



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr I Ashton
Respondent: Annandale Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Hull Hearing Centre **On:** 10 and 11 May, 2018
Before: Employment Judge Nicol (sitting alone)

Representation

Claimant: Mr V Fullager, solicitor
Respondent: Mr J Bryan, Counsel

JUDGMENT

It is the Judgment of the Tribunal that the claimant was not a worker for the purposes of the Working Time Regulations, 1998, whilst in his relationship with the respondent and his claim that he did not receive all of the holiday pay to which he was entitled during and at the termination of that relationship is not well founded and is dismissed

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The claimant requested that the Tribunal should set out its Reasons in writing. Accordingly, these Reasons set out the Tribunal's findings in support of its Judgment. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal. The parties were made aware that the Judgment and Reasons would be published on a dedicated government web site accessible by the public.

2 This is a complaint by Ian Ashton, the claimant, against Annandale Limited, the respondent, arising out of his relationship with the respondent as a kitchen fitter. The claimant's relationship with the respondent commenced on 15 April, 2006, and ended on 27 October, 2017, a period of eleven complete years.

3 The claimant alleges that he did not receive the holiday pay to which he was entitled during and on the termination of the relationship. The issue to be decided by this Tribunal is whether the claimant was a worker for the purposes of the Working Time Regulations, 1998. The definition of 'worker' is set out in Regulation 2.1 and is in similar terms to the definition in Section 230 of the Employment Rights Act, 1996.

4 The Tribunal heard evidence from the claimant and from David Annandale, director, Steven Annandale, director, Andrew Annandale, director, and Patrice Williamson, secretary, on behalf of the respondent. The witnesses gave their evidence in chief in written statements and, as allowed by the Tribunal, answering supplementary questions. The statements were read by the Tribunal at the start of the hearing and each witness confirmed the truth of their statement at the start of their oral evidence. All witnesses were cross-examined and answered questions from the Tribunal. The Tribunal had before it two bundles of documents prepared by the respondent, marked 'Exhibit R1' and 'Exhibit R2' to which additional documents were added at the start of the hearing by the claimant. Both parties made oral closing submissions by reference to skeleton arguments.

5 From the evidence that it heard and the documents that it saw, the Tribunal finds the following facts.

6 The respondent is described as being a small family run business that has been trading since 1977 and was founded by the parents of the current directors, who are three brothers. They all work for the respondent undertaking a variety of roles but at least one has occasionally worked elsewhere. It is engaged in the business of supplying and fitting kitchens and bathrooms. From the evidence before the Tribunal, it would appear that the respondent's business has contracted over the years and was particularly hit during the recent recession. Whilst numbers have varied over time, the respondent has utilised direct labour and subcontractors to complete work. Any installation may require the services of several trades, such as carpenters, plumbers, electricians and tilers, so that work needs to be carefully co-ordinated to ensure that trades attend in the appropriate order and do not hinder one another. The respondent prepared estimates for customers based on site visits, the cost of materials and the employee/sub-contracting costs that would be incurred. Sub-contractor costs were usually based on a rate for time spent, which could be estimated at the respondent's risk, which were agreed in advance on a per day or per hour basis. Accordingly, sub-contractors did not need to tender for individual jobs.

7 In 2006, the respondent required an additional kitchen fitter and advertised a vacancy for an employed fitter, intending to pay an appreciably lower wage than the amount that was actually paid to the claimant.

8 The claimant is an experienced kitchen fitter. Prior to 2006, he had been in business on his own account, trading as Kitchens by Design. His father-in-law had been working with him but this arrangement had ceased. The claimant had an accountant who prepared annual accounts for him. The claimant is still having accounts prepared in his business name. The firm's income had reduced considerably in the previous year so it is likely that the claimant was looking for new clients. Although, the claimant is described as a 'kitchen fitter', the invoices that he produced show that he was prepared to undertake other types of work.

