



EMPLOYMENT TRIBUNALS

Claimant: Mr D Harper
Respondent: SMB Electrical Contractors Limited
Heard at: East London Hearing Centre (By CVP)
On: 21 July 2022
Before: Employment Judge Park

Appearances

Claimant: Did not attend
Respondent: Mr Nathan Jenner (Director)

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the Claimant was neither an employee nor a worker. As a result this Tribunal does not have jurisdiction to hear the Claimant's claim against the Respondent and the claim is dismissed.

REASONS

Claims and Issues

1. The Claimant brought a claim for unpaid wages. In the ET3 the Respondent stated that the Claimant was a self-employed contractor.
2. This preliminary hearing was listed to determine whether or not the Employment Tribunal has jurisdiction to hear the Claimant's complaint of unlawful deduction of wages. This is because the Employment Tribunal only has jurisdiction to hear claims from individuals who are categorised under section 230A Employment Rights Act 1996 as either employees or workers. The issue for me to determine was whether or not the Claimant was a worker for the purposes of s.230 ERA, in respect of a claim for unlawful deduction of wages, or for a breach of contract claim.

Procedure, documents and evidence heard

3. This hearing had initially been listed for three hours starting at 2pm. The day before it had been relisted for 10am. It was then changed again at the Respondent's request to 12pm. The Claimant was contacted and he had confirmed he could attend at 12pm.
4. The Claimant initially joined the hearing by CVP at 12pm. I was unable to join the hearing immediately and the Claimant left the hearing at 12.05pm. The Claimant was contacted at which point he explained he was driving and he would not be available until after 4pm. The Respondent was already in attendance. The Claimant was contacted again and asked if he would be able to attend if the hearing proceeded at the original time of 2pm. The Claimant was unable to attend at 2pm. The Claimant was informed that the hearing would potentially go ahead in his absence. The Claimant did not object to this proposal.
5. I decided to go ahead in the Claimant's absence. The Claimant had been notified on 21 May 2022 that the hearing would last 3 hours. Although the Claimant attended he only waited 5 minutes and then made it clear he would not be available again during the allotted time slot. I took into account that there had been changes to the time only made the day before, which may have made it harder for the Claimant to attend. However, the Claimant was aware of the change and had not objected. He had also indicated that he would still be unable to attend when the original time slot of 2pm was offered again. I was satisfied that the Claimant had notice that the hearing would be on 21 July 2022 and last three hours. He was given opportunities to attend the hearing at different times but the Claimant had not ensured that he would be available for the duration of the hearing as originally listed.
6. Directions had been given previously and the parties were ordered to send to the Tribunal witness statements and other documents they relied on 7 days before the hearing. The Respondent provided some documents and two witness statements. The Claimant did not provide any documents or witness statement.
7. The Respondent's witness statements were by Mr Aaron Horst and Mr Paul Taylor. Neither attended the hearing so I was unable to ask them any further questions so the weight I have attached to their evidence is limited. Mr Nathan Jenner, the Respondent's director, attended and he was sworn in and I was able to hear oral evidence from him.
8. As the Claimant did not attend and had not provided any documents or a statement the only information I had from him was the contents of his ET1.

Findings of Fact

9. The Claimant's ET1 contained no information that related to his status as an employee, worker or self-employed contractor. The only evidence I had was that provided by the Respondent.

10. In his witness evidence Mr Jenner explained that his business had very few employees. He has clients and he will agree a price for the job as a whole with his client. He then engages a number of electricians and he will pay them out of the money he receives for from his client. He explained that he engages some electricians via agencies and others directly. Those that he engages directly set their own rate of pay. There is quite a broad spectrum or rates, so some will be on around £240 a day and others will do the same work for less.
11. All the electricians provide their own transport and equipment. The Respondent only provides a hard hat and high vis with the Respondent's name on. This is a requirement of the Respondent's clients so they know who is on site. Mr Jenner had noted that the Claimant had his own insurance and he explained this was standard in the industry as electricians need it when working directly for their own clients. When working for the Respondent electricians would be covered by the Respondent's insurance.
12. Mr Jenner initially engaged the Claimant via an agency. This was around 3-4 years ago. Later Mr Jenner engaged the Claimant directly. The Claimant set his own rate of pay and Mr Jenner agreed this. There was no written contract between the Claimant and Respondent. The Claimant then invoiced the Respondent for the work he undertook.
13. During 2021 the Claimant worked for the Respondent in July for around 5 weeks. He then left to do some other work and came back in September for 2 weeks. He returned again in October for 4 weeks and again in November 2021.
14. Mr Jenner explained that when electricians are working for him they will be on a particular site and given a list of things to do. Once that list had been finished they would be allocated other tasks. There would be one supervisor on site allocating work to the different electricians working that day.
15. Mr Horst's statement indicated that he provided additional labour to assist him. Mr Jenner expanded on this. He explained that he would just agree a price with individual electricians. As far as he was concerned, they could either bring someone to help or send someone else in their place. The price would still be the same and it was up to the electrician to pay anyone who assisted them. All that Mr Jenner needed to know was who was on site so they could be inducted. He thought that Mr Horst had brought someone with him who was not an electrician but as an extra pair of hands.
16. Mr Jenner did not know if the Claimant ever employed anyone else to assist him. Mr Jenner also did not know what other work the Claimant did when not working for the Respondent. He did draw to my attention the invoice in the documents provided. These were in the name of "David Harper Electrical" which Mr Jenner thought could be an indication that he had a more substantial business than just undertaking work on his own.

