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EMPLOYMENT TRIBUNALS

Claimant: Mr J Johnson

Respondent: Contour Roofing (Essex) Ltd.

PRELIMINARY HEARING

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 8 June 2021 and (in chambers) 29 June 2021

Before: Employment Judge B Elgot

Representation
Claimant: Mr C Kelly, Counsel
Respondent: Ms A Farah, Solicitor

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

The Employment Judge having reserved her decision now gives judgment as follows:-

JUDGMENT

1. **The Claimant was an employee of the Respondent as defined by s 230 Employment Rights Act 1996 with at least two years' continuous qualifying service until the date of his dismissal on 15 September 2020.**

2. **As a result of this decision an Employment Tribunal has jurisdiction to hear his claims of unfair dismissal, failure to pay accrued holiday pay and breach of contract (failure to pay notice pay).**

3. **Reasons for the judgment are attached.**

REASONS

1. This was a wholly remote Preliminary Hearing using the cloud video platform (CVP) facility as part of the Employment Tribunal's covid 19 pandemic arrangements.

2. The duly notified issue to be decided at the Hearing was whether the Claimant has status as an employee or alternatively as a worker in relation to all or part of his contractual working relationship with the Respondent which is a construction company whose main business is the provision of roofing services (new build and refurbishment). It has a workforce of approximately 20-25 persons. At paragraph 1 of Mr Woods' witness statement he refers to 18 employees and 9 'directly employed' roofers and '*in addition engages the services of self- employed sub-contractors and limited companies in order to provide services'.* The Claimant is said by the Respondent to be one of the self-employed group.

3. The Claimant began work with the Respondent in March 2011 and was dismissed without notice on 15 September 2020 for alleged misconduct. His right to claim unfair dismissal and breach of contract depends upon his ability to establish that he was an employee of the Respondent for at least the two year qualifying period required by s 108 Employment Rights Act 1996 (the 1996 Act). His right to claim accrued and unpaid holiday pay depends upon his status as either an employee or a 'worker' as defined by the 1996 Act.

4. I heard oral evidence from the Claimant himself who was cross examined. The Respondent had three witnesses- Mr Lee Clift who is the Construction Director, Mr Joe McCanna one of the Contracts Managers (the other is named Dean Brazier) and Mr Jonathan Woods, Managing Director. There is an agreed Preliminary Hearing (PH) bundle. In accordance with the usual practice of the Employment Tribunal I read only those documents in the bundle to which my attention was directed by the representatives and/or the witnesses. I had the benefit of a Skeleton Argument prepared by Mr Kelly and written Closing Submissions from Ms Farah; both representatives also made oral submissions.

5. The issue of employment status is one in which there is an extensive body of case law including the recent Supreme Court case of Uber BV v Aslam [2021]ICR 657. I am grateful to both representatives for setting out an accurate and comprehensive summary of the relevant cases and to Mr Kelly for the provision of a bundle of authorities. I have thus set out relatively brief references to the relevant parts of the cases upon which my decision is based and cross-referenced to the submissions.

6. The statutory provisions are at s 230 of the 1996 Act and the precise text is set out in paragraph 3 of Mr Kelly's Skeleton Argument. It is immediately clear from that text that there must be a contract between the Claimant and the Respondent whether orally or in writing and whether in express or implied terms. An employee is an individual who has entered into or works under (or where the employment has ended worked under) a contract of employment. I make further findings about the contract between the Claimant and the Respondent below.

7. A contract of any kind involves legal obligations on both sides. A contract of employment has been held by the appellate courts to require a bare minimum obligation on an employee to accept, carry out and complete at least some of the work which is offered to him under the contract. The obligation of the employer is to offer some work and to pay for it. In other words there must be a mutuality of obligation. I have asked myself whether that element of mutuality of obligation exists in this case.

8. The case of St Ives Plymouth Ltd v Haggerty UKEAT [2008] 0107/08/225 heard by the then President Mr Justice Elias makes it clear that there can still be an overarching or 'umbrella' contract of employment even where there are gaps in work or between shifts so long as there is an overall finding of fact of sufficient mutuality of obligation. That is why I make reference to 'some' work.

