

documentation to the bundle in the form of a log of phone calls which had been provided by Apex/Emerald (the payroll services company) but there was no witness statements available from Apex/Emerald to explain the detail of any contact with the claimants.

Evidence

3. The claimants are all specialist bricklayers with significant experience in the industry. Both Mr Wilkinson and Mr. Kinsella had each 50 years experience in the industry. Prior to his death Mr Archibald had also significant years of experience. All three claimants had “UTR references” and the Tribunal accepted the evidence of both Mr Wilkinson and Mr Kinsella that this was usual and was a mandatory requirement of contractors to go on site. All three claimants were registered with the Government’s Construction Industry Scheme. In the industry, the norm is that tax payments are deducted 25% at source. Mr Wilkinson accepted that he submitted tax returns.
4. In June 2022, Mr Wilkinson was looking for work and approached a construction site ran by the second respondent and spoke to Mr Higson, the site manager. He understood that Mr. Higson was employed by the second respondent. Jim Higson agreed to take Mr. Wilkinson on. Mr. Wilkinson believed he would be employed by the second respondent too. Mr. Higson also agreed to take on Mr. Wilkinson’s friends, Mr. Kinsella and Mr. Archibald. They commenced work as a bricklayers on the second respondent’s site on or about 20 June (Mr. Wilkinson) and the others on or about 23 June 2022 until 21 January 2023. There was no written contract between the second respondent operating the site and the claimants. Prior to any introduction of the claimants to the first respondent the claimants had started work at the site. The claimants were informed and understood in order to get paid they had to contract with the first named respondent.
5. In respect of written documentation, Mr Wilkinson’s evidence, which was accepted by the Tribunal, is that he was given a document to sign; otherwise he was informed he would not get paid. Eddie, the deputy site manager, told the claimant he would give the claimant a copy because Mr. Wilkinson did not know what he had signed. However, Mr. Wilkinson was never given a copy of the form (at page 248). Mr Wilkinson when shown the document said that this was not his signature; he did not sign the document and he does not have an e-mail address (see page 248/p.240). Furthermore, he does not actually have a computer.
6. The Tribunal accepted the evidence of Mr. Wilkinson there was telephone communication between the first respondent and Mr Kinsella and Mr Wilkinson. In the course of the telephone call, the claimants were made aware of an “assignment documentation” that had to be signed. The claimants’ evidence which the Tribunal accepted was that the claimants understood this was to facilitate payment only and nothing else; the Tribunal finds that this is corroborated by the transcript of the discussion (see page 198). If this documentation is cross-referenced with documentation at page 168 it indicates that Miss. Thompson of Apex/Emerald (the payroll company) signed the documents electronically for the claimants. The claimants did not read these. Mr Wilkinson who is aged 82 years does not in fact have an e-mail account for the documentation to be sent to. Mr Kinsella was recovering

- from a stroke and has no recollection of ever receiving the documentation sent to his email address.
7. There was no discussion as to whether Mr. Wilkinson could substitute a friend if he felt unwell. The claimants were paid a daily rate of £200 for each day worked. Mr. Wilkinson was instructed by Eddie as to what to do on site and told by Mr. Higson what time he should start/finish his work and what time to take lunch. He described in previous jobs when working as a self-employed person, he would agree a price and days he was going to work. Whilst waiting around for materials on the second respondent's site to complete work, he was paid the daily rate. Materials provided to him included all machinery (save for small tools which he brought with him) and damp proof courses.
 8. Mr. Wilkinson was asked about calls on a log from Apex/Emerald dated 4 July 2022 for about 2 minutes and 37 seconds; a call on 5 July 2022 for 8 minutes and 57 seconds and a further call on 10 October 2022 for 4 minutes. He said he might have spoken to the first respondent but he was unclear about the nature of the conversation. He did not send in timesheets; this was done for him.
 9. Mr. Kinsella said he was required to sign a form (he corrected his witness statement paragraph 8 where it says forms to form). He said he did so because he was told that he had to sign the forms to get paid. He did not see it properly and he was not allowed to read it. He accepted at page 158 his e-mail address was 54 Gmail. He noted that there was a self-employed registration form provided by Apex/Emerald. He had no recollection of the document at page 160. On 13 June 2022 Mr. Kinsella did not recall actually seeing the document. He could not recall phone calls between the first respondent and himself because he was recovering from a stroke; he could not remember the conversation between Laura Thompson of Emerald at page 198 dated 30 June 2022; stating the form would be signed on his behalf. He was unable to recall any telephone calls with Apex at it was a long time ago.
 10. On arrival at the site, the claimant Mr. Kinsella was not introduced to anyone from the first respondent. The claimants had contact with the second respondent's direct employees Eddie and Mr Higson. Mr Gregory in his evidence was vague as to whether Mr Higson was a direct employee at this time but accepted certainly at a later stage that Mr Higson did become an employee of the second respondent. The Tribunal finds on the balance of probabilities, that Mr. Higson was a direct employee of the second respondent at the material time of his contact with the claimants in 2022 and it is incredible to believe that Mr. Gregory would not have researched this aspect of the case fully prior to attending the Tribunal.
 11. On site the claimant, Mr. Kinsella, received instructions from Jim Higson, the site manager and his deputy Eddie; he was told the timings of the day; when there should be lunch breaks and morning breaks; start times were around 8:00 am and finish time 4:00 p.m. Although neither Eddie nor Mr. Higson gave direct instructions as to the way the claimants should use their specialist skills; they were not bricklayers themselves. Eddie was always watching the claimant and others and Mr. Kinsella was supervised by Eddie. Mr. Kinsella had to wait for materials to be delivered. He and the other claimants were paid on a daily basis. Following the conclusion of this

