in Fact section.

Findings in Fact

- 25 5. The respondent operates in the construction and engineering sectors. It provides services to, amongst others, the petrochemical industry. One of its projects involved the building of ground flares at the Grangemouth chemical plant. The claimant was engaged by the respondent to work (using that term

in a neutral way at this stage) on that project. He was engaged as a rigger which involves the operation of large cranes. He has extensive experience in the field and has previously operated as a rigging supervisor.

- 5 6. The Grangemouth plant is operated by a third party (Ineos) who were, for the purposes of the respondent's project, their client. The plant is an exceptionally hazardous working environment. The client imposes strict health and safety rules which require to be followed by all contractors, such as the respondent, as well as those engaged by the contractors.
- 10 7. The claimant became aware that the respondent was looking for riggers and sent in a CV. This led to him being offered a position. The claimant wished to be engaged on a PAYE basis as he preferred not to deal with his own tax. The respondent wished to engage the claimant on a self-employed basis using the UK government's Construction Industry Scheme (CIS) for tax purposes. The claimant was told that if he did not accept the appointment on that basis, he would not be offered the position. He 15 therefore accepted that classification.
- 20 8. The claimant was advised that the work was likely to last for a year or so. He was not provided with any written contractual documentation. The payments he received from the respondent were made after deduction of fixed rates of tax in accordance with the CIS. He was liable to account for the balance of tax due in his tax return.
- 25 9. The claimant started with the respondent on 3 October 2022, and before commencing work, he underwent an induction. This included information about health and safety rules as they related to the site as well as other HR related matters. The forms used by the respondent refer to those being inducted as "employees". That term, however, is said to include subcontractors.
- 30 10. Access to the site is strictly controlled. Any person working there is required to be issued with a daily work permit by Ineos. These permits detail the work to be done that day.

11. In order to access the site, the claimant would first visit a cabin belonging to the respondent where he would change into overalls and PPE. These were branded with the respondent's name and logo. He would then be transported in one of the respondent's vehicles to the site. He was not permitted to access the site in any other vehicle. At the perimeter of the site, he would exit the vehicle and go through a turnstile. On the other side of the turnstile, he would re-enter the respondent's vehicle and be driven to a mess cabin. Once in the cabin, the claimant's supervisor would issue him with the necessary daily work permit. The claimant would sign the permit and thereafter walk to the location on site where the work required to be carried out. The site has a prohibition against individuals being alone, such that they must be in at least pairs at all times.
12. All tools and other equipment required to carry out the work were provided by the respondent. All such tools and equipment required to meet specified standards and/or be regularly tested. The use of tools or equipment other than those provided by the respondent was prohibited.
13. On occasion, Ineos would not grant any daily permits for safety reasons. In those circumstances, the claimant would not be able to work. He would, however, still receive his normal daily remuneration from the respondent.
14. The claimant worked regular hours, five days a week. Although the precise start and finish times varied from time to time, his normal hours were 38 per week. The respondent prepared timesheets recording the claimant's hours of work which were used as part of their arrangement regarding payment under their contract with Ineos.
15. Initially, the claimant was advised that no regular overtime would be available. During the course of the engagement, however, overtime became necessary. The claimant was advised that he could not pick and choose when to work overtime. Either he worked all overtime required or none. He chose to do the overtime was paid at higher rates of pay for those hours worked.

16. The claimant was required to carry out the work personally. Given the nature of the work, the hazardous environment, and the need for detailed induction and bespoke daily permits, there was no question of the claimant being able to provide a substitute.
- 5 17. Apart from a period of time when the claimant was on holiday, he worked every day. He did not have the ability to refuse work. During the course of his evidence, Mr Layton suggested that the claimant would routinely leave work early. He suggested that the claimant would simply walk off site on his own. Crucially, these suggestions were not put to the claimant in cross
10 examination; nor were they referred to in the pleadings. On being pressed about what would happen in these circumstances, Mr Layton suggested that the claimant's remuneration would be reduced to reflect his non-attendance. This was not borne out by the pay slips produced before the tribunal which showed no such deductions. Having regard to the strictly enforced
15 procedures regarding access to the site, the policy against individuals being separated from others, and the claimant's unchallenged evidence that he abided by these rules, the tribunal found Mr Layton's account to be highly implausible and inaccurate. The claimant was highly experienced, and it was clear from his evidence that he took the health and safety requirements
20 of the site seriously.
18. Shortly prior to the end of his engagement, the claimant approached his manager requesting holidays. He was asked to fill out holiday request form. He did so. The form was subsequently signed by his manager approving the holiday in question. Mr. Kelly sought to suggest in his evidence that the
25 form was not in fact an approval and was simply a notification to the office that the claimant would be absent. That does not, however, accord with the terms of the form itself or the approval process the claimant was required to follow.
19. The claimant was not paid for the holidays he took. His engagement was
30 terminated on 21 June 2023, whilst absent on holiday.

20. The respondent operates projects at different sites. It currently has around 70 subcontractors and 110 employees. On being questioned as to the differences in practice between an employee and a CIS subcontractor operating as riggers, Mr Kelly's evidence was that there were no differences in the actual work or the way that it was done.