9 The claimant claims not to have seen the advertisement placed by the respondent but went to the respondent's office to see if any work was available. He was seen by David Annandale and his father, Brian Annandale. The nature of the discussion that took place was in dispute, the claimant contending that he was seeking employment but the respondent contending that he was seeking sub-contracting work. At that time, the claimant was in business on his own account. Although it is highly material, the claimant does not refer to this in his statement and does not explain his intentions at that time. It was accepted that he had ongoing work to complete that would have to be fitted in with his work for the respondent.

10 The terms agreed between the parties were never recorded in writing and neither party could identify more than the most basic terms. All that was certain was that the claimant would work about seven hours a day for a daily rate of pay of £130 a day. There may have been a presumption that the claimant would work as a kitchen fitter but the nature and extent of those duties were not described. All materials required by the claimant would be provided to him on site and he was not required to report to the respondent's depot on a daily basis to collect materials as employees of the respondent did. The expectation was that he would be on site from roughly 9.00 to 16.30, with a half hour lunch break. The length of day was shorter than for employees of the respondent.

11 The claimant did attend at the respondent's depot from time to time. Although he said that he did occasionally help with odd tasks, such as unloading deliveries, the Tribunal finds that he was more reluctant to do this than the respondent's employees were.

12 There was a dispute over whether the respondent held or participated in events that employees could attend. The claimant said that he went to one such event but denied that there were regular events. However, it appeared likely that some social events were arranged for employees but that the claimant was not invited.

13 The claimant acknowledged that he did not work on certain days because he was on holiday but he did not receive any holiday pay.

14 The rate received by the claimant was increased to £140 during 2008. The circumstances in which this was done were not made clear to the Tribunal.

15 Before and during his relationship with the respondent, the claimant was registered under the Construction Industry Scheme ('CIS'). Under the scheme, the claimant was treated as a sub-contractor and money paid to him by the respondent was taxed at the rate of twenty per cent. The claimant's tax returns were completed on this basis so that he could offset expenses incurred in connection with his work, including an allowance for using facilities at his home in connection with his work, and adjust his tax liability as appropriate.

16 The respondent's evidence was consistent and clear that the claimant had asked for a higher rate of remuneration than that which was paid to other employees, including the directors. This led to a family discussion over the merits and demerits of engaging the claimant. The higher rate was justified on the basis that the claimant appeared to be a good worker and that there would be savings to the respondent if

the claimant was engaged on a self-employed basis. The Tribunal considered that much of the criticism levelled at the claimant over timekeeping arose from a degree of ill feeling towards the claimant following this discussion.

17 The Tribunal accepted that the claimant set out the rate that he needed and this was accepted by the respondent.

18 The claimant was to submit weekly invoices that were to be paid by the respondent. These were numbered but the numbering is not always consecutive. No explanation was given for this but it may be assumed that the invoice forms were either spoiled or used for other work not paid for by the respondent.

19 Some invoices were adjusted to below the daily rate to allow for reduced hours of working.

20 The work undertaken by the claimant for the respondent was mostly in respect of fitting kitchens. However, he did undertake other work that was within his competence. There was not any evidence to suggest that the claimant objected to this but there was evidence that was accepted by the Tribunal, that the claimant was anxious to keep his income up and was prepared to do other paid work.

21 In his statement, the claimant states that he did not work for another company whilst working for the respondent. Later in the statement, he confirms that he did undertake paid work for other clients, which will be referred to later in these Reasons. However, one invoice produced by the claimant is for work undertaken for Mulberry Fitted Kitchens Ltd on a labour only basis. Details given include the claimant's CIS reference, which is not included on other invoices to non-trade clients.

22 The claimant had been undertaking work for Mulberry Fitted Kitchens Ltd before he began working for the respondent and produced invoices similar to those that he produced for the respondent. It was not suggested that this was other than on a sub-contracting basis. The daily rate shown on at least one of the invoices is £130, which is what the respondent initially paid the claimant.

23 When the claimant undertook work for the respondent, he provided his own personal protective equipment and clothing and did not receive any branded work clothing from the respondent. He had his own tools and equipment, including some large value items, which he maintained at his own expense. Some minor consumables were provided by the respondent.

