Case Number: 1600883/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Bonner and Romick Plant Hire	v	**Chepstow Plant International Limited**

PRELIMINARY HEARING

Heard at: **Watford** **On: 31 July 2017**

Before: Employment Judge Bedeau

Appearances:

For the Claimant: **Mr J Anderson, Counsel**
For the Respondents: **Mr R Vernon, Counsel**

RESERVED JUDGMENT

1. The claimant was not employed by the respondent.

2. The claimant was, at all material times, a worker working for the respondent.

REASONS

1. By a claim form presented to the tribunal on 30 November 2016, the claimant issued proceedings in his name as First Claimant and by Romick Plant Hire, as Second claimant, in which he claimed that he had been unfairly dismissed and or suffered a detriment on the grounds that he made a protected disclosure/s.

2. In the response presented to the tribunal on 11 January 2017, the respondent averred that the claimant was neither an employee nor a worker and was, therefore, not entitled to pursue either a public interest dismissal and/or detriment claim. He was at all material times a self-employed independent contractor and that Romick Plant Hire could not pursue the claims as a corporate entity.

The issues

3. At the preliminary hearing held in private on 7 March 2017, Employment Judge Lewis, listed the case for a preliminary hearing for me to hear and determine whether the claimant was either:

   3.1 an employee within the meaning of section 230(1) Employment Rights Act 1996 "ERA";

   3.2 a worker within the meaning of section 230(3) ERA 1996; or

   3.3 a worker within the meaning section s.43(K)(i)(a) ERA 1996?

The evidence

4. I heard evidence from the claimant. On behalf of the respondent evidence was given by Mr Robert Aidan Smith, senior operations manager. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 85 pages. References will be made to the documents as numbered in the bundle.

<u>The claimant's application to adduce evidence</u>

5. The claimant's legal representatives wrote to the tribunal on 24 July 2017, requesting an order that Mr Paul Somers, an employee of the respondent, be ordered to attend to give evidence about whether or not the claimant was required to complete a holiday request form prior to going on leave as that form had to be authorised. The application was refused on 26 July by Employment Judge Lewis, who considered that the relevance of the evidence was limited and that the witness had not been asked to attend voluntarily.

6. It further appears that the claimant had covertly recorded a conversation on 21 July 2017 with Mr Somers without either Mr Somers' knowledge or permission. A copy of the transcript was disclosed to the respondent's representatives on 24 July 2017 by the claimant's representatives who invited them to agree that it could be admitted into evidence at the preliminary hearing.

7. The respondent's representatives replied on 27 July 2017, opposing the request. They stated that the evidence was of little relevance; where it was relevant the admission of it breached Mr Somers' Article 8 human rights; and the preferred course of act was to call Mr Somers to give evidence.

8. Mr Anderson, counsel on behalf of the claimant, took me to those parts of the transcript in support of the claimant's case that he was either an employee or a worker of the respondent. On page 5, the claimant asked in respect of the holiday forms: "Well you still remember that I filled one in" and Mr Somers' reply was: "Oh yeh yeh". On page 10, the claimant asked: "Yeh, did he, did he ask you about the holiday form then?" Mr Somers: "What do you mean about the holiday form what? Oh yeh he did ask me about the holiday form and I said yes they're all on the computer. When the computer came back all that was on there now isn't on it." Claimant: "So he's deleted mine" Mr

Somers: "He's rubbed Gillies off, everybody's, anybody who had their holiday on my fucking computer has gone." The claimant: "Rubbed it all off Mr Somers' computer."

9. On page 8, it appears that Mr Somers was mindful that he should not be talking to the claimant. He said: "Yeh I'm not supposed to be talking to you at all and I've talked to then I could have done for disciplinary and everything."

