# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondent:** |
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| Mr M Tipping | **v** | M&W Property Services Limited |

## PRELIMINARY HEARING

**Heard at:** Reading **On:** 13 and 14 July 2017

**Before:** Employment Judge Gumbiti-Zimuto

**Appearances**
**For the Claimant:** Mr R Marsh (Counsel)
**For the Respondent:** Miss C Nicolaou (Solicitor)

**JUDGMENT** having been sent to the parties on 21 August 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. In this preliminary hearing, I am required to make the decision whether the claimant, Mr Michael Tipping, was an employee of M&W Property Services Limited, or, if he was not an employee, if he was a worker; or, if he was not a worker, whether Mr Tipping was an independent contractor. If the answer is the last of those three options, then the employment tribunal does not have jurisdiction to consider his complaints.

2. This case requires me to consider the provisions contained in section 230 of the Employment Rights Act 1996 which sets out the definitions of an employee and a worker.

3. M&W Property Services Limited is a property maintenance company. M&W undertakes general building and roofing work among other things. M&W employs 25 people in four offices around the country. Those people undertake administrative work, accounts, give quotes for jobs, conduct inspections, etc. These employees have standard employment contracts.

4. In addition, M&W uses people like the claimant, the respondent says that they are self-employed contractors, to undertake building and roofing work and also other types of work when required. There was no written agreement that governed the relationship between M&W and the claimant.

5. Between 2012 and 2016, M&W's main client was Whitbread PLC. M&W has a contract with Whitbread for maintenance service across Whitbread's estate. As part of this maintenance contract, M&W undertake roofing work when the need arises. M&W uses 'contractors'[1] to do this work - principally, a company called Myers, but they also use others amongst whom is the claimant.

6. Mr Wigham (a director and co-founder of the respondent) has known the claimant for around 30 years. When they first met, the claimant was in business on his own account as a roofing contractor. The claimant contacted Mr Wigham in 2012, after some time spent in Tenerife, looking for work. Mr Wigham told the claimant he could provide him with contracting work by M&W.

7. Whitbread use a national electronic database called ProNett. It is a system designed to be used by the property maintenance industry. M&W have an account with ProNett as a user of Whitbread's account. Whitbread enter every job that is required to be done onto ProNett.

8. Once entered onto ProNett this information comes through to the respondent's administration office. The respondent's administration staff review it and decide how it is to be allocated. If the work was a roofing job, the administration staff would contact Mr Wigham and he would decide whether to quote for the work himself, or to request a quote from one of his contractors. The claimant was one of the contractors who might be asked for a quote.

9. When the claimant did provide a quote, and was required to carry out the work, the claimant and a labourer would be paid at the rate of £35 per hour: the claimant's rate being £20.00 per hour and the labourer's rate being £15.00 per hour. The respondent provided all the materials.

10. For larger jobs, Mr Wigham generally asks two or three contractors to give him a quote for the work. He would decide which quote to take and then would ask that contractor to do the work. M&W tried to keep the same contractors working within their own local geographical area. Each contractor had an individual log in for ProNett. They could see details of a job once they had been allocated but they could not see other information.

11. Roofers cannot work alone. The roofer always has a labourer working alongside. Mr Wigham stated that it is the responsibility of the roofer to provide the labourer, and M&W did not get involved in this at all. However, where the labourer is used, the labourer is paid by M&W. There were instances when the labourer's payment was made to the claimant, who then passed on the payment to the labourer.

12. Contractors are only paid for time spent on site. The exception is where travel time to a site exceeds 90 minutes. There are circumstances when payments are made in respect of overnight stay.

13. M&W does not tell the contractors when they need to arrive or leave a site.

[1] The term contractor refers to anyone contracted to carry out work for M&W.

The contractor is expected to complete the job. Mr Wigham states that there is no requirement for contractors to carry out the work themselves, there are no restrictions on them sending someone else to do the work as long as that person is suitably qualified. The claimant challenges this.

14. I concluded that as between the claimant and Mr Wigham, there was no expectation that anyone other than the claimant himself (accompanied by a labourer) would attend on a roofing job. Mr Wigham expected the claimant to attend and he always did.