24 The Tribunal formed the view that the claimant was satisfied with the volume of work that he received from the respondent but took an opportunistic approach to doing other work. He claimed that this was only for his own benefit or to help friends and family. There was not any evidence to support this. He did undertake some work for the directors of the respondent and this appeared to be on a 'cash in hand basis' rather than as an employee of the respondent. It was not clear that all of this income was declared, which raises questions as to whether other work was undertaken on this basis.

25 The claimant admitted to having opened two trade accounts with building materials suppliers whilst working for the respondent. There was evidence of a

possible third account but it was not known when this might have been opened. The claimant suggested in his statement that items purchased through these accounts were for use in connection with work that he undertook for a friend. In his oral evidence, he stated that some of the items had been for his own use.

26 In respect of one trade account, the claimant spent a total of £3350.02, which was after discounts on individual items of 59.8 and 85 percent. The items purchased appear comprehensive and include fitted units, electrical appliances, a sink and plumbing items. The invoice to the client is for £5495.00 in total, including a deposit of £500.00, to cover materials and labour. The work is listed as including the kitchen installation, electrics, ceiling and plasterwork and plumbing. Whilst there may have been other items purchased, such as ceiling boards, from another trade supplier, there seems scope for the labour costs to be equivalent to more than one week's earnings from work undertaken for the respondent. The invoice has the appearance of one given to a customer rather than just a friend.

27 With regard to the third trade account, evidence concerning this was only raised in the respondent's oral evidence after the claimant had given his evidence. The claimant was offered the opportunity to apply to be recalled if he wished to respond but he declined the invitation.

28 For three years, the claimant had the use of a van provided by the respondent that he was free to use in connection with his work. The claimant had previously used his own vehicle but it was beyond economic repair and the respondent had a vehicle that was surplus to its requirements. The claimant's statement glosses over the point but he met all of the expenses of running the vehicle, apparently without complaint. This is confirmed by his tax returns. He subsequently acquired his own vehicle.

29 The claimant's accounts show several items that would seem to indicate that the claimant was undertaking work for others or, at least, looking for it. One such item is 'printing, stationery, postage and advertising'. The claimant suggested that this was just a generic heading and did not imply that all of the items were actual causes for expenditure. The Tribunal did not find this credible because the claimant's expenses in relation to the respondent were limited to submitting invoices, which were delivered by hand. There is also an item of 'business insurance', which would not be required by an employee.

30 The claimant's vehicle was described as being well kitted out with his tools and equipment being extensive and stored for easy access. Many of the items in the vehicle would either not be required when undertaking work for the respondent or would have been supplied by it. However, the extra items could well have been of considerable use, if the claimant was undertaking work on his own behalf.

31 Contrary to the respondent's evidence, the claimant denied having materials in his vehicle or that he used materials not used by the respondent whilst undertaking private work for the directors of the respondent. The Tribunal did not find it credible that the claimant would regularly have tools and equipment in his vehicle if he were not intending to use them other than on extremely rare occasions. Similarly, it would be remarkable if he did not carry excess material from other work in his vehicle, if that was his main store place for work related items.

32 The parties disagreed over the claimant's timekeeping. It is probably unlikely that the respondent would have tolerated persistent under performance but the Tribunal accepted that the claimant was not required to be as rigid about his hours as an employee would have been.

33 The respondent stated that the claimant would not give as much notice of his absences as it would have expected from an employee. In one example, the respondent put the respondent to considerable inconvenience because he took holiday at short notice when the respondent had arranged for him to do work. As a result, the respondent's director had to work additional hours to complete the work. On his return, the claimant telephoned the respondent to see if there was any work for him and was told that there was not. As an employee, the claimant would have been expected to simply turn up for work in the normal way to find what he was required to do, if anything. During cross-examination, the claimant accepted that he was not entitled to be offered work or required to undertake work that he was offered.