9. In relation to the case law relating to employment status I begin by re-stating what is sometimes called the 'classic' test used to distinguish between employees and the self-employed. It is set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance[1968]1 All ER 433 QBD and by the Supreme Court in Autoclenz Ltd. V Belcher 2011 ICR 1157 SC. That test poses three questions:-

i) Did the worker agree to provide his own work and skill in return for remuneration? This is the element of personal performance.

ii) Did the worker agree expressly or impliedly to subject himself to a sufficient degree of control for the relationship to be one of employer and employee? The older terminology is 'master and servant'.

iii) Are the other provisions of the contract consistent with it being a contract of employment? This is, as Mr Kelly points out at paragraph 21 of his Skeleton Argument, a kind of negative condition. If there is a contract with the mutuality of obligation as described above are there any other factors about the relationship which can defeat the conclusion that a contract of employment exists?

I have examined whether these three elements are part of the working arrangements between the parties.

10. The Contract for Services

The Claimant has signed a series of contracts, usually annually, since he commenced working with the Respondent the most recent of which is dated 1 September 2020 and is to be found at pages 35-40 in the bundle. It is described as a Contract for Services and the Claimant is described therein as 'the Subcontractor'. It contains clauses allowing the provision of substitutes to perform the Services and stating in clause 1.10 that there is no obligation to offer or accept/continue work on any future or current 'assignment'. In other words it purports to exclude an obligation of personal service and to exclude mutuality of obligation. The signature page (page 40) summarises the four key terms I-IV by reference to self- employment status, right to supply substitutes, no mutuality of obligation, and responsibility for the Services.

11. The Claimant agrees that he was given time to read the contract, did note its contents and did sign it (whilst on site) in its latest version. He maintains that, from the beginning, '*I had no say in the matter and just accepted this was what they wanted me to do*'. He pays tax as a self- employed person. He submits invoices for payment. However he disputes that the Contract for Services reflects the true agreement between him and the Respondent and

he says that these contractual arrangements certainly do not describe how he worked for the Respondent in practice.

12. I have determined that for the reasons given below there was a consistent and long standing practice of the Respondent to offer work both at a flat day rate and on priced jobs and of the Claimant accepting that work which he personally provided, without having any meaningful right of substitution. He was engaged in full time service for the Respondent for almost ten years. He in fact worked under a contract of employment quite different from the written Contract for Services.

13. The legal position in relation to the existence of the Contract for Services is clear following the Uber case (which related to 'worker' status) which confirms the position in Autoclenz. I agree with the summaries set out in paragraph 5 a-g of Mr Kelly's Skeleton Argument and in paragraph 7 of Ms Farah's Closing Submission. The task for me in this case is to establish on the evidence whether the Claimant falls within the statutory definition of 'employee' based on the true nature of the relationship between the Claimant and the Respondent and whether the Claimant thus has protection as an employee under the statutory regime in the 1996 Act and elsewhere.

14. Lord Leggatt in Uber does not say that the contractual terms, for example in a Contract for Services like this one, should be ignored but the Supreme Court states that the tribunal is entitled to look at the reality of working arrangements, must not presume that the written contract for services represent the true agreement just because it has been signed and '*any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded'.*

15. I cannot agree with Ms Farah's contention at paragraphs 26-32 that the Claimant's bargaining power in this working relationship was so strong that it overcame any imbalance of power between him and the Respondent and that thus the need for the protections afforded by employment legislation were ' a world away' from the Claimant's situation. He made clear in his evidence both written and oral that he needed the work from the Respondent and the pay (at least the '*guaranteed day rate')*. He said that he wanted to '*move over and do better in life'* by joining the Respondent in 2011 and that he sought to establish a loyal and secure working relationship. In no part of his evidence does the Claimant describe building a separate and equal independent business on his own terms. He is consistent in his evidence that he signed the Contract for Services because he was given no choice in the matter and did not subsequently wish to challenge the position and '*get nowhere'.*

16. In his previous job the Claimant had been directly employed for five years by roofing contractors in Cambridge. He was approached by Mr Woods to come and work for the Respondent instead. The Claimant has specific specialist skills, valued by the Respondent, in the installation and maintenance of single ply flat roofs manufactured by Sika. Sika require installers to be accredited.

