EMPLOYMENT TRIBUNALS

BETWEEN

Claimants: **MR T WALSH**

Respondent: **IMPACT CONTRACTING LTD**

OPEN PRELIMINARY HEARING

HELD AT: London Central **ON:** 16 August 2019

HEARD BY EMPLOYMENT JUDGE: **Oliver Segal Q.C.**

Representation:

For Claimant: In person
For Respondent: Ms K Weston, manager at Respondent

JUDGMENT

1 The Claimant was not a worker within the meaning of s. 230(3) ERA 1996 and his claim for unpaid wages and holiday pay is therefore dismissed.

REASONS

Facts

2 I heard evidence from the Claimant and Mr Grierson, MD of the Respondent. Both witnesses were clearly truthful and there was no dispute of fact.

3 The Claimant, a bricklayer, is self-employed and provides his services to contractors on building sites within the Construction Industry Scheme (CIS) under which he is registered and has a unique registration number.

4 The CIS is in effect a product of the tax regime, whereby certain individuals (or partnerships or companies) can be engaged as self-employed having (in the Claimant's case) a 20% deduction made at source towards their overall tax obligations on self-assessment.

5 The Claimant's details are held at times by various agencies, one of which, Total Site Projects Ltd ("Total"), offered him work for several weeks at a site where the relevant sub-contractor was Tenon Construction Ltd, at the rate of £180 per day. He accepted that offer.

6 Total, like many other agencies, has out-sourced its contractual, payroll and various admin functions to companies like the Respondent. The Claimant suggested this had been forced on agencies by legislation; the Respondent did not believe that to be the case. In respect of this job, Total used the Respondent to engage the relevant workmen, including the Claimant.

7 The Respondent acts in that capacity for many agencies, and engaged on their behalf: PAYE employed workers (increasingly as the legislation had made it more difficult for an agency safely to have workers engaged on a self-employed basis), CIS self-employed workers, workers providing services through limited companies. It relies on the agency and the individual worker to determine the appropriate basis on which to engage that individual. In the latter regard, by reason of s. 44 ITEPA, it seeks to

protect itself by requiring as a contractual term that any individual engaged on a CIS self-employed basis confirm that they will be working and continue to work without being "subject to the supervision, direction or control by any person" (clauses 2.4-2.6 of the contract discussed below).

8 As is not unusual, it appears, the Respondent was only given the Claimant's details some days after the work had commenced on site on 20 August 2018. The Claimant says he was contacted by the Respondent after a few days to confirm basic details, but the Respondent has no record of that contact and doubt it took place.

9 In any event, on 30 August 2018 a member of the Respondent's staff phoned the Claimant and went through orally some of the main terms of the contract under which the parties would agree for the Claimant to be engaged. Those terms, included, in summary, all the main provisions identifying the contract as one which did not fall within the s. 230 definition of a worker: no mutuality of obligation, unrestricted right of substitution, right to determine own method of providing the services, no right to holiday pay, etc. The Claimant said he could not hear all that was being read out, being on a noisy building site. Mr Grierson, MD of the Respondent, said in evidence that if the Claimant had objected to not being paid holiday pay, then the Respondent would not have engaged him on a self-employed basis, but would have reverted to Total to see if he could be engaged on a PAYE basis.

10 On the same day (30/8), the Respondent sent the Claimant an email containing a link to an online portal where the full contractual terms could be found, backdated to the first day of work (20/8) ("the Contract"). The Claimant said he did not in fact read the Contract until after he had finished working on the site. He was not sent a hard copy.

11 The full terms of the Contract are, likewise, wholly inconsistent with worker status, covering the same matters listed above and several others. I note in particular in this regard clauses: 2.1, 2.4-2.7, 2.8, 2.9 (must be

self-insured), 2.10, 3.4, 3.7 (must put defective work right at own cost), 3.10-3.12, 5.8, 7.3.

12 Clause 3.5 of the Contract provided for the Claimant's entitlement to be paid *"upon receipt of funds from the Client"* (Total).

13 On site, the Claimant was told by Tenon or by the main contractor where to work, the hours he could work on site and of certain matters relating to health and safety. However, the actual performance of his work as a skilled bricklayer was largely unsupervised.

14 The Claimant told me that, so far as sending a substitute to perform the work, that person would, like himself, have to show he had the right to work in the UK (generally by producing a passport), was registered under the CIS and appropriately skilled/qualified. Tenon would decide whether those conditions were met.

15 The Claimant was paid for his first two weeks' work (till 31/8) on 31/8 and 7/9.

16 On 13 September 2018, it became clear that Total would not be paying in respect of the workers it had agreed to supply on site because it had run into financial difficulties. By that time the Claimant had worked an additional almost two weeks.

17 On 14 September 2018, the Respondent's online portal record shows the Claimant sending a message online to say that he accepted the terms of the Contract. The Claimant accepts that happened, but says he had still not actually read the Contract.

18 The Respondent was not paid by Total and the Claimant was not paid by the Respondent for those final two weeks. The Claimant was not paid any holiday pay.

19 The Claimant has brought a few other tribunal claims in relation in particular to holiday pay and has been successful in three such claims, establishing worker status. However, in none of those cases was

reference made to industry standard terms and, in so far as they were defended at all, the tribunal had to decide what the terms of each engagement were in fact.

Law

20 S. 230(3) defines a worker as including a person who works under “any contract … 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”.

21 It is that definition that must be satisfied if the Claimant is to succeed in his claims for unpaid wages and holiday pay. Today’s PH was convened to determine whether the Claimant was such a “worker” of the Respondent.

22 There was no dispute as to the relevant law, which I summarise very briefly:-

a. The wording of any written contract was of key significance. However, if there was evidence that the actual agreement between the parties was deliberately not reflected in the terms of that written contract, then it was the actual agreement not the written terms which determined the status of the individual.

b. An unrestricted right of substitution was not consistent with worker status, but a very limited right of substitution was consistent.

c. As regards the “client or customer” part of the definition, the issue is whether the individual had a similar degree of dependence as an employee or was rather an arm’s length contractor who could look after themselves.

Discussion

23 It is agreed that the Claimant was self-employed.

24 Absent the terms of the Contract, it would, I find, be unclear whether the Claimant was a worker. There would have indications both ways and several areas of uncertainty (as to substitution in particular).

25 However, by at least the time at which the Claimant was working in the two weeks for which he was not paid, I must find that the terms of the Contract did govern the engagement of him by the Respondent. If he did not hear or listen to, and did not read those terms (as is quite understandable), he must in these unfortunate circumstances take responsibility for that.

26 The terms of the Contract had been carefully drafted comprehensively to negate worker status (see above). The Claimant must be taken to have agreed those terms (as he did, formally, on 14 September). There is no suggestion that the Contract was in any way a sham or did not reflect the reality of the engagement. I find it did document the reality of the engagement.

27 In the circumstances, I must dismiss these claims.

EMPLOYMENT JUDGE- Segal

16 August 2019 London Central

Date Sent to the Parties

16/08/2019

For the Tribunal Office