10. Mr Anderson submitted that the transcript, for the purposes of the preliminary hearing was limited to the issue of holiday leave and the forms submitted by the claimant to the respondent. He relied on those parts I have made reference to. He acknowledged that the recording was made clandestinely but submitted that I do have a wide discretion under Rule 41, Employment Tribunals Rules of Procedure 2013 and referred me to the case of Chairman and Governors of Amwell View School v Dogherty [2007] IRLR 198, a judgment of the Employment Appeal Tribunal "EAT".

11. Mr Vernon, counsel on behalf of the respondent, submitted that I should engage in a balancing exercise. On the one hand, there is the claimant's right to a fair trial and the on the other, Mr Somers' right to private life as he was not aware that he had been recorded by the claimant and said to the claimant that he should not be talking to him. He did not expect that the conversation would be recorded, transcribed and put before the tribunal to be admitted into evidence. There is on the other hand, the claimant's position, whether he should be allowed to rely on parts of this evidence in support of his case. The interference with Mr Somers' Article 8 rights impacted more severely on him than upon the claimant's right to a fair hearing. Accordingly, Mr Vernon has invited me to exclude those parts of the transcript Mr Anderson relied upon in support of the claimant's case.

12. The case was stood down for a short while to ascertain whether or not the claimant had requested disclosure of his holiday request forms. When we reconvened, I was told that a request was made on 21 April 2017 and a reply was sent on 9 May 2017, stating that the respondent did not have any holiday request forms for the claimant. The claimant was not required to complete such forms as he was neither an employee nor a worker.

13. In the Dogherty case, the Employment Appeal Tribunal held that an order allowing into the public domain remarks made by the governors during private deliberations did not amount to an interference with the right to "respect for private life" in Article 8 of the European Convention on Human Rights. The privacy element of Article 8 was not engaged. The panel members had put themselves and the contributions they made during the course of their work as school governors, into the public domain whilst acting in their role. They did not retain the right to personal privacy in relation to their participation in their public or quasi public function.

14. The EAT then went on to hold: "The employment tribunal was entitled not to refuse to admit the evidence consisting of recordings on the ground that the evidence had been disclosed very late in the proceedings."

Conclusion on the admissibility of the evidence

15. I engaged in a balancing exercise and acknowledged Mr Somers' right to private life in Article 8 of the European Convention. He was talking to the claimant and believed it was a private conversation, not recorded. My concern, however, was that Mr Somers was indeed aware that the claimant had engaged in legal proceedings against the respondent as the claimant had told him that the respondent had denied that he had filled in holiday request forms. Notwithstanding that, Mr Somers continued in his discussion with the claimant and part way through acknowledged that he should not have been talking to him, the very person who had issued proceedings against the respondent. In my view, he must have known the import of what he was saying to the claimant and ran the risk that the information he disclosed was likely to be used by the claimant in tribunal proceedings as the claimant was telling him that the respondent was challenging his assertion that he had completed the holiday request forms.

16. I have, therefore, come to the conclusion that the extracts referred to me by Mr Anderson, are relevant to the issues in these proceedings and that the claimant's right to a fair hearing requires reliance on those extracts to the extent circumscribed in Mr Anderson's address to me. That right to a fair hearing outweighed Mr Somers' right to private life under Article 8. Applying the judgment in Dogherty I will allow those extracts to be admitted into evidence.

Findings of fact

17. The respondent is a privately owned, family run business operating within the plant industry. Its business is divided into two sections, contracting and used equipment sales. The used equipment involves plant sales and the purchasing of all categories of machinery. Within the higher end contracts division, equipment is supplied on a national basis to all sectors of industry including quarrying, steelworks, power stations and earth works. The respondent offers services ranging from a single machine on a small contract to several teams for an extensive quarrying operation.

18. In June 2007 Romick Plant Ltd (RPL) was incorporated as a limited liability company with the claimant being the sole director and employee. It has its own accountant for accountancy and tax purposes; is registered for value added tax; and has its own bank account with Lloyds Bank. (page 50 of the joint bundle).

19. By consent, RPL was formally dismissed as a party in these proceedings at the preliminary hearing held on 17 March 2017.

