EMPLOYMENT TRIBUNALS

Claimant: Mr D Hindley

Respondent: Amstone Building Limited

HELD AT: Manchester **ON:** 13 July 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr A Serr, Counsel
Respondent: Mr D Kiely, Director

JUDGMENT

The complaint of unlawful deductions from pay fails and is dismissed.

REASONS

Introduction

1. By his claim form presented on 9 March 2017 the claimant complained of an unlawful deduction from his pay in respect of two weeks spent working as a bricklayer for the respondent company. By its response form of 10 April 2017 the respondent denied that he had been an employee or a "worker", and said that he had been paid what was due pursuant to the "pricework" arrangement for payment to the claimant as part of a team of bricklayers.

2. Regional Employment Judge Robertson conducted a telephone preliminary hearing on 17 May 2017 and identified the two issues to be determined:

(a) Whether the claimant was a "worker" within the meaning of section 230(3)(b) Employment Rights Act 1996 and therefore entitled to bring a complaint of unlawful deductions from pay; and

(b) If so, whether on any occasion he was paid less than the amount of pay properly payable to him.

3. The second issue turned upon what had been agreed between the claimant and Mr Kiely at the start of the working relationship. The claimant maintained that he was entitled to be paid on an hourly rate for the first week of employment, and then on a pricework basis for the second week. Mr Kiely denied that there had ever been an agreement for hourly rates of pay. The claimant said that in total he had been underpaid in the sum of £1,827.50. Mr Kiely denied any underpayment.

Evidence

4. Regional Employment Judge Robertson had given directions for a bundle of documents to be prepared and for witness statements to be served from the claimant and Mr Kiely. The claimant had complied with that requirement. There was a bundle of documents and any reference to page numbers in these reasons is a reference to that bundle.

5. The claimant had also served a written witness statement. Mr Kiely had not done so. On the eve of the hearing the claimant's solicitors applied for an order striking out the response.

6. At the outset of the hearing I raised this matter with Mr Kiely. He said he had not realised that a witness statement was required as everything he wanted to say had appeared in the response form. Mr Serr suggested that the appropriate course of action was to prevent the respondent calling evidence at the hearing, as Regional Employment Judge Robertson had envisaged in paragraph 9 of his Case Management Order, but after further consideration I decided that would not be the proportionate way to proceed. I accepted that this had been a misunderstanding by Mr Kiely due to not being legally represented. The purpose of the order of Regional Employment Judge Robertson was to prevent either side being taken by surprise at the hearing as to the evidence relied upon by the other party, and as Mr Kiely said that the factual details on which he relied were set out in the response form, I considered it proportionate and appropriate to treat that response form as his witness statement.

7. The claimant and Mr Kiely each confirmed the truth of their written statement before being questioned by the other party and by the Tribunal.

Relevant Legal Principles – Worker Status

8. The Employment Rights Act 1996 defines in section 230(3) the concept of a worker as follows:

> **"In this Act "worker" means an individual who has entered into or works under, or where the employment has ceased worked under,**
>
> **(a) a contract of employment, or**

> **(b) any other contract, whether express or implied, and (if it is 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,**
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> **and any reference to a worker's contract shall be construed accordingly."**

If there is a contract requiring personal service, the key question is whether the individual is in business on his own account (making the other party a client or customer of that business), or whether he is in truth part of someone else's business. That is a matter of overall impression, although the factors which are significant in any particular case may differ depending on the context.

9. An important factor is whether the claimant is economically dependent upon the contract with the respondent, or whether it is just one of a number of sources of income for his business. In **Byrne Brothers (Formwork) Limited v Baird [2002] ICR 667**, a case involving carpenters, the Employment Appeal Tribunal ("EAT") chaired by Mr Recorder Underhill QC (as he then was) said (paragraph 17):

> **"We were referred to no authority giving guidance on that question; and we accordingly spell out our approach to it in a little detail, as follows:**
>
> **(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the Applicants do not carry on a "profession" in the ordinary sense of the word; nor are Byrne Brothers their "clients".**
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> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" *tout court*; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.**
>
> **(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.**
>
> **(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in**

the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction 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 in the relevant respects.

(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) …….

18. Self-employed labour only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the "intermediate category" created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk. They have long been regarded as being near the border between employment and self-employment: it is for this reason that their status has for many years been a matter of controversy with the Inland Revenue and has also given rise to a string of reported cases (see, e.g., Lee v. Chung and Shun Shing Construction and Engineering Co. Ltd. [1990] ICR 409 and Lane v. Shire Roofing Company (Oxford) Ltd. [1995] IRLR 493). Cases which "could have gone either way" under the old test ought now generally to be caught under the new test in "limb (b)". The fact that such a subcontractor may be regarded by the Inland Revenue as self-employed, and hold certificates to prove it, is relevant but not decisive. (We note that in R.G. Carter Harleston Ltd. v. Jarvis (EAT/756/95; unreported, 28.2.96) this Tribunal accepted, though the contrary was not argued, that a group of self-employed carpenters, paying tax under Schedule D, were "workers" for the purpose of the Wages Act 1986 (where, as noted above, the identical definition is employed).)"