17. I found Mr Jenner to be straight forward in his evidence and I accepted what he told me about his business and the working arrangements with the Claimant. I made the following findings of fact:
- a. The Claimant worked for the Respondent from time to time. When he did so he was able to set his own rate of pay and this was accepted by the Respondent. There was no other contract and the only term that was agreed was the rate of pay.
 - b. I accepted that the Claimant could send a substitute or sub contract some of the work if he wanted to without needing the Respondent's approval. There were no actual terms agreed on this point due to the lack of contract. However I accepted Mr Jenner's evidence as the overall impression I got was that he was not particularly concerned with who actually did the work.
 - c. The Claimant was set up as having his own business. He had his own insurance and provided his own tools. He invoiced the Respondent under a business name.

The Law

18. Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under):

- a contract of employment ('limb (a)'), or
- any other contract, whether express or implied and (if 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 ('limb (b)').

For the purposes of this definition, a contract of employment is defined as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing' — S.230(2) ERA.

19. There is no statutory definition of 'contract of service' for the purposes of s230(3)(b) ERA and the definition of 'worker' must be determined by reference to the statutory definition and the caselaw. This definition concerns the dividing line between those who are truly self-employed, carrying on a profession or business undertaking on their own account and entering into contracts with clients or customers to provide work or services for them, and those who, while self-employed, in fact provide their services as part of a profession or business undertaking carried on by someone else.

20. In *Uber BV and ors v Aslam and ors* 2021 ICR 657, the Supreme Court has confirmed that the question of whether work is performed by an individual as a worker or as an independent contractor is to be regarded as a matter of statutory, rather than contractual, interpretation. In *Uber v Aslam and others* 2021 the Supreme Court described the effect of the different definitions and how there are three distinct statuses, namely employees, the self-employed and the intermediate status of worker as follows:
- “The effect of these definitions... is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all ‘workers’.”
21. It is well understood and accepted that tax treatment is a different issue from employment status, and one does not determine one from the other. In taxation law, one is either employed or self-employed, and the intermediate status of a worker is not recognised.
22. In this case there is no indication that the Claimant was an employee. The issue is whether or not the Claimant is a ‘limb b worker’ or genuinely self-employed.
23. To meet the statutory definitions under s230 ERA the following are necessary:
- a. There must be a contract, whether express or implied, and, if express, whether written or oral.
 - b. That contract must provide for the individual to carry out personal services.
 - c. Those services must be for the benefit of another party to the contract who must not be a client or customer of the individual’s profession or business undertaking.
24. On personal service, the requirement was made clear in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367. In that case, the contract provided that, if the worker was unable or unwilling to do the work personally, he had to provide a substitute. The Court of Appeal held that the power to send a substitute meant that this could not be a contract of employment. The irreducible minimum of a contract of employment was an obligation on the worker to provide his services personally.
25. Where there is a power to send a substitute only where the worker is unable to do the work, the obligation to undertake work personally does not

necessarily cease to exist. *Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51*, sets out some general principles relating to the right of substitution, emphasising the need to examine the wording of the contract and the underlying reality of the situation:

- a. An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.
 - b. A conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.
 - c. A right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance.
 - d. A right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.
 - e. A right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.
26. The final part of the definition of limb (b) workers is usually referred to as the ‘client or customer’ exception. In *Byrne Brothers (Formwork) Ltd v Baird [2002] ICR 667*, the EAT gave guidance on this. It held the intention was 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. The “essence of the intended distinction [created by the exception] 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”.

Conclusions

27. The first issue is whether or not there was a contract between the Claimant and Respondent. I have found there was an agreement that the Claimant would work for the Respondent at an agreed rate of pay. This was verbal and the terms of that contract were minimal, but one did exist.
28. The agreement between the Claimant and Respondent only related to the rate of pay, which was set by the Claimant. I accepted Mr Jenner’s evidence that the Claimant could then have sent someone else or alternatively brought someone to assist him. I also accepted Mr Jenner’s evidence that there was no real limitation on who else did the work or assisted the Claimant. If the Claimant did do this it would then be his responsibility to pay that person.

Therefore, I have concluded that although in practice the Claimant did carry out the work personally this was not a requirement.

29. On the final question, I also find that the Respondent was sufficiently independent that he can be treated as being on business on his own account. The Claimant had a profession and he set his own rates of pay which then the Respondent accepted. The fact that the Claimant was able to set his own rates of pay and, once that was agreed, could organise how that work was undertaken himself is not consistent with being a 'limb b worker'.
30. As the Claimant was not a worker this Employment Tribunal does not have jurisdiction to hear the Claimant's claims for unlawful deduction of wages or breach of contract.

**Employment Judge Park
Dated: 19 August 2022**