20. On 14 December 2015, the claimant was engaged by the respondent through his company, RPL, to provide work as a labourer driving a dumper truck. He was based on a site in St Albans owned by Tarmac called the Tyttenhanger Quarry. There was no written agreement between RPL and the respondent. There was, however, and oral contract was oral contact between them. There was no contract either written or oral between the claimant and the respondent.

21. At or around the time the claimant commenced work with the respondent he offered to sell, on behalf of RPL, two dumper trucks to the respondent but the offer was rejected. The trucks were later sold by him in April 2016.

22. On his first working day, he had a 45 minutes induction conducted by Tarmac followed by a one hour induction by the respondent. As work on the quarry site is highly regulated, the induction was to do with Tarmac's and the respondent's procedures as well as health and safety policies and procedures.

23. The claimant brought in to work, on the first day, a yellow high visibility jacket but was instructed instead to wear the respondent's yellow high visibility jacket and trousers as well as protective headgear and gloves. He provided his own footwear but signed for the respondent's personal protective clothing and equipment.

24. In the course of his work, he drove the respondent's dumper truck.

25. Following discussions with the respondent, it was agreed that for his work on behalf of RPL, he would be paid at the rate of £12.00 per hour. I am satisfied that this was as a result of him negotiating with the respondent a suitable hourly rate of pay. I also acknowledged that other sub-contractors had negotiated a much higher rate of pay of £18.00 per hour.

26. The respondent's hours of work were from 7am to 7pm although this would extend to 8pm depending on the amount of work required to be done on the day. There is no dispute between the parties that the claimant worked 50-65 hours per week. His times would be recorded on the respondent's machine and on the operator's timesheet which included a daily health and safety checklist. These would be completed by either Mr Juby McCulloch, site foreman, or by Mr Alun Jenkinson, site supervisor (40-59).

27. Payment would be made to RPL after the claimant submitted his time sheet covering the work done. RPL would issue an invoice for payment to the respondent giving its VAT number, tax reference and bank details. (38-39, 50, 52, 53 and 55).

28. On 10 February 2016, the claimant had signed personal protective equipment form acknowledging that he received protective glasses, gloves and clothing as well as footwear from the respondent. I was not satisfied that he had used, up until that time, his own PPE, as he had claimed. The evidence given by Mr Smith was to the effect that all workers on the respondent's site were and are required to wear its PPE in order to project a positive image to third parties and they are provided early on in their engagement.

29. The claimant said that Mr Jenkinson had instructed him to train new drivers on the use of a dumper truck and on the respondent's policies and procedures for which he would be paid the increased rate of £14.00 per hour upon the promise that he would be promoted to team leader. This he agreed to do. He asserted that he became team leader in 2016 but I do not accept his evidence in that regard. I accepted Mr Smith's evidence that there was no such position in the respondent's hierarchy nor had there been subsequently to the claimant's

departure. There is the position of lead operator and that person is paid in accordance with a defined salary structure. There is also a procedure to be followed when someone is promoted. Either the site foreman or the site supervisor would put in a request for an increase in pay which would be considered by either Mr Smith or the managing director for approval. The request must demonstrate why that person should be promoted referring to either an increase in responsibilities and duties or additional qualifications or to all three. In the claimant's case, no such procedure was followed.

30. In order to train the respondent's staff a person must have the requisite mineral products quality control qualifications which the claimant does not possess. Furthermore, a request for training is normally made in writing. The site supervisor would fill out a request for training form. This would be approved either by Mr Smith or the managing director. A qualified trainer would then be sent to the site to train the employees and/or workers.

31. I find that the claimant was asked to be a buddy to new employees for a limited period, showing them how to drive a dumper truck and advising on the respondent's policies and procedures. This was distinct from providing formal training to the respondent's employees and acting as a team leader.