15. Mr Wigham stated that the contractors are required to show that they have an appropriate level of public liability insurance to cover the work that they carry out for M&W. The claimant has never had any public liability insurance for the entire time that he was carrying out work for M&W. There is a dispute of fact between the claimant and the respondent about whether the claimant was told that he was covered by M&W's insurance. I do not need to resolve that dispute as it is not in dispute that (1) the claimant did not have his own insurance throughout the relevant period; and (2) it was only latterly that the claimant was asked to provide insurance cover.

16. The respondent required contractors to be trained on specialist systems or products required when working with certain of their clients. They required training to be carried out on a specialist liquid roofing system called Sikalastic. In January 2013, the respondent paid for the claimant to attend the relevant product training course to enable him to qualify to be able to work with this product.

17. There is a dispute between the claimant and the respondent as to whether or not the claimant was paid for his time in attending the course. The claimant says that he was and there appears to be an invoice raised in respect of attendance at the course at the very least the claimant expected to be paid for attending the course. Whether he was in fact paid was not capable of being resolved by the documentation before me. I am satisfied that it is more likely than not that the claimant would have been paid for attending this course. It was something that he was required to do by the respondent.

18. The respondent requires any contractors working on its behalf to wear a polo shirt or other clothing that has its logo on it. The claimant wore this clothing. The claimant carried an identity card that carried the respondent's logo.

19. The respondent provides specialist equipment for certain jobs. The claimant provided his own basic roofer's tools.

20. There is a dispute between the claimant and Mr Wigham as to whether the claimant was invited to social occasions with the respondent's company. The claimant says that he was and referred to being invited to a Christmas party which was also attended by his wife. That was not challenged. The claimant says that he was also invited to attend a staff outing to a race meeting but on that occasion declined.

21. The claimant did not have a driving licence but did rent a van from the respondent. The van carried an M&W logo. The van was driven by the claimant's labourer. The claimant paid £324.00 per month. The respondent insured the van. The claimant was responsible for the cost of maintenance and repairs. The claimant was responsible for any parking fines that may have been incurred.

22. There is a dispute whether the payments made by the claimant for the use of the van were monthly payments going towards the purchase of it by the claimant from the respondent. I prefer the account which was given by Mr Wigham. His account appears coherent and made more business sense. For such a significant and important arrangement, I would have expected it to be evidenced in some way.

23. Mr Wigham said that the claimant was under no obligation to accept any job that the respondent offered him. The evidence before me is that the claimant always accepted the work that was offered to him except on one specific occasion when the claimant was on holiday in Tenerife.

24. The claimant worked exclusively for the respondent. The parties agree that the claimant was free to carry out work for others but the evidence shows that any work that the claimant did for others was negligible. The claimant carried out four private jobs for other parties in four years. Mr Wigham did not give evidence of the claimant carrying out for third parties.

25. I do not accept that the claimant regularly turned down any work offered by the respondent in order to do other work. The evidence which is given by Mr Wigham left me with the clear impression that if the claimant regularly turned down work, he would not have been offered the amount of work that he in fact did receive from the respondent.

26. Mr Wigham stated that the respondent had no obligation to offer work to the claimant. However, in a period of 82 weeks there were only 10 weeks during which the claimant was not engaged in work for the respondent. When the claimant was not available for work because of holiday, he informed the respondent that he was not available.

27. Mr Wigham stated that there was absolutely no obligation that the claimant was expected to carry out roofing work himself and at the relevant time the claimant had several roofers he could use to either help him carry out the work or to substitute for him. I have been unable to accept this evidence.

28. When the claimant approached Mr Wigham for work in 2012, he was told that if he needed work he could probably "sort him out" with some contracting work. When this offer was made the claimant was not operating in business as a roofer. He had just returned to Aylesbury after a period when he was living in Tenerife. Mr Wigham considered the claimant a friend. Mr Wigham had in previous years worked for the claimant when the claimant was in business on his own account as a roofing contractor. It was this relationship with the claimant that led to the offer of work. It would have been obvious at the time that the claimant was going to do the work personally, and that was the expectation of both parties. In 2012, and in the years that followed, that is what happened.

The claimant did the work himself.

