



EMPLOYMENT TRIBUNALS

Claimant: Mr L Richards

Respondents: 1 Unity Build and Repair Ltd
2 Waterfield Homes Ltd

Heard at: Exeter **On:** 9 and 10 November 2020

Before: Employment Judge Smail

Representation

Claimant: Ms D Grennan, Counsel

Respondents: Mr G. Hine, Solicitor

JUDGMENT ON PRELIMINARY HEARING ISSUES

1. Between 22 October 2010 and 19 November 2018, the Claimant was a worker within the meaning of Regulation 2 of the Working Time Regulations 1998 and within the meaning of Section 230(3)(b) of the Employment Rights Act 1996.
2. He was not an employee within the meaning of Section 230(1) of the Employment Rights Act 1996 between those dates, namely 22 October 2010 and 19 November 2018.
3. He was an employee within the meaning of Section 230(1) of the Employment Rights Act 1996 between 20 November 2018 and the effective date of the termination of his employment on 18 July 2019.
4. At all material times his employer whether as a worker or as an employee was Waterfield Homes Ltd, the Second Respondent.

REASONS

1. At a Preliminary Hearing in private on 19 March 2020 Employment Judge Gray ordered that there be a Preliminary Hearing in public to determine the Claimant's employment status.
2. The Second Respondent is Waterfield Homes Ltd. It is the primary Respondent in this case. References below to 'the Respondent' are references to Waterfield Homes Ltd. It owns, manages and/or maintains a series of rental properties in and around Plymouth. Its Director is Mr Matt Conyers.
3. The Claimant is a skilled worker describing himself as a multi-trade carpenter. The Claimant was introduced to Mr Conyers through the Claimant's ex wife. The Claimant at the time was in need of work. He was then already a registered CIS contractor. He made it clear to Mr Conyers that he wanted to remain such because of the advantages to him of the CIS scheme (Construction Industry Scheme). First of all, that scheme provides a mechanism for the payment of tax and National Insurance such that the scheme covers all those liabilities. It was explained to me that there would annually be a system of back pay being paid to the Claimant after full calculation of tax and National Insurance and that was something he welcomed, an annual lump sum in back pay. Further it was convenient to him to be able to deduct expenses from takings in a tax efficient way.
4. The CIS Scheme expressly does not cater for employees: it caters only for the self-employed, that is widely known throughout the industry. The Claimant and Mr Conyers engaged on that basis with the clear understanding that the Claimant would be engaged under the CIS Scheme.
5. Mr Conyers has a diverse workforce of tradesmen working for his companies on his properties. None of those tradesmen, so far as I can tell, are employees. Others like the Claimant are registered under the CIS Scheme.
6. Worker status has been conceded by the Respondent on the morning of this Preliminary Hearing. In my judgement the concession is well made.
7. Although the parties agreed engagement under the CIS Scheme, the relationship was close to an employment one. There was sufficient work for the Claimant to work everyday Monday – Friday between normal working hours. The work was all provided by the Respondent and whilst I accept in theory that the Claimant may have been free to accept work elsewhere, he never did so in practice because the Respondent had a continuous supply of work. It is likely also that it would have not been popular for the Claimant to work elsewhere. It never happened in practice, however. Everyday the Claimant would meet at the Respondent's office, take jobs that were on job sheets at the office and do the work. He would fill in timesheets at the end of the day. The timesheets had to be precise in terms of hours worked because on many occasions the Respondent was doing work for third party landlords whom it could bill. There was an expectation that a full day would be worked and so billed on to third parties in those situations.