32. I further find that the increase in the claimant's hourly rate of pay made to RPL, reflected the busy nature of the work required to be done at the time and the demand for people with the claimant's knowledge and skill. It was increased from £12.00 to £14.00 per hour in or around January 2016, taking into account the demand for experienced labour. The respondent's Band 3 dumper driver was paid at the rate of £9.22 per hour from December 2015 which was increased to £9.40 in June 2016. The claimant did not benefit from a salary review conducted every June by the respondent and did not receive the 2.5% salary increase in 2016 whereas the respondent's employees did.

33. I find that there was no discussion between the respondent and the claimant as to whether he could substitute someone in his place to carry out his work. In order to do so, the respondent would have to be satisfied that person had the requisite knowledge and skills to carry out the work and had been inducted by Tarmac as well as itself.

34. In the response presented to the tribunal on 11 January 2017, in paragraph 24 of Rider A, the respondent wrote the following:

> "The first claimant worked varying hours depending upon when he wanted to work and what hours were available for him. The first claimant was informed on a Monday morning what the site was working and what hours were available for him should he choose to work them. On average he worked between 50 to 65 hours per week." (30)

35. The claimant took leave for one week commencing 18 July 2016. He said that he completed the holiday request form following the advice given to him by Mr Paul Somers, site supervisor. This form could not be found by the respondent and it has denied that the claimant was required to submit such a form for leave to be approved.

36. From reading the transcript of the recording made of the claimant's conversation with Mr Somers on 21 July 2017, that Mr Somers appear to be admitting that the claimant did complete such a form. I accept that he did but there was no indication that Mr Somers had treated the claimant as an employee in such circumstances. A worker equally is entitled to leave with pay. The claimant was not, however, paid for the one week he took as leave. He also did not raise a grievance in respect of the non-payment.

37. Although the claimant said that he was paid for days when work was not available, for example, due to rain or when the quarry was waterlogged, such an account was neither in his witness statement nor in his claim form. He took me through the timesheets showing that he had been paid the minimum period of eight hours when work was not available but I was not satisfied that he had left the respondent's site on those occasions or that he did not carry out some form of work for the respondent on the days in question. What had been recorded in the timesheets are his start and finishing times with no reference to him having left site. He might not have been working the quarry, but still working for the respondent in some other capacity, for example, cleaning or being engaged in the maintenance of the respondent's equipment. It made no sense sending the claimant, other workers and employees home when it was raining as the respondent did not know how long it would last. Its practice was to keep the workers and its employees on site.

38. The claimant took one day's sick leave for which he was not paid. He did not challenge the non-payment based on his assertion that as an employee he should have been paid.

39. His duties, like the other workers and employees at the Tyttenhanger site, were placed on a board and would follow what was required of him on any particular day. He knew that his shift would come to an end either at 7pm or extended to 8pm. I was satisfied that he worked long hours including overtime and at weekends but this was at his own choosing. He told me that the pay was good and that he enjoyed working at the site.

40. The respondent's employees were paid through its payroll with income tax and national insurance deducted. In the claimant's case, he was not paid through that process and neither did the respondent deduct tax nor national insurance. He held a Construction Industry Scheme card. Under that scheme RPL, as the contractor, would be responsible for deducting money from the claimant's earnings and passing it on to Her Majesty's Revenue and Customs.

41. On 1 August 2016, the respondent had concerns about the claimant's conduct in relation to an internal investigation and terminated its contract with RPL. The claimant was then told that he would no longer be engaged in work with the respondent. I was satisfied that the respondent did not follow any recognised disciplinary procedures in terminating his engagement.

42. Reference has been made to a statement prepared by Mr Smith as part of the grievance lodged by the claimant on 15 August 2016. The statement dated 29 September 2016, referred to the claimant allegedly saying to Mr Smith when he was told that the respondent was not able to offer him further work that he knew

he was self-employed and the respondent had no obligation to find work for him. (64-65)

43. I do not place much credence on Mr Smith's statement as it came after a letter had been sent by the claimant's solicitors dated 15 September 2016 in which they asserted that the claimant was an employee, had been unfairly dismissed and suffered detriments for whistleblowing. (64-65, 67-73).