- assignment none of the claimants were sent to any other sites nor did they expect the first respondent to find them other work.
12. Mr. Kinsella's only contact with the first respondent and Emerald was in weekly text messages; the first respondent would text the claimant to say they had received his time sheet and text messages from Apex that his pay had been paid into his bank account. He understood that Emerald was a payroll company the second respondent used. He believed he worked for the second respondent.
 13. The claimants had small tools which they brought with them on site as part of a toolkit which they used in the course of their work of bricklaying. They were provided on the site with a high viz DRG jacket; hard hat; and gloves. He was told by Eddie to wear this equipment. Materials were provided by the site DRG.
 14. Timesheets for the claimants' work were not sent by them to the first respondent and in fact the claimants had no direct interaction with the first respondent. Eddie mainly gave the claimants instructions. The second respondent prepared timesheets who passed them to the first respondent who passed them on to Apex/Emerald. The claimants were paid £200 for each day worked.
 15. Mr Gregory of the second respondent stated that as an organisation the second respondent regularly approaches the first respondent for various contractors to assist on building projects. Mr. Gregory accepted that he had no personal contact between the claimants and the contact was between Mr Higson the site manager of DRG. He also accepted that he did not deal with the claimants at the time but said he had a general overview of how things worked. He was not party to any conversation between the claimant and the first respondent or Apex. He had read the transcripts and accepted that the first respondent did not submit the timesheets; DRG submitted the timesheets to the first respondent who sent those onto Apex/Emerald. In fact, the second respondent writes down the times worked and then sends the timesheets onto Apex/Emerald; the claimant's rate of pay is set by the second respondent and it varies depending on the skill of the contractor and the work done but the second respondent has the final say about the rate of pay. Following sending the timesheets to the first respondent
 16. If DRG was unhappy with any of the claimants' work they would directly take that up with the claimants initially but then it would be taken up by the first respondent. Mr Gregory accepted the documentation between the claimants and the first respondent post-dated the start dates of their work on site 20 and 27 of June; the claimants were working on the site before contact was made with the first respondent.
 17. Mr Poole, for the first respondent, did not have any personal dealings with the claimants at all nor was he on site prior to the claimants being introduced to them. The claimants were referred by DRG to the first respondent whilst they were working on the site. They were contacted that the services were needed and DRG approached the first respondent and not the claimants. He accepted that the first respondent was not party to the conversation with the claimants. Emerald/Apex and the first respondent are not related companies. They have a supply chain of companies and that they are external to the first respondent. They do not pay the claimants but pass the time sheets from DRG to Apex/Emerald for payment. DRG had the right to terminate the engagements of the claimants and the second

respondent did not require the permission of the first respondent to do so. He accepted that DRG initially engaged the claimants but when Apex and the first respondent became involved, the work carried out by the claimants did not change and their work on the expectation to be paid did not change either. DRG told Mr Poole what the claimants were to be paid.