34 The respondent stated that the claimant could have sent a substitute to undertake work if he was not personally available. However, there was not any evidence to suggest that this was actually discussed or even considered by either party. The respondent accepted that the completion of work was its responsibility and required the coordination of various trades. Any fitting work undertaken would have to be carried out by a person with, at least, the competence of the claimant. There was not any evidence to suggest that the claimant worked with anyone with that level of competence or would have access to such a person.

35 During cross-examination, the claimant accepted that he was not entitled to be offered work or required to undertake work that he was offered. There is evidence of at least one occasion when he asked for work but was not given any, without any indication of protest on the part of the claimant. This was after the claimant had taken leave at short notice placing the respondent in the position of needing a replacement.

36 The contentions of the parties were explained in their closing submissions and skeleton arguments. Briefly, the claimant contends that, notwithstanding his previous history, the claimant was a worker during his relationship with the respondent. Further, that he worked virtually exclusively for the respondent over a long period, he was dependent on its directions as to the work that he was to undertake and he was obliged to carry out work personally. Finally, he took holidays but was not paid for them. The respondent contends that the claimant was a sub-contractor and was entitled to and did undertake work for others so that he was not a worker for the purposes of the Regulations.

37 The Tribunal had regard to the Working Time Regulations, 1998. The Tribunal also referred to the authorities referred to by the parties, which were extensive.

38 During the hearing, the parties agreed that

38.1 There was no written contract of employment or any other form of written contract between the parties

38.2 In respect of each week in which the claimant did some work for the respondent, he would raise an invoice

38.3 The claimant worked for the respondent from 15 April, 2006, until 27 October, 2017

38.4 The claimant had annual accounts prepared in the names of 'Ian Ashton', 'Ian Ashton Subcontractor', 'Ian Ashton trading as Kitchens by Design' or 'Kitchens by Design' and he filed tax returns

38.5 The claimant was registered under the CIS scheme pre-dating his relationship with the respondent and throughout

38.6 The respondent did not provide the claimant with any of its branded clothing.

39 As the claimant says in his closing submission 'it is important to bear in mind before embarking on an analysis of the authorities that each case throws up a different set of facts. The authorities are very helpful but the Tribunal always has to determine that facts of the individual case and then apply the words of the statute'.

40 The Tribunal was informed that a decision in favour of the claimant could have serious financial consequences for the respondent but the Tribunal did not consider that this was a relevant matter to which it should have regard.

41 Any contract between the parties is oral and there is not any written evidence as to its terms. The only items that were agreed were the daily rate and the general nature of the work to be undertaken. The rate was subsequently changed and other work was undertaken from time to time. There was an understanding of the approximate times when the claimant would be present on site to undertake work. It was understood that the claimant would submit weekly invoices, which would be paid by the respondent. The claimant was registered under the CIS scheme and tax was deducted from payments made to him by the respondent on that basis.

42 Whatever, the contractual terms may have been, they appear to have worked. There is not any evidence of disputes during the course of the relationship over the contractual terms or their application. It would be easy to suggest terms that might have been included, subject to the nature of the relationship, but it is not for the Tribunal to exercise its own judgment on this, it must look at what actual took place. Obviously, if the relationship was one of employer/employee or worker, there may be terms implied by statute. It was not suggested that any terms should be implied in the contract as a result of custom and practice.

43 The claimant's relationship with the respondent existed over a long time. It was a mutually satisfactory arrangement with which both parties were satisfied. The claimant was getting regular work and received, at least, the same rate as he had previously received from a competitor of the respondent. It covers the period of the recent recession and the claimant was probably fortunate that the respondent was able to continue providing work for him at a time when the construction industry was struggling. The Tribunal had regard to this but did not consider that the time period assisted in deciding the nature of the relationship in the circumstances of this case.

44 With regard to mutuality of obligation, the claimant accepted that he was not entitled to be offered work or required to undertake work that he was offered. There is evidence of at least one occasion when he asked for work but was not given any, without any indication of protest on the part of the claimant. This was after the claimant had taken leave at short notice placing the respondent in the position of needing a replacement.

