Case Number: 3329112/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Goredema	**v**	Whirlpool UK Appliances Limited

Heard at: Norwich **On:** 18 September 2018

Before: Employment Judge Postle

Appearances
For the Claimant: In person
For the Respondent: Mr Blake, Counsel

RESERVED JUDGMENT

1. The claimant was not an employee, he was a self-employed contractor.

RESERVED REASONS

1. This was a preliminary hearing to determine the claimant's status, namely whether he was an employee or self-employed contractor.

2. In this tribunal we have heard evidence from the claimant through a prepared witness statement and from the respondent, a Mr Tacey, the National Contracts Manager for Whirlpool.

3. The tribunal also had the benefit of a bundle of documents.

The Facts

4. Whirlpool manufacture and supply domestic household appliances. A major part of their business is maintainance and repair of such goods purchased by their customers.

5. The claimant commenced his association with the respondents on 12 April 2011 via his company known as Eutek Trading Company Limited and then subsequently, Wadsly Trading Limited.

6. It would appear that the respondent operates two types of sub-contractor agreement, a service partner agreement, which is between the respondents and a company under which that company can provide several sub-contractors depending on the level of work offered; and a sole trader agreement between whirlpool and an individual trading as a business.

7. It would appear that at all times the claimant supplied his services to the respondents via a service partner agreement, (108 and 109). Originally on 23 March 2012, the respondents entered into a service partner agreement with Eutek Trading Company Limited, under which they agreed to provide maintainence and repair services to Whirlpool, (40 – 55), under that service partner agreement the owner of Eutek, Mr Munjoma, who hired his own employees to perform the services for the respondents. The claimant was one of several individuals hired by Mr Munjoma to perform such services for the respondents.

8. In 2013 – 2014, it appears that Mr Munjoma set up a second company called Wadsly Trading Limited and on 10 July 2014, the respondents entered into a service partner agreement with Wadsly, (56 – 70), in which the claimant signed the service partner agreement as a director of Wadsly.

9. It would appear from 10 July 2014, the claimant then provided his services to Whirlpool through the company known as Wadsly. Under the Wadsly service partner agreement, that company can hire individuals to perform repair services for the respondents. It would appear at the time up to ten sub-contractors were engaged under the Wadsly service partner agreement which included the claimant, (211 -213).

10. It is clear, the respondents do not guarantee a certain level of work, or indeed any work to the claimant or any of his sub-contractors. The claimant was completely free to engage in other business activities, which is confirmed by the Wadsly service partner agreement at clause 3.3 and 3.5, (59).

11. It is clear, from the respondent's data base, approximately 13 working agreements with sub-contractors who can choose to be open to accept work or decline it. Working patterns appear to range from 3 days per week, up to 6 days per week.

12. It is further clear, that if the claimant did not wish to work he could request to be shut down for any period. That would mean that no work would be offered to him during that period. If the claimant had made himself available for work and subsequently decided not to perform the work, Mr Munjoma would be entirely responsible for distributing the claimant's

work amongst other sub-contractors within the network. Mr Munjoma would normally notify the respondents of any substitution.

13. Payments made under the service partner agreement are paid at an enhanced rate compared to those under a sole trader agreement. All work completed by sub-contractors provided under the Wadsly service partner agreement were paid monthly in one single transaction via a self-billing invoice for Wadsly, into Wadsly's bank account, (150 – 210). Payment advice is generated by the respondents and sent to Wadsly. That advice is a single statement which shows what work has been done for each individual sub-contractor so that Mr Munjoma knows how many calls each sub-contractor has done and how they should be paid.

14. The respondents have no control over the rates of pay provided to the claimant. Payment for the work is made into the Wadsly company account. It would appear that Mr Munjoma then determines what rate of pay is made to the hired sub-contractors including the claimant.

15. Wadsly is only paid for the calls carried out by its sub-contractors that it provides, if those calls are completed. If the calls are incomplete or if there is a recall, no payment will be made. Whereas the respondent's employed field service engineers are paid at the same level of salary irrespective of whether a call is completed or not.

16. The respondents do not provide vehicles or other equipment to the claimant or other sub-contractors. Any specialist tools required for the respondent's appliances are to be purchased from the respondent, the lap top which distributes the calls is leased from the respondents. The claimant had to provide his own van to carry out the service, whereas the respondent's employed engineers are provided with a company van free of charge.

17. Furthermore, all service partner agreements require the service partners to have their own public liability insurance to cover sub-contractors providing insurance up to a value of five million. Whereas the respondent's employed field service engineers are covered under the respondent's public liability insurance.

18. The claimant did not receive any benefits from the respondents such as a pension, holiday pay or sick pay, whereas the respondent's employed field service engineers did. When the claimant was in hospital for an extended period in 2015, the respondents did not make any statutory sick pay payments during this period and the claimant did not request any such payments.

19. Sub-contractors are not required to wear Whirlpool branded uniform, they can wear a uniform, the branding of their own business. The respondent's employed field service engineers must wear Whirlpool branded uniform.

20. Under the Wadsly service partner agreement, Wadsly can provide a substitute if any of the sub-contractors are unable to perform the services, (66 – 67).