Submissions

18. The first respondent provided a written submission and supplemented this with oral submissions. It was submitted that there was no worker relationship with between the claimant and the first respondent. Furthermore, they did not fit into the “agency worker” definition pursuant to Regulation 36 of the Working Time Regulations at the time when they commenced work on the site. The first respondent submitted there was an oral agreement between the second respondent and Mr Wilkinson for which the first respondent played no part in. Mr Wilkinson entered into discussions with Jim Higson who was employed by the first respondent. The first respondent facilitated the process of the assignment to the second respondent but there was no contract between the first respondent and the claimants. It was submitted the reality of what happened was unclear from the chronology but the claimants were not told by the first respondent to go to other sites. Once the project at the second respondent’s site was completed, the claimant’s work had ceased and there was no obligation upon the first respondent to find other work for the claimants (which would have been typical of an agency). There was no visible presence on site of the first respondent. There may have been mistakes as to what the claimants thought they were signing but the reality is that the claimants and the first respondent had no work relationship. There was no direct conversations between the first respondents and the claimants day-to-day. There was no agency relationship between the first respondent and the claimants.
19. The second respondent submitted that there was no contractual relationship between the second respondent and the claimants. The second respondent submitted there was a change of apparent position from the first respondent’s grounds of resistance (see page 49). The first respondent had pleaded in its ET3 that the claimants were self-employed individuals who had contracted with Emerald Sales Limited an umbrella company and a separate entity from the first respondent. It was submitted that for tax purposes they were self-employed and the claimants had conveniently forgotten about the documentation indicating that. The claimants signed documentation indicating they were self-employed and there can be no suggestion the documentation was fabricated. Mr.Kinsella’s documentation at pages 166,171,172 and 160 and the HMRC registration page 109 or CIS registration page 108 dated 26 July 2019 shows that Mr. Kinsella is referred to as a sub contractor or sole trader. It is evidence which the Tribunal can take into account. Further the second respondents submitted that SAGE supplier records suggest no contribution at page 322; a business type is a sole trader 5 January 2024 verified by HMRC further (see page 320). In the records these documents point to the fact that the claimants were sole traders and were self-employed. The claimants were not employed by the second respondent and there was no agreement to pay them directly; that was expressly prohibited between the standard terms agreed between the first and second respondent. The first respondent was an agency; the

second respondent was the contractor. It was submitted that the respondents entered into an agreement so that they could provide temporary workers to the second respondent. Although Mr Wilkinson approached the site; he was referred to the first respondent. Despite providing works to the second respondent the claimants were only ever self-employed; there was no contract that could be implied between the second respondent and the claimant; see the Court of Appeal decision of **James Greenwich and LBC council 2008 ICR 545** and in particular paragraph 24. In the absence of a contract between DRG and the claimant, it was not necessary to imply a contract of employment; this was the genuine master agreement which was signed and elected by the claimants to be self-employed; that was the clear objective of the parties. The mere fact that they assisted by working for the end user does not make them a worker for the end user; see also paragraph 44 of that judgement. It was disputed that there was any sham or fabricated documentation; the key is that there was a true agreement between the parties. The second respondent relied upon paragraph 32 of the Autoclenz case; the contract is not a sham; not inconsistent as to what was going on, on the ground and there was no evidence to establish any inconsistency. It was submitted that there was no contractual relationship between the second respondent and the claimants. Further, the subcontractor here is allowed to substitute (see Section 2 page 246 of the assignment schedule; section 3 page 228 4.1 point 2.5); there is a provision for substitution. The Tribunal was also referred to paragraph 8 point 2.5 at page 230 of the document nature of services are subcontractors; they are self-employed. The second respondent disputed the claimant's suggestion that documents were not signed by them; taking account of phone calls with Laura Thompson see pages 312; page 190 and at page 200. It was submitted that these contacts were consistent with the fact that the claimants agreed to enter into these relationships (see page 191,192 and 198). Ms. Thompson was signing the documents on behalf of the claimant having discussed the situation over the phone (see page 192). See the phone call with Mr Kinsella 30 June page 198; this information correlates with his evidence namely he had 50 years experience. The questionnaire was completed by Ms. Thompson whilst speaking to the claimant on the phone.