Submissions

44. I have taken into account the submissions by Mr Anderson, counsel on behalf of the claimant and by Mr Vernon, counsel on behalf of the respondent. Their submissions were in writing and supplemented orally. I do not propose to repeat them herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

45. Section 103A, Employment Rights Act 1996, gives an employee the right to claim unfair dismissal if the reason or the principal reason for his or her dismissal is that they made a protected disclosure. There is no qualifying period of service but it is restricted to an employee.

46. Section 47B ERA provides that a worker shall not be subjected to any detriment on the ground that he or she made a protected disclosure.

47. Sections 230(1), 230(3) and 43(K)(1)(a) ERA defines an employee and a worker respectively. Section 230 provides:

> "(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 expressed) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting 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 expressed) 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 professional business undertaking carried on by the individual;
>
> And any reference to a worker's contract shall be construed accordingly."

48. On the definition of a "worker" under the public interest disclosure provisions in Part IVA, the relevant part of section 43K ERA, states:

> **"**43K Extension of meaning of "worker" etc. for Part IVA.

> (1) For the purposes of this Part "worker " includes an individual who is not a worker as defined by section 230(3) but who—
>
> (a) works or worked for a person in circumstances in which—
>
> (i) he is or was introduced or supplied to do that work by a third person, and
>
> (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
>
> (b)contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)","

49. In the case of Ready Mix Concrete (South East) Limited v Minister of Pensions and National Insurance, [1968] 2 QBD 497, an employment tribunal, in determining employment status, should consider whether there was mutuality of obligations; control; and any other provisions in the contract consistent with it being a contract of service. The starting point is to look to see whether there was a written contract.

50. I have taken into account the cases referred to me of: Windle v Secretary of State for Justice [2015] ICR 156; Montgomery v Johnson Underwood Ltd [2001] ICR 819; Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730; Cotswold Developments Construction Ltd v Williams [206] IRLR 181; Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667; Chairman and Governors of Amwell View School v Doherty [2007] IRLR 198; Autoclenz Ltd v Belcher [2011] ICR 1157; Catamaran Cruisers Lt v Williams [1994] IRLR 386; Pimlico Plumbers Ltd v Smith [2017] IRLR 323; Keppel Seghers UK Ltd v Hinds [2014] IRLR 754; Croke v Hydro Aluminium Worcester Ltd [2007] ICR 1303; McTigue v University Hospital Bristol NHS Foundation Trust [2016] IRLR 742; and Day v Lewisham & Greenwich NHS Trust [2016] ICR 878.

51. In Autoclenz Ltd v Belcher, the Supreme Court having considered the authorities, held that in determining whether there is an employment relationship the question to ask is, "What was the true agreement between the parties?", Lord Clarke, paragraph 29. In that case the Court had to look at the terms of the written agreement between the parties and further held that a written contract is not necessarily determinative of the relationship. The focus of the enquiry must be to discover the actual legal obligations of the parties. All relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other. There could well be a legal right to provide a substitute worker and the fact that the right is never exercised in practice does not mean that it is not a genuine right.

52. In paragraph 84, Sir Terence Etherton MR, in Pimlico Plumbers Ltd and Another v Smith, in the Court of Appeal, summarised the applicable principles required for personal performance. His Lordship held,

> "84. Some of those cases are decisions of the Court of Appeal, which are binding on us. Some of them are decisions of the EAT, which are not. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.
>
> 85. In the present case the ET was correct to find that, on the proper interpretation of the 2009 Agreement, Mr Smith undertook to provide his services personally within section 230(3)(b) of the ERA, regulation 2 of the WTR and the definition of "employment" in section 83(2) of the EA."