21. It is to be noted there were considerable difficulties in obtaining a disclosure from the claimant, though ultimately the claimant did disclose, at least partially, documents which seemed to suggest the claimant had a contractual relationship with Wadsly Trading Limited. In particular disclosure showed the independent contractual agreement between the claimant and Wadsly, (39). The claimant's pay slips were from Wadsly, and bank statements which show payments to the claimant from Wadsly, (120, 122, 127, 131 and 136).

The Law

22. Section 230 of the Employment Rights Act 1996 provides the following definition of an employee and the employer for the purposes of the Employment Rights Act 1996:

    (1) In this Act, employee means an individual who has entered into, or works under, (or, where the employment has ceased, worked under), a contract of employment.

    (2) In this Act, contract of employment means a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing.

    …

    (4) In this Act, 'employer', in relation to an employee or a worker means the person by whom the employee or worker is, (or where the employment has ceased, was) employed.

23. It is clear, for a person to be classed as an employee, there must be a contract. It is also true there have been a number of cases which have considered whether a contractor, (in this case the claimant), provided by a separate company, (Wadsly), to an end user, the respondents, is an employee of the end user. The situation focuses on whether a contract can be applied between the end user and the contractor. The principles are set out in the EAT decision in James v London Borough of Greenwich [2007] ICR 577, (affirmed by the Court of Appeal at [2008] ICR 545). In the EAT Elias J stated:

    "21. in the agency cases there is a relationship between the end user and the worker. In this case, for example there is significant control exercised over the way in which the work is performed, and plainly the work itself is for the benefit of the end user. The question is, however, whether that work is being provided pursuant to a contractual obligation between the end user and the worker…

23. the issue, therefore, is whether the rights which are conferred on employees can be preserved for those workers by establishing a contractual relationship with the end user.

…

34. the Court of Appeal did emphasise (in Muscat) as had Mummery LJ in Dacas, that in order to apply a contract in business reality to what was happening the question was whether it was necessary to imply such a right…

…

54. …the issue then is whether the way in which the contract is in fact performed is consistent with the agency arrangements or whether it is only consistent with an implied contract between the worker and the end user and would be inconsistent with there being no such contract. Of course, if there is no contract then there will be no mutuality of obligation…

…

57. …provided the arrangements are genuine and the actual relationship is consistent with them, it is not then necessary to explain the provision of the worker's services or the fact that payment to the worker by some contract between the end user and the worker, even if such contract would also not be inconsistent with the relationship. The expressed contracts themselves both explain and are consistent with the nature of the relationship and no further implied contract is justified.

58. when the arrangements are genuine and when implemented accurately represented the actual relationship between the parties as is likely to be the case where there was no pre-existing contract between the worker and end user - then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end users. If any such contract is to be inferred, they must be subsequent to the relationship commencing be some words or conduct which entitled the tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is being actually performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show the worker is working not pursuant to the agency arrangements but because of mutual obligations by the worker and the end user which are incompatible with those arrangements"

24. The traditional way of identifying a contract of employment was set out in the case of Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] QB497. at 515:

"A contract of service exists if these three conditions are fulfilled:

(i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) he agrees, expressly or impliedly that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) the other provisions of the contract are consistent with its being a contract of service.

25. In closing it was interesting to note that the claimant not only admitted that he was a contractor for Wadsly, but to record his exact words, *"there is no argument, I was a contractor."*

Conclusions

26. It is clear that the claimant had a contract with Wadsly, and Wadsly had a contract with the respondents. It is further clear there was no contractual relationship between the claimant and the respondent.

27. The claimant's contractual relationship with Wadsly is evidenced by the documents the tribunal has seen in the course of this hearing, (39L – 39P, 116C – 116G and the claimant's bank statements from Wadsly). Although the claimant has disclosed only some of his payslips, it does show that in 2017, the claimant was not providing any services to the respondent. One can surmise that the claimant provided services to Wadsly during that period which were unrelated to Wadsly's contract with the respondents. It is also true from the claimant's tax return, (120), that he himself regard Wadsly as his employer.

28. The relationship between the claimant and Wadsly was confirmed by the fact that the claimant was a director of Wadsly, the fact that Mr Munjoma and the claimant controlled Wadsly's bank account and the claimant was paid a company dividend from Wadsly over and above the rate Wadsly received from the respondents.

29. Under the sub-contractor's agreement, (56 – 70), Wadsly provided a number of engineers whom provided services and Wadsly paid by the respondent under one invoice for the services of all those engineers, (150 – 210).

30. Wadsly submitted VAT returns in relation to its work for the respondent.

31. It is clear, the relationship between the claimant, Wadsly and the respondent was a tripartite arrangement. The claimant understood this to be the case, acknowledged it in his ET1 and confirmed it in his own closing before this tribunal.

32. There was therefore, no implied contract between the claimant and respondent. At all times the claimant was a self-employed contractor.

_____
Employment Judge Postle

Date: ……17.12.18……..

Sent to the parties on: ..17.12.18.....

.....
For the Tribunal Office