Relevant Legal Principles – Unlawful Deductions from Pay

10. Part II of the Employment Rights Act 1996 prohibits unauthorised deductions from pay. Section 13(5) provides that there will have been a deduction on any occasion where the total amount of wages paid to a worker is less than the total amount of the wages properly payable. In this case it was common ground that the sums paid to the claimant would fall within the definition of wages if he were found to be a worker, and there was no suggestion he had authorised any deduction. It was a question of identifying the terms of his contract as to his entitlement to be paid.

Relevant Findings of Fact

11. The Tribunal's task was made more difficult by the limited amount of documentation available, and the fact that there was no evidence from any person other than the claimant and Mr Kiely. In particular there had been no attempt by either party to record in writing what had been agreed between them as to the basis on which the claimant would be paid. On the balance of probabilities I found the relevant facts to be as follows.

Background

12. The respondent company operates as a subcontractor in the building industry and works on a number of sites in the North West. Its work includes the construction of new houses for property developers. It has an ongoing need to engage self-employed bricklayers in accordance with the Construction Industry Scheme ("CIS"). That scheme operates on the basis that the bricklayer has a CIS card with a "UTR" number, and the company makes a deduction of 20% from the gross remuneration which is treated as a payment on account of tax and national insurance by the bricklayer when he comes to do his tax return.

13. The claimant is a bricklayer with a CIS card. Bricklaying is his only source of income. He works on jobs for different companies from time to time. The shortest engagement is a couple of weeks. Sometimes the job can last for over a year.

14. In November 2016 the respondent was sub-contracted on a development at Huntley Court in Bury. This was a new housing development. Bricklayers were required. As is industry convention, the bricklayers working on site for the respondent were organised into teams. There would generally be two bricklayers and one hod carrier, or three bricklayers and a carrier. Bricklayers supplied their own hand tools but heavier equipment was provided on site. The site was managed by the main contractor which in turn had sub-contracted with the respondent. The register of who was on site at any one time was maintained by the main contractor, not by the respondent.

Engagement of the Claimant

15. On 14 November 2016 the claimant saw an advert on the Jobcentre Plus Universal Job Match site (page 26). It identified the respondent company and said that bricklayers were urgently required for various sites in the North West. The advert had been placed 12 days earlier. At the top the advert said:

> **"£15 an hour".**

16. Lower down, however, it said:

> **"We pay £15.00 an hour or £400 at 1,000 face bricks, £12.00 per metre block work."**

17. Mr Kiely's mobile telephone number was given.

18. The claimant telephoned Mr Kiely and arranged to visit the site. The claimant said that they had a discussion in which it was agreed the claimant could start as a bricklayer on the hourly rate for the first week and then on pricework thereafter. Mr

Kiely disputed this. He had no actual recollection of the conversation with the claimant, because he was engaging new bricklayers all the time and it was entirely run of the mill, but he said he would never agree to an hourly rate on a new development because his own company was paid on a pricework basis as a subcontractor. That was a key dispute of fact in these proceedings and I will return to it in my conclusions.

19. It was common ground, however, that the claimant was sent to speak to the bricklaying teams on site to see if he could join one of them, and he joined the team led by Mr Woodward.

Weeks 1 and 2

20. The claimant began work on Tuesday 15 November 2016. His case was that he worked on site 8.00am to 4.30pm for the rest of that working week, including Saturday 19 November 2016. He said he also worked between 8.00am and 2.00pm on Sunday 20 November 2016 because he had been asked to attend the site as some scaffolding was being delivered.

21. For the second week from Monday 21 November 2016 the claimant said he worked the same hours but without the weekend working.

22. Mr Kiely disputed that the claimant worked all these hours or spent them all on site. His case was that when there was anything more than very light rain bricklaying could not be done and the teams would leave the site. He said that the team headed by Mr Woodward was particularly reluctant to work in the rain and would stop work even when other teams carried on working. However, he was not present on site all the time because he had to visit the other sites run by his company.

Payment

23. The arrangements for payment to the teams of bricklayers were recorded on a "booking in form" of which the relevant parts appeared at page 31. The respondent company priced the job of building a house in six stages. The first four were known as the First Lift, Second Lift, etc., followed by "Pikes" and "Patch and Clean". Generally each Lift would take a team of bricklayers a week at this time of year when the weather was variable.