53. In Croke v Hydro Aluminium Worcester Ltd, the claimant, an engineer, in July 2001, incorporated Amerstar Ltd. He was the sole director with his wife as company secretary. Huxley is a recruitment consultancy providing recruitment services primarily in the field of information technology and engineering. The claimant signed, as director of Amerstar, a contact with Huxley for the provision by his company of technical services and was not a party to it. There was a substitution clause in the agreement allowing Amerstar, "the service provider" to substitute the claimant if the services remain as set out in the agreement and the client was satisfied that the substitute possessed the necessary skills and resources to fulfil the services and he or she would comply with health, safety, security and confidentiality requirements.

54. In the agreement between Huxley and Hydro, Huxley, "the company" agreed to supply technical services. Hydro was described as "the client". The service provider was "the limited companies employing the consultants and with whom the company as contracted to carry out the services…" The claimant was defined as "the consultant". The contract permitted Huxley to substitute the consultant similar to that contractual provision between Amerstar and Huxley.

55. The claimant worked on two contracts between Hydro and Huxley. Amerstar sent a monthly invoice to Huxley supported by the claimant's time sheet for the provision of intellectual engineering consultancy services. Huxley sent a monthly invoice to Hydro. Payment by Huxley to Amerstar was not dependent on payment by Hydro to Huxley. Amerstar paid the claimant on an "as and when

required" basis. Details of his salary were in Amerstar's annual audited accounts. The claimant did not receive dividend payments.

56. Huxley provided at least three other consultant engineers who worked on the same project, each using their own limited companies as "the service provider".

57. There was a dispute between the claimant and Hydro resulting in Hydro notifying Huxley that it no longer required his services on the site.

58. The EAT referred to the following findings of fact:

> "11. Throughout the two contracts Mr Croke was the only consulting engineer provided by Amerstar. In evidence, Mr Vine admitted that he would have been unhappy to accept a substitute because he had spent time training Mr Croke to carry out the necessary engineering tasks. Mr Vine accepted that, although Mr Croke was not subject to Hydro's disciplinary processes and could, within reason, choose his own time to attend work, in practice he attended during normal working hours. Mr Croke was provided with the IT equipment necessary. He received neither holiday pay nor sick pay but was subject to Mr Vine's overall direction when working at Hydro. Mr Croke was an experienced engineer operating on a contract where he was expected principally to be self managed, but was still working in accordance with Mr Vine's general direction.
>
> 12. During the period Mr Croke worked at Hydro he was identified by name in internal documents and described as a contractor. He was interviewed personally before his company was offered the work through Huxley and his personal details were contained in the temporary work/contract form. He was given a security swipe card to record his presence at Hydro.
>
> 13. Mr Croke, in his complaint to the ET, asserted that he had suffered detriment as someone who had made a protected interest disclosure. The protected disclosure alleged was raising concerns with Mr Vine that Hydro had failed, or were failing, or were likely to fail, to comply with a legal obligation to Aston Martin. He complained that the detriment he suffered was the termination of his service contract on the basis that he had made a protected disclosure."

59. Mr Croke did not assert that he was an employee of the respondent but that he was a worker under sections 230(3)(b) and 43K ERA 1996. The Employment Judge dismissed his claim that he was a worker under those provisions in the statute. The EAT held:

> "40. In our judgment the starting point is the contract between Huxley and Hydro, the contractual vehicle by which any supplying by Huxley to Hydro for the purpose of Hydro's work being done was achieved. Under it, Huxley contracted to provide "the service provider" to Hydro and represented that "the service provider" was contractually engaged by Huxley under a contract for services. "The service provider" was, however, defined in the contract by reference to the fact that it employs "the consultant," identified as Mr Croke. Moreover, although "the service provider" was entitled to substitute Mr Croke under a genuine agreement, it could do so only in circumstances in which both Huxley and Hydro had "a reasonable veto". In fact, the question in this case

> only arose because Mr. Croke was doing the work and so any right to substitute him had not been exercised.
>
> 41. In our judgment, adopting the purposive approach referred to in **Tansell**, Mr Devonshire is correct in his submission that the ET misdirected themselves in concluding that Mr Croke was not supplied to do that work by Huxley. The ET concluded that Mr Croke "worked for" Hydro by reference to the realities rather than the strict contractual position. Adopting that approach to the question, who "supplied" Mr Croke to Hydro to do the work, the correct answer, in our judgment, is that it was Huxley. He was the consultant named in the schedule as the employee of "the service provider" whom Huxley was agreeing would provide the services and he was the one who was supplied to the end user to perform the work and for whose work the end user paid Huxley."