20. The claimant provided a written submission and supplemented it with oral submissions. The claimants' primary submission was that the claimants were limb (b) workers for the second respondent by way of a direct contract or by way of an implied contract. Alternatively, the claimants were agents of the first respondent. The claimants relied upon the case of **Byrne Brothers Formwork Limited v Baird 2002 ICR 667** where it was held that the intention was clearly to create an intermediate class of protected worker made-up of individuals who were not employees but equally could not be regarded as carrying on a business (see paragraph 17) where it was stated the essence of the intended distinction must be between on the one hand workers whose degree of dependence is essentially the same as that of employees and on the other contractors who have a sufficiently arms length and independent position to be treated as being able to look after themselves. Further it is stated self-employed labour only subcontractors in the construction industry are it seemed to us a good example of the kind of worker who may well not be carrying on a business undertaking in the sense

of the definition over whom the intermediate category created limb (b) was designed. There can be no general rule and we should not be understood as propounding one cases cannot be decided by applying labels but typically labour only subcontractors will though nominally free to move from contractor to contractor in practise work for long periods for a single employer as an integrated part of his workforce; their special skills may be limited they may supply little or nothing by way of equipment and undertake little or no economic risk. The claimant also relied upon **Bates van Winklehof v Clyde; Autoclenz Limited v Belcher; Uber BV V Aslam 2021 IRLR 407**. The claimants submitted that they found work on their own and began working for the second respondent as brick layers long before they had any interactions with the first respondent, or Emerald/Apex. The claimants had carried out work for the second respondent before they had been assigned such work by any other party including Emerald/Apex. The claimants submitted there was an oral contract with the second respondent or alternatively a contract ought to be implied between the claimants and the second respondent. This was a true contractual relationship and remained the initial contractual relationship. Any subsequent payments via Apex/Emerald did not change the contractual relationship between the second respondent and the claimants. Apex/Emerald had a responsibility to pay the claimant's wages. The claimants had no knowledge of how this structure operated and understood that the other companies involved used a payroll mechanism. At no point did the claimants believe or agree to hold to work for Emerald or Apex. The claimants did not sign any contractual documents with Emerald/Apex and there was no agreement between them. The claimants submitted that the registration forms and contracts within the bundle were plainly a sham and improper to remove the claimants employment protections. The brief phone calls made between the claimants and representatives of Apex show that the claimants working relationship predated the involvement of Apex and the so-called contractual documentation. The contractual relationship between the claimants and the second respondent predated the involvement of Apex where the wage bargain between the claimants and the second respondent was completed. The relationship was of a worker; the claimants were required personally to provide services; they were significant controlled; their equipment was supplied by the second respondent; the hours were stipulated by the second respondent including lunch hours. They were archetypical of limb (b) workers. They are due holiday pay. In the alternative the claimants relied on section 36 of the Working Time regulations.

21. In respect of the **James Greenwich** case whether it is necessary to imply a contract in the circumstances is dependent in each particular case. The agreement at its inception of the relationship is the starting point of the relationship and whether it truly represents the true intention of the parties. The contracts provided to the Tribunal are a sham because they do not reflect the relationship. All the conversations post-date the claimants actually working for the end user on the site. The agreement to start work at the second respondent's site was effectively the work/wage bargain. At that point the claimants had no inkling of any relationship with the first respondent or Apex. The second respondent agreed rates. They used a different payroll provider. The primary contract was between the claimants and the second respondent. Mr Wilkinson did not have a computer which

was not challenged; he's an 82 year old man and he doesn't have an electronic signature to sign on the contract. The transcript assists the claimants because it is a perfunctory short call; what was the claimant doing. Miss. Thompson said she would sign the contract for the claimant; there was an oral contract between the second respondents and the claimants already; the timeline at page 186 is that the document was created sent and signed. It is unlikely that any claimant would have read or had a true picture of what was suggested to happen; the claimants main concern was about getting paid because they had already been working for two weeks before this documentation appeared. The reality is that the claimants were directly engaged by the second respondent. The claimants were clearly under the control of Mr Higson and given specific tasks to complete and they used their skills to do so. They were dependent on the second respondent and could have their assignments terminated by the second respondent. There is no evidence of substitution either way. A health and safety check for skill on a site such as this HMRC tax status is not a determination of worker status in employment law; see the case of Enfield. There is an oral contract between Mr Wilkinson and the second respondent made by Mr Higson who worked on site who fixed the amount of money to be paid. Alternatively, the tribunal is invited to imply a contract of employment or find the individuals were agents pursuant to the definition of section 36 of the Working Time Regulations.