45 Having regard to the nature of the respondent's business, it was necessary for the respondent to select the sites where the claimant worked and the work that he undertook. His work had to fit in with other trades working on site and he had to meet the specification prepared by the respondent. There is not any suggestion of 'harsh words' being spoken to the claimant when the respondent felt that it had been let down in terms of time worked or leave taking. The claimant was a skilled worker and allowed considerable leeway by the respondent.

46 Substitution presents several problems. There was not any evidence to suggest that this was ever considered by either party. The claimant did not have any employees or partners. If he had considered sending a substitute to do his work, it is unknown who that might have been. The respondent had the responsibility to the client to complete the work and the respondent sorted out any problems to its own satisfaction. It is apparent that the claimant was a skilled worker and his talents would have been hard to replace at short notice.

47 The Tribunal was satisfied that the claimant was opportunistic and undertook other work as and when the opportunity arose. This was not prohibited by the respondent, which expected him to undertake other work from time to time. The claimant's clients included directors of the respondent, for whom he undertook work when he was not undertaking work for the respondent. The arrangements were outside the scope of the relationship between the parties.

48 The Tribunal was also satisfied that the parties entered into their relationship with the intention of the claimant being self employed and able to continue his own business. He needed to finish work in hand and the claimant did not give any evidence as to when this situation might have changed. However, there was evidence that he did still undertake paid work for other persons.

49 Having genuine sub-contractors avoids the need for employees to be paid when standing idle whilst other trades are completing tasks but the building trade has always been notorious for people working on site and attempting to avoid payment of tax. This is one of the reasons that the CIS scheme was introduced.

50 Although the claimant had a daily rate, he accepted that he adjusted the rate to allow for short time working. The claimant was always registered under the CIS scheme and his tax returns show the advantages that he received from self-employed status.

51 The claimant was never offered company branded clothing or the respondent's personal protection equipment. He could not therefore be identified as one of the respondent's workers. He used his own tools, although there might be an overlap of convenience from time to time. He did not need to attend the respondent's base on a daily basis and, if he did, he only joined in communal tasks on an

infrequent basis. Despite the possible difference in appearance, clients of the respondent would want a unified service from the respondent and would not be concerned with who did what as long as it was done to the client's satisfaction. Any issues, such as the price of materials or source of labour, would be entirely a matter for the respondent to sort out.

52 The claimant provided and maintained his own equipment, some of which was to a better standard than might have been provided by the respondent. Even when he used the respondent's vehicle, he still paid all of the associated expenses.

53 The claimant did not share any of the economic risk of the respondent. His work was included in overall pricing and it was for the respondent to bear any risk. He had a set rate of remuneration and so did not need to price individual jobs as the estimator could assess time requirements. However, the risks associated with Kitchens by Design, the claimant's trading name, were all carried by the claimant.

54 There is not any evidence to suggest that the claimant ever made any complaint about being treated as self-employed during his relationship with the respondent. There was not any dispute or any falling out and it is not given as the reason why the claimant ceased undertaking work for the respondent.

55 The onus is on the claimant to demonstrate his status. However, his written statement was brief and did not deal with important points. Many points that are dealt with were contradicted by either the documents or his oral evidence. The Tribunal considered that he was not a credible witness. It was satisfied that the claimant had operated his own business prior to commencing his relationship with the respondent and that he continued to do so during the relationship. He was not obliged to undertake all work offered to him by the respondent and the respondent was not obliged to provide him with work. Despite mainly working for the respondent, he undertook other work on his own account, when the opportunity arose. The claimant was unable to demonstrate that he was integrated into the respondent's workforce.

56 Having regard to all of the circumstances referred to above, the Tribunal finds that the respondent was at all material times a client of a profession or business undertaking of the claimant.

57 It follows that the claimant was not a worker for the purposes of the regulations and his claim in respect of holiday pay is dismissed.

Employment Judge Nicol

Date: 25 May 2018

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