60. On the application of section 230(3)(b), the EAT went on to hold that the ET had not erred in law in concluding that there was no contractual relationship between the claimant and Hydro,

> "48. Since the ET's decision, the EAT, presided over by the President has in **James and Greenwich Council** UKEAT 0006/06/ZT was given guidance on the circumstances in which a contract may be implied between the worker and end user in circumstances where the worker is supplied through an agency. We refer particularly to paragraphs 56 to 60 in which it is said that, 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 is no pre-existing contract between worker and end user, then it will be a rare case where there will be evidence entitling the tribunal to imply a contract between a worker and the end user. If any such contract is to be inferred there must, subsequent to the relationship commencing, be some words or conduct which entitle the tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end user which are incompatible with those arrangements.

Conclusions

Was the claimant employed by the respondent?

61. It is for the claimant to prove that he was an employee of the respondent. There was no written agreement defining the relationship between them. The oral agreement was between RPL and the respondent.

62. Although the claimant's name was on the board and he worked long hours of between 50 to 65 hours a week, he chose to work those hours because he enjoyed the work and the extra hours were also available. The respondent was, however, under no obligation to provide him with work nor was he obliged the carry out the work. He did not work in inclement weather conditions and was not instructed to go home but was engaged in non-driving duties until he was able to resume his normal driving duties when the weather conditions improved. This is supported by the time sheets.

63. There was little control over his work as he was taken on as an experienced driver and was a buddy to the new drivers. I was satisfied that he was expected to self-manage and did do so.

64. RPL was able to charge the respondent a higher rate of pay for his services when compared with the other dumper truck drivers. The respondent's payroll paid for his services directly into RPL's bank account. Its employees, however, had income tax and national insurance deducted at source.

65. The dispute between the claimant and the respondent did not result in disciplinary proceedings, instead he was told to leave.

66. I have concluded, taking the above matters into account, that the claimant was not employed by the respondent.

Was the claimant a worker under section 230(3)(b)?

67. I have considered s.230(3) and have come to the conclusion that I am unable to imply a contract between the claimant and the respondent as the end-user. Having regard to James and Greenwich Council, there was no cogent evidence leading me to conclude that the arrangements between RPL and the respondent no longer dictated how the claimant performed his work. Accordingly, I have come to the conclusion that the claimant was not a worker under section 230(3)(b).

Was the claimant a worker under section 43K(1)(a)?

68. I have come to the conclusion that the claimant was at all material times a worker within the wider definition in section 43K(1)(a). There was no mutuality of obligation but he performed services as a dumper driver personally and was aware of the work he was required to do and the hours available to him should he choose to work them. These were personal to him and not to any other individual.

69. He could not substitute his services as the respondent required someone with the relevant knowledge, skills and experience as a dumper truck driver who also had already undergone induction training by it and by Tarmac. On this point, I have applied paragraph 84 of the Pimlico Plumbers' judgment.

70. The judgment in the case of Croke v Hydro Aluminium Worcester Ltd I do have regard to the facts, although not the same, they are similar. An individual providing services through his own company to an end-user can be a worker under section 43K. Through RPL the claimant was introduced as the person who would personally provide its services.

71. Having regard to my judgment, the claimant does not have the right to pursue an unfair dismissal claim under s.103A Employment Rights Act 1996. Accordingly, that claim is struck out. He is, however, entitled to pursue his claim under section 47B.

72. The case has already been listed for a final hearing on **Monday 6 through to Thursday 9 November 2017** before a full tribunal.

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Employment Judge Bedeau

6 October 2017

Sent to the parties on:

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For the Tribunal:

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