24. Each Monday Mr Kiely would agree with the bricklaying team working on the property what that team should be paid for the work done in the previous week, and payment would then be made on the Friday at the end of that week. Accordingly page 31 showed that on Monday 14 November 2016 it was agreed that the Woodward team would receive 100% of the payment for the first lift of £1,550, and the booking in sheet also recorded how that figure was to be split between the three members of the team. This was agreed with Mr Woodward as team leader. It was work done before the claimant started so no payment was due to him.

25. On Monday 21 November 2016 the entry showed what was agreed for work done in the previous week (i.e. the first week the claimant worked). It was agreed that 80% of the total fee would be payable. The sum of £1,240 was to be divided so

that Mr Woodward was paid £480, the hod carrier, Mr Jones, paid £400, and the claimant paid £360. This amount (minus the 20% deduction leaving a net figure of £288) was paid to the claimant on Friday 25 November 2016.

26. The payment for the second week in which the claimant worked was agreed on Monday 28 November 2016. The agreement was reached not with Mr Woodward's team but with another team led by Mr Blackledge. Mr Kiely explained that this was because Mr Blackledge's team had had to take over some of the work of Mr Woodward's team in the previous week, and would only be persuaded to take on the completion of the property in the following stages if they were paid for that previous stage, even though Mr Woodward's team had done some of the work. His evidence was that it was standard practice for a team to become entitled to payment only when a certain percentage of the work had been done, possible 50%. If a team failed to complete that minimum level of work no payment would be due, and the payment for that work would go to whichever team succeeded them. He therefore agreed that Mr Blackledge's team would be paid the final 20% from the second lift, and the whole of the sum of £1,550 for the third lift. Effectively, therefore, Mr Woodward's team received no payment for what they had done in the week beginning Monday 21 November 2016.

Termination

27. The claimant and Mr Woodward's team did not attend for the third week. The claimant had found another bricklaying job.

Requests for Payment

28. However, having not been paid on Friday 2 December 2016 he pursued the question of payment by text message on the morning of Saturday 3 December. His initial text (page 27) claimed payment for his second week beginning 21 November at the pricework rate. It made no mention of any underpayment for the first week.

29. Following a further exchange Mr Kiely said the claimant had been paid everything that was due and that he and his gang had abandoned the job unfinished. At that stage the claimant responded in the following terms (5 December page 28):

> **"The first week was daywork. I booked in six days as that is what I worked. You only paid me for three. The second week you changed it to pricework. I've sent over the booking in for that which was never paid so there is three days plus the pricework outstanding."**

30. The response from Mr Kiely the same day was to say:

> **"We don't pay daywork. Everything is always on price. I never agreed daywork with anyone."**

31. The claimant responded in the following terms:

> **"You told me on the first day I would be doing the first week on daywork. It also states it on your job advertisement which I have a copy of and that doesn't excuse the non payment for the second week on pricework."**

Submissions

32. At the conclusion of the oral evidence each party made a brief submission summarising its case.

Claimant's Submission

33. For the claimant Mr Serr submitted that the claimant should be regarded as a worker within the statutory definition. The CIS scheme was only one factor to be raised in the balance. The claimant had been required to undertake the work personally and he was not running a business of which the respondent was a client or customer. He responded to a Jobcentre advert, he was economically dependent on the role whilst he did it and had no other work ongoing at the time.

34. On the second issue he submitted that the claimant had behaved in a way which was only consistent with it being agreed that he would be hourly paid in the first week. He would not have come in at the weekend to help with scaffolding had it been otherwise. His text at page 28 about only being paid for three days made sense when the amount paid against the hours worked and the hourly rate was calculated. Mr Kiely had not been able to recall the conversation and therefore the claimant's evidence should be preferred for week one.

35. As to week two, Mr Serr submitted that the respondent contradicted himself by saying the work had no value but then admitting some work was done. He also suggested in the response form that any defects were not substantial which would not justify any reduction in pay. Although his explanation of the business model suggested that daywork would not be practicable across the board, that did not prevent him making a one off exception for one week to a worker who was new to the site.

Respondent's Submission

36. On behalf of the respondent Mr Kiely submitted that the claimant had only ever been genuinely self-employed under the CIS scheme. Everyone knew that bricklayers were self-employed.

37. As to the rate of pay, it made no commercial sense for him to agree an hourly rate when his own company's income was calculated on a pricework basis. He simply would not have done it. The claimant was on a pricework basis only as part of the team, and the team was not entitled to be paid for week two because the work done was not sufficient. The team run by Mr Blackledge had to finish it off and it was standard practice for that team to get payment for the work in the previous week.

Discussion and Conclusions

Worker Status

38. The first matter for me to determine was whether the claimant had the status of a worker under section 230(3)(b) Employment Rights Act 1996.