17. In respect of each version of the contracts for services the Claimant says that he believed that he had no choice but to sign the document the Respondent insisted upon. He said that if he wanted to start and then to remain working with the Respondent and building a consistent and solid working history and relationship with them then he believed he had to sign the written agreements in the terms presented to him.

18. Mutuality of Obligation. The way in which the Claimant is paid in practice has been slightly difficult to ascertain. He has never been required to submit tenders for specific projects. Indeed the contract itself provides for verbal negotiation and agreement of the rate and frequency of payment for the 'Services'. No written assignment schedules of the type referred to in clauses 1.2-1.2 of the contract have ever been issued. The statements of the Respondent's witnesses only describe situations in which the Claimant is offered a roofing job and negotiates a price verbally (priced jobs).

19. A priced job was described by the Claimant as a job where he would be asked if he wanted to do a roof, he would quote a price based on the time he thought it would take. The respondent supplied all materials. If he could get the job done quicker than quoted the Claimant would still be paid the agreed price and might therefore gain time and 'draw' a bonus. This was more advantageous to him than if he had installed the same roof in the same amount of time whilst paid a flat day rate. It has not been possible to obtain from either party any detailed accurate information about the ratio of priced jobs to day rate work and that ratio has changed from year to year.

20. I do not conclude that the existence of some negotiation around these priced jobs is convincing evidence that the Claimant was a self-employed contractor changing and negotiating his payment terms in an equal bargaining position. Indeed I agree with Claimant's counsel that many of the Claimant's What's App messages, for example at pages 108 -111 consist of 'griping' and complaining about prices rather than conveying any sense of commercial negotiation.

21. However, I do find that on both priced jobs and on day rate the Claimant worked exclusively 100% for the Respondent five days a week (with some weekend work on offer for extra pay). He summarised this exclusivity by saying '*you work who you work for…I wouldn't ask for a week off to go and work somewhere else*'. He acknowledges that his working hours were 8 am to 4pm with some flexibility and with some allowance (as he himself admits) for his sometimes poor timekeeping and occasional unreliability. The Claimant states clearly and credibly at paragraph 5 of his witness statement that he did not work elsewhere and that he carried out roofing work full time for the Respondent for almost ten years. This is supported by the evidence of his earnings.

22. He also described in his answers to cross examination that he joined the Respondent '*because they had work all year round and I would work all year round…it guaranteed itself.'*

23. Mr Kelly's calculations, not queried by the Respondent, and utilising the financial records at pages 153-205 show that in the period between March 2011 and September 2020 the Claimant earned between £600-1000 per week from the Respondent. The Claimant's witness statement at paragraph 11 refers to a day rate of between £110-145

which equates to approximate weekly earnings of between £550-725. The Claimant's consistent earnings support his full time work for the Respondent.

24. I am satisfied from the Claimant's evidence given under cross examination that he not only carried out priced jobs but also made up his hours and earnings by working on a flat day rate to 'infill' and help out with other teams of roofers working on bigger jobs. In his answers to cross examination he called it '*mucking in with someone else for a day or two…where they wanted or needed you, you went there, to different places'.* He said '*I was in the Planner every week'.* The Planner is the work plan and rota maintained by the Contracts Managers. The Claimant would ring or message at the end of each job to ask where he was wanted next. He was also offered some optional weekend work which he often took. There are emails and What's App messages, for example at the top of page 108 in the bundle, enquiring about and planning the next week's work. I note that much of this correspondence reads like communication between colleagues and co-workers both in relation to content and language used.

25. In addition, Mr Woods says at paragraph 16 of his witness statement that the Claimant worked between 50-60% of his time on new homes projects for Fairview Homes which is '*over 50% of our flat roofing order book and turnover*'. I find that this was, in practice, regular work not subject to individual pricing by the Claimant and, certainly before the relationship between the parties began to break down, the Respondent was pleased with the Claimant's skilled work and regarded him as a valuable resource in carrying out the flat roofing work which they were able to provide full time to their clients and customers.