22. All parties agreed in the circumstances that the case was listed for liability and remedy and no counter schedules having been submitted by the respondents, if the claimants are successful then awards should be made pursuant to the schedules that the claimants had provided.

The Law

23. Section 13 of the Employment Rights Act 1996 states

“(1) An employer shall not make deductions from wages of a worker employed by him unless –

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

24. Section 23 of the Employment Rights Act 1996 states

“(1) A worker may present a complaint to an employment tribunal –

- (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applied by virtue of section 18(2)).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made.

(3) Where a complaint is brought under this section in respect of –

(a) a series of payments

The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.”

25. Section 21 of the 1996 Act defines wages as including holiday pay.

26. Pursuant to section 230 (3)(b) of the employment rights act 1996 means an individual who has entered into or works under or where the employment has ceased worked under any other contract whether express or implied and if it is expressed whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for another party to the contract who stated is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

27. Pursuant to the Working Time Regulations 1998 (WTR) the definition of worker is extended to include an agency worker supplied by another person to do work for a principal who is not carrying out the work under a contract where the principal is a client or customer of a professional or business undertaking carried on by the individual (Reg 36):

‘Agency workers not otherwise “workers” 36.—

(1) This regulation applies in any case where an individual (“the agency worker”)—

(a) is supplied by a person (“the agent”) to do work for another (“the principal”) under a contract or other arrangements made between the agent and the principal; but

(b) is not, as respects that work, a worker, because of the absence of a worker’s contract between the individual and the agent or the principal; and

(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—

(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work, and as if that person were the agency worker's employer.'

28. Under the provisions whether an individual is a worker is to be determined by considering:

(1) Was there a contract to perform work personally; if so

(2) Was the other party a client or customer of the individual?

29. In **Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT**, the EAT considered the intention of section 230(3)(b) was clearly to create an 'intermediate class of protected worker' made up of individuals who were not employees but equally could not be regarded as carrying on a business. It held *'the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves'*. In respect of labour-only contractors it was stated that

"self-employed labour-only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom

the “intermediate category” created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk.”

30. In the case of **Autoclenz Ltd v Belcher [2011] UKSC 41**, the Supreme Court stated that the Tribunal should consider whether the written contract represents the true intentions or expectations of the parties. Case law has provided further guidance that a Tribunal should start with the relevant statutory provisions and then weigh up all the factors in the particular case and ask whether it is appropriate to call the individual an employee; to stand back and look at the whole picture before reaching a conclusion.

31. In **Uber BV v Aslam [2021] IRLR 407** the Supreme Court suggested the starting point is the statute definition and then any written agreement, if there is one, and then to question whether any written agreement reflects the reality of the relationship. What was the true intention of the parties?

Conclusions

32. The Tribunal takes into account the evidence, statutory provisions and case law referred to.

Contractual terms

33. On the balance of probabilities, the Tribunal found that the claimants entered into oral contracts to work personally for the second respondent as bricklayers on the second respondent’s construction site. Mr Wilkinson as set out above was looking for work and approached the construction site and spoke to Mr Higson. Mr Wilkinson informed his colleagues Mr Kinsella and Mr Archibald of the opportunity to work on the site. Mr Wilkinson commenced his work as a bricklayer on site on or about 20 June 2022 and the others commenced work on the site as brick layers on or about 23 June 2022. There is no evidence before the Tribunal from Mr. Higson as to what was discussed with Mr. Wilkinson and the best evidence is that of Mr. Wilkinson and Mr. Kinsella.

34. Prior to any introduction of the claimants to the first respondent the claimants had already agreed to and started work at the second respondent’s construction site as bricklayers. The claimants were informed by Mr. Higson and understood

in order to get paid for the work of bricklaying on the site they had to enter a contract with the first named respondent. Emerald Sales Limited who were to administer payroll services. The claimants understanding is that they worked for the site controlled by the second respondent.