8. The Claimant's issue at work was not that he was working under the CIS Scheme - his issue was that he was not paid holiday pay. He was right to have that issue. He first put it in writing on 14 February 2014, when he first claimed holiday pay. Today the properties of the file which created that letter have been proved as emanating from around that date. The likelihood is, although this is not recalled by Mr Conyers, that the letter was sent. I find on the balance of probability that the Respondent has known for some time that the Claimant was asserting a right to holiday pay. He can do that, of course, as a worker within the wider sense. He does not have to be an employee working under a contract of employment. Indeed, that was his issue. He learnt from reports of cases in the newspaper that someone in his position was entitled to holiday pay. He complained to fellow workers that they were not being paid holiday pay; it seems that he was more aggravated than them on this topic.
9. Mr Conyers engaged the advice of Peninsula to regularise his employment relationships. In or around November 2018, he proposed a contract of employment to be entered into by the Claimant with one of his companies called Unity Build and Repair Ltd. He intended that this company focus predominantly on working on maintenance contracts for third party landlords. In the event, this company did not trade at all relevant times for the purposes of this case. We know that, first, because Mr Conyers essentially confirmed that in evidence; and secondly, also Companies House shows that the accounts for this company described it as being dormant on the 31 March 2019.
10. Waterfield Homes Ltd however, started to pay the Claimant through payslips treating him as employed. It did so with effect from 20 November 2018. Admittedly the payment in respect of the Claimant over this period was mostly statutory sick pay because the Claimant was off sick between this time and the time of his eventual resignation. The Claimant refused to enter into a contract of employment at this time, indeed, he tells me he barely read it because he was asserting continuity of employment going back to 2010 whereas Mr Conyers was envisaging that employment start afresh from November 2018. The particular issue again that the Claimant had was his right to holiday pay rather more so than being engaged through the CIS Scheme.
11. In terms of Waterfield Homes Ltd being the only real Respondent in the case: it was significant today that Mr Golding, a witness for the Respondent who remains working for the Respondent, made no mention of working for Unity Build and Repair Ltd. The only real Respondent in this case is Waterfield Homes Ltd.
12. I agree with Mr Hind that from October 2010 – November 2018 the intention of the parties was that the Claimant be self-employed through the CIS Scheme. The Claimant plainly - and this is now conceded by the Respondent with its concession of worker status - was working under a contract personally to provide services to the Respondent in circumstances whereby the Respondent could not be said sensibly to be a client of the Claimant. In truth the Claimant was part of the Respondent albeit with an express agreement to be treated under the CIS Scheme.

13. The agreement between him and the Respondent in October 2010, was not a sham agreement - it was what both parties intended. It was not forced upon him and here I distinguish the position of the car valeters in Autoclenz v Belcher [2011] IRLR 820 (Supreme Court). In that case the Claimants were not able to negotiate their terms and conditions. In contrast, the Claimant in this case insisted upon working through the CIS Scheme.
14. I do not invoke Young and Woods Ltd v West [1980] IRLR 211 (CA) so as to undo that agreement; that would not be just on the facts of the case. In that case an employee expressly wanted to be a sub-contractor, self-employed. The employer agreed but the Tribunal found on the true analysis, he was an employee. That case seems to be the high watermark of the Courts intervening with what the parties had actually agreed.
15. The CIS Scheme is a well-recognised industry-wide scheme in relation to which registrants know they are to be treated as self-employed and they expect that to be the case. That is not however inconsistent, as conceded by all sides before me, with the entitlement to be paid holiday pay. It seems to me that the analysis in Autoclenz has moved on somewhat since Young and Woods Ltd.
16. The question for me is what was the true intention between the parties? They might have agreed employment but they did not; and that was a position equally arrived at by the Claimant and by Mr Conyers. Here the parties agreed that the legal basis of the engagement of the Claimant was through the CIS Scheme as a self-employed contractor. The Claimant entered that agreement with sufficient bargaining power to make it a genuine arrangement. That, however, does not contradict the right to claim holiday pay and other rights of workers under the employment legislation. The substantive hearing will go on to examine some of those.

Employment Judge Smail

Date 1 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
6th January 2021
By Mr J McCormick

FOR THE TRIBUNAL OFFICE