26. Taken together, including the persuasive factor of the ten year length of a mostly successful working relationship, the evidence in this case supports the existence of mutuality of obligation because there is a strong picture of the Respondent offering work (on both a priced job and day rate basis) and the Claimant accepting it and being obliged to complete it not only out of commitment and loyalty but also to earn additional remuneration if he finished early. Mr Clift gave clear evidence that the Claimant was obliged to finish a job he was given. The Claimant worked full time for the Respondent because he wanted a secure future, he said he '*needed to earn'* and the Respondent was able to progress its business by utilising the specialist skills of an experienced roofer who was acknowledged by Mr Clift as being good at what he did.

27. Mr Kelly makes the pertinent point in his closing submission that the business model of the Respondent is to provide excellent service, meet clients' expectations and timescales. These aims require the consistency and reliability of skilled roofers. For the Respondent to employ the Claimant under a contract involving mutuality of obligation makes commercial sense in a way that a contract for services, with a right of substitution and even of abandonment, does not. The Respondent was able to recruit and retain an expert Sika accredited roofer for single ply roofs whenever needed.

28. Is there the requirement for personal service/performance?

I have correctly been asked to consider the question posed in Pimlico Plumbers v Smith [2018] ICR 1511 which is whether personal performance of the work in question is a

'dominant feature' of the agreement between the parties in this case. I am satisfied that it is, for the reasons given above and below.

29. As stated above the Claimant worked in what Mr Clift described as a '*specialist industry'* particularly in relation to Sika roofs. He described roofers as a 'breed' each with their own skill set and agreed that the Claimant was very good at what he did which is why the Respondent preferred to work with him over and above '*anyone unknown'*. I find that the Claimant had his own personal reputation for skilled work done quickly. That is one reason why Mr Woods went out of his way to recruit him and indeed one reason why the Respondent put up with some elements of admitted poor conduct on the Claimant's part. Mr Clift said '*you had to work with what you had from Joe'.*

30. Sika require installers to have an installer's card/ certificate of competence which must be checked by the Sika Field Technician. It is not compatible with the parties' established way of working together that the Claimant would inform the Respondent that he was sending a substitute roofer (thereby losing the money he would otherwise have earned himself since he did not work elsewhere) whereupon the Respondent would accept the need to check the substitute's installer card, health and safety and training certificates and agree to have the substitute on site. It sounds unfeasible that these checks could regularly and reliably be completed in '*as little as 15 minutes'* as Mr McCanna states in paragraph 13 of his witness statement. This was not a practicable arrangement between the parties nor one which occurred in practice. The Claimant said he was unaware of this possibility and not aware of anyone he could send as a substitute.

31. The option in the Contract for Services to substitute was never exercised by the Claimant and he never considered or tried to do so. It was in practice never part of the working arrangements between the parties that the Claimant would give one week's notice that he was sending a substitute roofer to undertake all or part of one of the Respondent's jobs. He knew that he was expected as an experienced and skilled roofer to work full time for the Respondent and carry out the jobs he was allocated by Messrs McCanna and Brazier in the Planner. The Claimant said in his oral evidence when asked when he decided to take a job- '*it was not a matter of me choosing…they would tell me how big the roof is, where it is …I would get on with it'.* He said he could choose whether or not to work weekends.

32. <u>Did the Respondent exercise sufficient control over the Claimant for this to be an employee/employer relationship?</u>

33. Messrs Brazier and Mc Canna are described by Mr Clift at page 71 re-72 of the bundle in an email to the Claimant dated 12 August 2019 as his '*direct managers and if you make their working life's easier I'm sure they'll make your working life better it's a simple as that'*(sic). The email is written in the context of the Claimant's concerns that he is not getting his fair share of good priced jobs where as Mr Clift puts it he '*can make a little bit here and there'.*

Both the wording and the context of the email illustrate that the Claimant is allocated work and directed by the Respondent's managers/supervisors on when and where to carry out roofing jobs in the Planner against a background of the Respondent's wish to create multiple

opportunities for the Claimant, and its '*main focus … to try and keep everyone busy'* and *'have more work for everyone'.*

Mr Clift goes on to give detailed advice on how the Claimant may improve his conduct and 'attitude' in order to have a better working relationship with the two Contract Managers. This correspondence and, for example, the email of instruction at page 74 concerning mess left behind on a site, is indicative of supervision and control characteristic of an employment relationship. I find that such emails even if categorised as 'advice' are unlikely to have been sent to a self-employed contractor. There are no allegations against the Claimant of any breach of the terms of a sub contract.