29. Mr Wigham states that the claimant used others to carry out work and that there were occasions when the claimant sent a substitute. I reject that evidence. The material before me does not identify any occasion when the claimant sent a substitute. There are occasions when the claimant used an extra man or men and on those occasions the respondent was aware of it, had agreed it, and in due course made a payment in respect of the extra man or men. M&W's consent was required before any extra man or men could be used. It was said David Tipping, the claimant's cousin, substituted for the claimant on one occasion. This is wrong. On that one occasion, David Tipping was engaged by the respondent in his own right to carry out work. There was one other occasion when David Tipping worked as a labourer for the claimant. On both occasions David Tipping was paid by the respondent.

30. While the absence of a written agreement leaves it possible to argue that the claimant was free to delegate, this in my view was not the true position. The claimant never delegated and the expectation was the claimant would do the work himself.

31. It is said that once a job was allocated to the claimant, it was up to the claimant to decide when he would do the work as long as it was within a reasonable period of time. For large projects, it was said that it was up to the claimant to inform the respondent when he would be able to carry out the work, as long as it can be done within a time acceptable to Whitbread.

32. I am satisfied that it would be necessary to timetable work being done. I bear in mind the work that the claimant does is serving Whitbread or another M&W client. It is inevitable that sometimes the work has to be scheduled. The fact that the claimant was able to have that level of control in consulting with the third party client in relation to the arrangements for carrying out the work is of little significance.

33. Mr Tipping said that the claimant was not supervised by the respondent when he was engaged in the work. That on larger jobs Mr Wigham or his fellow director would visit the site from time to time to go through the schedule of work and make sure that the client was happy with the progress. Generally, it was for the client to notify the respondent if they were not happy with the work. On occasions when the client did complain about the claimant's work, the claimant was sent back to correct this and did so at his own expense.

34. The claimant was paid by the respondent on the production of an invoice. If the claimant needed an extra man or men he would inform the respondent, and if agreed, the extra man's or men's labour would appear on the claimant's invoice. The man or men would be paid direct by the respondent. Any third person working with the claimant would not be paid by the respondent unless it was agreed beforehand. In terms of how many people worked on a job the respondent retained control. On some occasions, the payments to the extra man or men made to the claimant who then passed it to the extra man or men. This occurred for example where a labourer did not have bank account.

35. The claimant was paid at the rate of £20.00 per hour for his services and any labourer he used was paid at the rate of £15.00 per hour. The claimant was registered through the CIS scheme for the deduction of tax and in his tax returns the claimant states that he is a self-employed roofer. The tax returns also show that his earnings were almost exclusively received from working for the respondent.

36. I point out that neither the claimant nor the respondent really gave the status of the claimant *vis a vis* the respondent any thought. They gave no consideration to what the nature of their legal relationship was.

37. I have been assisted by the clear oral submissions made on behalf of the respondent and the claimant. I was provided with written submissions on behalf of the claimant.

38. Section 230 of the Employment Rights Act 1996 provides a definition of an employee and as an individual who has entered into or works under a contract of employment. A "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

39. The statutory definition of employment includes three essential characteristics: control, mutuality of obligation, and personal performance.

Control

40. Dealing with the issue of control, Mr Marsh points to 10 factors which he says indicate that this was a case where the respondent had a significant or a sufficient degree of control to say that there was an employment relationship.

41. It was the respondent who largely identifies and agreed the work that needed doing, the duration, the cost of this and informs the claimant when and where he was required to attend. Once it is decided that the claimant would be asked or allocated a particular job, he would be told where to go, he would be told what would be the expected duration of the role, and he would know how much he was to be paid.

42. The claimant contends that the respondent allocated additional labourers if it was agreed that they were required and it was normal practice for them to be paid by the respondent. There is evidence in the bundle of Mr Wigham stating to the claimant that he had not agreed to three labourers working on a particular job. The reality was that it was for the claimant to exercise his professional judgment as to how many people were required on a particular job but it was also his responsibility to identify and select an individual that was going to accompany him as a labourer. If the labourer was to be paid that would have to be agreed with the respondent. The evidence appears to show that there were many instances when such an agreement was obtained and payments made by the respondent to labourers.

43. Supplies and equipment were provided by the respondent. The parties are

agreed that any specialist equipment and the supplied needed for a job were provided by the respondent. If the claimant required to purchase extra items, the consent of the respondent was needed and then the relevant items were purchased using the respondent's account.