35. The alleged signed contracts relied upon by the second respondent, stated the claimants were to be considered “self-employed”. The Tribunal has not heard any evidence from Laura Thompson as to what was discussed with the claimants so that the best evidence before the Tribunal is from the claimants. In any event, the Tribunal may also look beyond the contract to consider the true reality of the situation in accordance with **Uber BV and others and Aslam and others (2021) UKSC 5**.
36. Miss. Thompson of Apex/Emerald (the payroll company) signed the documents electronically for the claimants. The claimants did not read these. As noted above, Mr Wilkinson who is aged 82 years does not in fact have an e-mail account for the documentation to be sent to. Mr Kinsella was recovering from a stroke and has no recollection of ever receiving the documentation sent to his email address 54Gmail. Mr. Wilkinson was asked about calls on a log from Apex/Emerald dated 4 July 2022 for about 2 minutes and 37 seconds; a call on 5 July 2022 for 8 minutes and 57 seconds and a further call on 10 October 2022 for 4 minutes. He said he might have spoken to the first respondent but he was unclear about the nature of the conversation.
37. Mr. Kinsella said he was required to sign a form to get paid. He did not see it properly and he was not allowed to read it. He noted that there was a self-employed registration form provided by Apex/Emerald. He had no recollection of the document at page 160. He could not recall phone calls between the first respondent and himself because he was recovering from a stroke; he could not remember the conversation between Laura Thompson of Emerald at page 198 dated 30 June 2022; stating the form would be signed on his behalf. He was unable to recall any telephone calls with Apex at it was a long time ago.
38. The Tribunal was not satisfied on hearing this evidence that the claimants had actually entered into an agreement to be self-employed. The claimants had been in contact with the second respondent prior to any contact with the first respondent and had orally agreed to provide personal service to the second respondent. In the circumstances the documentation relied upon which post dated the agreement with the second respondent purporting to suggest the claimants were self-employed was unreliable and did not reflect the true intentions or expectations of the parties; **Autoclenz Ltd v Belcher [2011] UKSC 41**.
- Control
39. Day to day control of the claimants was exercised by Mr. Higson, site manager and his deputy, Eddie. The claimants recalled that Eddie was constantly watching and supervising them. Mr. Higson had initially agreed to take on the claimants following the direct approach by Mr. Wilkinson. They determined what work the claimants should do (without informing them as to how to perform the work; they were experienced and professional bricklayers and Mr. Higson and Eddie were not); they determined the hours they worked including start times, finish times and lunch times. Mr. Higson required the claimant's to wear a DRG hi viz jacket, hard hat and gloves supplied by the second respondent. Although Mr. Gregory was vague in his evidence as to the status of Mr. Higson at the material time, the Tribunal find that it is likely he was a direct employee of the second respondent at this time. The claimants would wait for materials to arrive

and were paid on a daily rate even if they had been waiting sometime for materials. The substance of equipment was provided by the second respondent to the claimants (save for some hand tools) along with materials. The second respondent submitted timesheets to the first respondent who forwarded these onto Emerald/Apex who made payment to the claimants. The second respondent set the rate of pay for the claimants and had a right to terminate the “assignment” of the claimants. Following the ending of the work at the second respondent’s construction site, the claimants were not sent to any other assignments.

Substitution

40. The claimants as experienced professional bricklayers were orally contracted to personally work for the second respondent. They obtained the work from Mr. Higson by reason of their expertise in the industry. The issue of substitution did not actually arise in the course of their work on site. The second respondent relies upon the term contained in the documentation. However, a right to substitute is not necessarily inconsistent with a contract for services; see **Pimlico Plumbers Ltd v Smith UKSC 29**.

Payment

41. The claimants commenced work on the site having agreed a daily wage with the second respondent prior to their contact with the first respondent. The second respondent set this rate. The claimants were paid this rate even if they were waiting around for materials to arrive.

Other factors

42. The Tribunal does take into account that the SAGE system noted that the claimant was a sole trader (see page 322) and that the self-employed registration form at page 246 noted Mr. Wilkinson was self-employed but these matters do not alone determine worker status.
43. In conclusion the written documentation in this case did not reflect the reality of the situation. The claimants had already entered into an oral agreement with the second respondent to provide personal service of bricklaying work on the second respondent’s site prior to any involvement with the first respondent. There was a substantial amount of control exercised by the second respondent’s site team on the hours worked by the claimants; what they wore on site; the provision of material and substantially, the equipment. The second respondent recorded and submitted the claimants time sheets to the first respondent who submitted them to the payroll company. The first respondent in these circumstances acted as a conduit for payment for the claimants.
44. The claimants have satisfied the Tribunal in the circumstances that they were workers within the meaning of section 230 (3)(b) of the Employment Rights Act 1996 and are awarded the holiday pay amounts set out in their schedule of losses.

Employment Judge Wedderspoon

5 March 2024