The Claimant mostly did the work using his own skills and methods but he said in his verbal evidence that he may occasionally be asked to use a certain method required by the customer or to weatherproof a site in a certain way. He would then be notified by one of the Respondent's Contract Managers or by Mr Clift to adapt his working practices accordingly. The ultimate right of control vested in the Respondent.

34. The Claimant was required to follow specific site rules, particularly on health and safety matters, and comply with site working hours as communicated to him by the Respondent ((see pages 111 and 115 of the bundle). At page 111 the Respondent writes '*to save me getting calls can you make sure your on site for 8 am instead of going for food first. Just go and get lunch at lunchtime'* to which the Claimant responds '*ok'.* The Respondent's major client Fairview Homes also has a Presentation Policy including regulations about 'considerate contractor' working practices and the wearing of Fairview branded PPE to which the Claimant was obliged to adhere.

35. The Claimant was subjected on at least one occasion to informal discipline as appears from page 82 of the bundle in an email exchange with Mr McCanna which commences *'can you please explain yourself for not showing up today for the second weekend in a row'*. On this occasion the Claimant did not attend to do a job at a weekend on 30 November 2019 because he had a hangover and was very late getting up. This was the second time he had failed to be there. He accepted that his payment was withdrawn and that he would not be permitted to work or be paid on the following Monday to which he responds '*fair enough'*. The Claimant accepts admonishment and discipline.

36. He said in his evidence that he expected a reprimand and a *'word about my actions'* when he fell short of the expected standards of conduct. He informed the Respondent if he was going to be away on holiday (which he says was rare) or be absent for any other reason and he felt obliged to give reasonable prior notice of any such absences and did so. His words were '*it's a practice to let them know out of respect ,just like anywhere…I give a call or message to the people running the job'.* The Claimant's evidence made it clear that he would expect a reprimand if he did not notify the Respondent where he was and what he was doing on any given day when he was due to work. He said '*I didn't always do it'* but he accepted that a failure would mean he was '*told off'.*

37. Are there other consistent factors which indicate that the Claimant has employee status?

I am satisfied that there are no significant factors of the parties' working relationship which show that a contract of employment did not exist. The Claimant not only wore the branded high viz and PPE insisted upon by Fairview but he also wore work clothing supplied by the Respondent with the Contour logo. He told me' *I represented Contour to Fairview'* and that was one reason for obeying site rules.

The Claimant supplied his own roofing tools but this is not inconsistent
with employee status. There are several trades where skilled persons use their individual tools and, in the Claimant's case, the Respondent would help him by purchasing tools for him using its corporate account and he would re-pay the cost. The Respondent made all the arrangements for regular PAT testing of the Claimant's tools.

There was a similar mutually beneficial arrangement with the provision of a work van. For the first six or seven years of his contract with the Respondent the Claimant was supplied with a van and not permitted to use it for any other purpose than the Respondent's business. Over the last three years the Claimant has been required to hire a van (with the Respondent's logo and signage) but a discretion is exercised not to charge him for it. It was only when he asked for a bigger vehicle that the Respondent proposed new charges.

The Claimant occasionally recruited labourers to assist him on priced jobs because that would enable him to finish the work more quickly and draw his bonus. Those labourers were paid by the Respondent although the Claimant sometimes also shared some part of his price with them (especially his own brother) and indeed several of the labourers were subsequently recruited permanently having been introduced to the Respondent by the Claimant.

Conclusion

38. In view of my decision that the Claimant had employee status for the qualifying period the Tribunal has jurisdiction to hear all his claims. Accordingly the Tribunal will next list a further one hour preliminary hearing by telephone in order to list this case for a full merits hearing (FMH) and make case management orders for the effective and efficient preparation of the case for the FMH.

Employment Judge Elgot

6 July 2021