39. I found as a fact that the claimant was working under a contract with the respondent. His discussions with Mr Kiely had been in Mr Kiely's capacity as director of the respondent. There was no contract with Mr Woodward even though the precise amount the claimant would be paid (for week 2 if not for week 1) was determined by agreement between Mr Kiely and Mr Woodward. The payments into the claimant's bank account were made by the company.

40. I also found as a fact that the contract required the claimant to do the work personally. There was no challenge to his oral evidence that if he sent someone else to do the work he would not be paid.

41. The real issue between the parties was whether the claimant was in business on his own account such that the respondent was one of a number of clients or customers. The fact that the claimant was self-employed for tax and national insurance purposes under the CIS scheme was relevant. However, during this engagement he was economically dependent on the respondent for his income. He did not do any other work at the same time. He moved from one job to another; they did not overlap. He responded to an advert in the Jobcentre and was taken on as an individual not as part of a team. I took note of what the EAT said in **Byrne Brothers**, paragraphs 17 and 18. In my judgment the claimant worked for one single employer at a time, had limited specialist skills other than bricklaying, and supplied little by way of equipment save for his own hand tools. He was paid at the end of each week for work which he had done or to which he had contributed in the previous week, and therefore his economic risk was very limited. In my judgment he was not running a business of which the respondent was a client or customer.

42. I concluded, therefore, that the claimant satisfied the definition of worker in section 230(3)(b). He had the right to bring this claim.

Unlawful Deductions

43. The success or failure of his claim therefore turned on what had been agreed with Mr Kiely about what he would be paid.

44. The claimant said under oath that he had agreed an hourly rate with Mr Kiely. An hourly rate was mentioned in the advert and he said the purpose was to enable him to settle in and get to know where things were on the site without losing money. He had mentioned it in the text exchanges and he would not have worked at the weekend to help with the scaffolding delivery had he been on a pricework only basis.

45. In contrast Mr Kiely admitted that he did not recall the specific conversation with the claimant, but said that he would never agree an hourly rate for work on a new build development. The whole structure of the respondent's pricing of those developments was on a pricework basis and this was required of the bricklayers too. An hourly rate would only be agreed for unusual or unpredictable work such as altering an existing building.

46. Further, he said that the advert was 12 days old, and that although it mentioned an hourly rate it also mentioned the pricework rates.

47. Importantly he submitted that page 31 (the booking in form) showed that he and Mr Woodward had agreed that the claimant should be paid on a pricework basis for week 1, suggesting that Mr Woodward regarded the claimant as working on that basis too.

48. This was a difficult issue to resolve because there was a rationale for both positions and in the absence of a written record of what was agreed it was difficult to choose between the competing oral accounts.

49. The advert did not seem to me to help either way as it offered both arrangements as possibilities.

50. The only contemporaneous documentation which predated the dispute after termination was the booking in form at page 31. This was consistent with Mr Kiely's account. It showed that Mr Woodward understood that the claimant would be paid on a pricework basis as part of the team for the first week in which he worked. I accepted Mr Kiely's evidence that these figures were agreed with Mr Woodward, acknowledging that this document was not shown to the claimant at the time.

51. Further, it seemed to me that it was inherently unlikely that Mr Kiely would have agreed a daywork rate with the claimant. The rationale suggested by the claimant did not appear in the witness statement but was something which he said under oath in response to questions from the Tribunal as to why Mr Kiely would have agreed this. It had the flavour of being an explanation after the event rather than something that was discussed at the time.

52. In contrast Mr Kiely's justification for why daywork would not be agreed on a new development was compelling. It would have been simply uneconomic for him to have agreed a daily rate when his own company's rates were fixed. There was no need to allow the claimant time to settle in because his colleagues on the team would help him and everything he needed to lay bricks would be brought to where he was working.

53. Putting these matters together I concluded that the account given by Mr Kiely was more likely to be correct. I found that the agreement was that the claimant would be paid on a pricework basis for each week in which he worked as part of the team.

54. It may have been that the claimant misunderstood this, not least because the headline figure in the advert was £15 an hour. That may be why he came in at the weekend.

55. Nevertheless, I was satisfied that Mr Kiely did not enter into a contract to pay the claimant that amount and it was on a pricework basis throughout. This meant that the claim for the first week failed.

56. As for the second week, I accepted Mr Kiely's evidence that the work done by the team of which the claimant formed part fell below the level at which the members of that team would become entitled to payment. That explained, I concluded, why Mr Kiely agreed with Mr Blackledge's team on 28 November that his team would receive payment for the previous week: insufficient work had been done by the claimant's team in that previous week.

57. For those reasons the complaint that there had been an unlawful deduction from pay failed and was dismissed.

Employment Judge Franey

14 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2017

FOR THE TRIBUNAL OFFICE