Relevant Law & Submissions

21. An employee is defined as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" (section 230(1), ERA).

22. A contract of employment means:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing" (section 230(2), ERA).

23. A worker is defined as: "an individual who has entered into or works under (or, where the employment has ceased, worked under) either of the following:

- A contract of employment.
- 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." (Section 230(3), ERA).

24. To establish protection under any of the two categories, an individual must establish that they have a contract with an organisation.

25. A contract is formed by offer and acceptance. The offer is a proposal from one party which is: sufficiently definite in its terms to form a contract,

capable of acceptance and made with the intention of being bound by

acceptance. Acceptance is a statement (in writing or verbal) or conduct by an offeree indicating assent to the offer. The assent must be unqualified.

5 26. To form a contract there must be: agreement on essential terms, intention to create legal relations and certainty of terms. In general, the essential terms are: the parties to the agreement, the subject-matter of the contract, and the price or the mechanism for pricing arrangements. There must be an intention by the parties to create a legally binding arrangement. Where no
10 such intention can be attributed to the parties, there is no contract.

27. Where there is a dispute as to status, case law has developed a number of tests which may be applied. The leading authority in this context remains the case of ***Ready Mixed Concrete (South East) Ltd v The Minister of Pensions & National Insurance*** [1968] 2 QB 497. The core elements of a
15 contract of employment include: (1) an agreement to provide the individual's own work or skill in the performance of service for the employer in return for a wage or remuneration; (2) in the performance of that service, the employer has a sufficient degree of control over the employee; and (3) the other provisions are consistent with a contract of employment.

20 28. Commonly referred to as “the irreducible minimum”, an employment contract must have personal service. There must be sufficient control and there must be mutuality of obligation. Other factors include the provision of equipment, the degree of financial risk adopted, the degree of integration into the business, whether a person is paid when absent due to sickness
25 and whether the person is paid a fixed wage or salary.

29. Also relevant are the parties' intentions and how they describe themselves (unless this is not reflective of the reality of the situation) (***Young & Woods Ltd v West*** [1980] IRLR 201).

30. The EAT considered the effect of the CIS scheme in analysing employee status in *Richards v Waterfield Homes Limited* [2022] EAT 148 and concluded that registration under the scheme was not determinative of the issue.
- 5 31. In considering the question of worker status, the primary focus should be on the relevant statutory wording (*Uber & Others v Aslam & Others* [2021] UKSC 5).
32. In broad terms, Mr Patterson submitted that all of the required components of the irreducible minimum were present, and that the Claimant was accordingly an employee. Ms Cunningham submitted that an assessment
10 of the facts should lead to a conclusion that the claimant was neither an employee nor a worker.

Decision

33. The tribunal first considered whether a contract existed between the parties.
15 There was nothing in writing between them. It was nonetheless satisfied a contract was agreed verbally between the claimant and the respondent. That much was not disputed. A role for the claimant was agreed as well as agreed hours and an agreed rate of remuneration. By commencing work for the respondent, the claimant demonstrated acceptance of those terms,
20 which were sufficiently certain.
34. The tribunal went on to consider whether the contract was one of employment. Considering the question of personal service, it is clear that the contract required the personal service of the claimant. Only he was able to provide the service. There was no question of any substitution rights or
25 delegation. The first element of the test is, therefore, established.
35. So far as control is concerned, the tribunal considered who had the power of deciding the things to be done, the way in which they should be done and the means to be employed in doing them, as well as the time and the place where they should be done.

36. Overwhelmingly, the respondent had full control over all of these elements. Whilst many of the working practices were ultimately dictated by the respondent's client, the claimant himself had no control whatsoever over the work to be done or the means to be deployed in doing it. Equally, the claimant's hours were fixed by the respondent, to the extent even that overtime, having agreed by the claimant, became compulsory.
37. The tribunal then considered the question of mutuality of obligation. There must be an obligation on the respondent to provide work and pay a wage to the claimant, and the claimant must be obliged to accept and perform that work.
38. This test was again clearly met having regard to the facts of this case. The respondent offered the claimant full time work throughout the course of his engagement. The claimant had no ability to refuse to carry out that work. It is notable, too, that even in circumstances where the respondent's client was not able to issue permits to allow the claimant access to the site, the respondent nonetheless paid him for his regular hours on such occasions, even of sent home.
39. With the exception of the respondent's CIS tax classification of the claimant, other relevant factors also pointed towards employment status. The respondent provided all necessary tools and equipment. The claimant did not accept any financial risk. He was fully integrated into the respondent's business by means of his work wear and otherwise. He was paid at fixed rates of remuneration.
40. Against that background, the tribunal was satisfied that the respondent's classification of the claimant as self-employed under the CIS tax arrangements did not reflect the reality of the situation. It was not the claimant's wish, and by admission of the respondent's own witness, there was no practical distinction between the way in which the claimant and those admitted as being employed by the respondent operated.

41. Having reached the conclusion that the claimant was an employee, it was unnecessary to consider separately the question of worker status.

Further Procedure

5 42. In light of this decision, the tribunal will list the case for a preliminary hearing to determine case management for a final hearing on the substance of the claims raised.

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Employment Judge:	R Mackay
Date of Judgment:	09 May 2024
Entered in register:	10 May 2024
and copied to parties	