44. The claimant was required to use a van and wear a uniform emblazoned with the respondent's logo. He carried an identity card that had the respondent's logo on it. The respondent paid for the claimant's fuel with a fuel card provided to the claimant an accounting was done to reflect personal use. If it was decided that an overnight stay was required, this would be arranged and paid for by the respondent.

45. The claimant was required to attend training in relation to Sikalastic. The training was paid for by the respondent.

46. There is a dispute about the public liability insurance but it is not in dispute that the claimant (1) was not covered; and (2) that there was no question of the claimant being required to provide public liability insurance until the latter part of the relationship between the claimant and the respondent.

47. Taking the stated matters into account, it seems to me that there is a significant level of practical control over the claimant by the respondent. The claimant is a professional who exercises skill and judgement in carrying out any job. He is a roofer and he is not going to have the respondent, Mr Wigham or his partner, Mr MacIntosh, standing over his shoulder and telling him how to carry out a particular job. However, on one occasion the claimant was assigned a task which was outside his experience and knowledge as to how to complete it. On that occasion, he got advice and assistance from Mr Wigham who was able to talk him through the job. I am satisfied that there was a significant degree of control over the way that the claimant carried out his work by the respondent.

Mutuality of obligation

48. In respect of mutuality of obligation, the claimant worked for the respondent for over three years; he worked frequently throughout that period regularly working for over 40 hours a week. The respondent challenges to the extent that it is said by the respondent that whilst there may have been occasions when he worked many hours, there are also many occasions when he did not work over 40 hours. There is a period relied on by the respondent where the number of hours that the claimant was working appear to be in the region of about 20 hours per week.

49. What the claimant says is that although there were no set hours or days during which the claimant was required to work, he was required to take jobs regularly when they were given by the respondent and that if he were going to be unavailable he would have to inform the respondent of this in advance.

50. There was only one occasion that we were referred to when the claimant was in fact knowingly away and on that occasion, the evidence was that the claimant did inform the respondent that he was going away. It was the expectation that if the claimant was not going to be available that he would

have informed the respondent. It would be not just common courtesy to do so and given the nature of the relationship between Mr Wigham and the claimant, it was what both sides expected in their professional relationship. It is the fact that the claimant was available for work as and when required that the respondent used the claimant in the way that it did to the extent that it did.

51. I am also satisfied that it is correct where the claimant says that throughout the period of his employment, it was understood by both parties that he was expected to undertake the work that he was offered and if he did not he would not be offered other work.

52. There was the following exchange between Mr Marsh and Mr Wigham: *Q: the relationship would not have worked if he was saying no? A: He did not say no. Q: That's why he lasted four years? A: I still gave him the option to turn the jobs down. I cannot say yes or no to what would happen if he said no.* I am satisfied that if the claimant was turning down work from the respondent then the work would have stopped. The work was offered because it was known that the claimant would accept it.

53. While it was put to the claimant that there were weeks that the claimant did not work for the respondent there is no evidence of the claimant doing any other work apart from "four private jobs". It appears to be the case that some of the "four private jobs" was work carried out for people associated with the respondent. Nearly all the claimant's earnings have been attributed to his employment with the respondent.

Personal Performance

54. The final issue is one of personal service. Personal service is an essential element in the definition of an employee.

55. For the reasons already set out, it appears to me that there was an expectation that the claimant would personally do the work. It was the claimant that was being personally offered work. That personal offer of work was made to the claimant because of the knowledge of the claimant by Mr Wigham. It was always the claimant who did the work. There was no substitution. The one instance of alleged substitution turned out to be no such thing. I am satisfied that this was the case that there was the personal service.

Conclusion

56. On the evidence before me I consider that the claimant was an employee of the respondent. The issue that has given me cause question whether that conclusion is correct relates to the use of labourers. The claimant was able to identify and instigate the use of the extra man or men. However, this required the consent of the respondent and they were paid by the respondent. I am satisfied that that does not point away from the claimant being an employee. The respondent retained control even in this regard.

57. My conclusion in respect of this case is therefore that the claimant was an employee of the respondent. If I am wrong in that regard, I would in any

event have concluded that the claimant was a worker as I am satisfied that this was a case where the claimant was required to personally undertake work and that in doing so he was not doing so as a client of the respondent.

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Employment Judge Gumbiti-Zimuto

Date: ……4 October 2017……

Reasons sent to the parties on

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For the Tribunal office