



EMPLOYMENT TRIBUNALS

Appellant: G & J Properties Limited

Respondent: HM Revenue and Customs

Heard at: Manchester **On:** 15, 16, 17 and 18 May 2018

Before: Employment Judge Whittaker

REPRESENTATION:

Appellant: Mr G Mahmood of Counsel

Respondent: Mr G Rowrell of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The appeal of the appellant in respect of the Notice of Underpayment dated 1 August 2017 relating to the period between 1 June 2015 and 4 September 2016 is refused.
2. In respect of the Notice of Underpayment dated 1 August 2017 relating to the period 27 October 2014 to 31 May 2015, then pursuant to section 19(8) of the National Minimum Wage Act 1998 the judgment of the Tribunal is that the appeal in respect of that Notice of Underpayment shall be allowed to the extent of cancelling any liability for payment and/or penalty for the period 27 October 2014 to 11 January 2015 only.

REASONS

1. The respondent, HMRC, had issued two Notices of Underpayment of the National Minimum Wage pursuant to section 19 of the National Minimum Wage Act 1998. The Notices were presented to the Tribunal at pages 22-30 inclusive. The first of the Notices alleged underpayments between 27 October 2014 and 31 May 2015. The second of the Notices alleged underpayment between 1 June 2015 and 4

September 2016. The appellant, G & J Properties Limited, had applied to the Tribunal for both Notices to be rescinded on the basis that Joseph Bannister was never at any time either an employee or a worker of G & J Properties Limited and that on that basis the company was never responsible for ensuring that Mr Bannister was paid the National Minimum Wage.

2. Mr Gary Flitcroft, a director of G & J Properties Limited, gave evidence on his own behalf and on behalf of his company, G & J Properties Limited. He did so on oath by reference to a written witness statement. HMRC called four witnesses who also gave evidence by reference to witness statements and on oath. Those witnesses were Mrs Elsie Bannister, Joseph Bannister's mother, and Joseph Bannister himself. Mrs Sinead-Marie McCrudden gave evidence on behalf of HMRC in her capacity as an HMRC National Minimum Wage Compliance Officer. Mr Jamie Powell, a director Astley Bridge Building Services Limited, also gave evidence on behalf of HMRC.

3. The Tribunal was presented with two bundles of documents comprising in total some 790 pages. At the outset of the hearing it was agreed that the Tribunal would only need to read, refer to and consider the individual page numbers to which it was referred, and it was confirmed that a significant part of the bundle in any event comprised of bank statements to which only limited reference would be needed.

4. The issues for the Tribunal to decide were whether or not on the dates referred to in the Notices of Underpayment issued by HMRC Joseph Bannister was an employee or worker of G & J Properties Limited. It was not suggested at any time that Joseph Bannister was self-employed and working in his own business.

5. Prior to any of the witnesses giving evidence on oath, the Tribunal read and considered the written witness statements which had been presented by each of the witnesses and considered the documents which were referred to by those witnesses in those statements. The Tribunal heard then from each of the witnesses by way of cross examination and by way of answer to questions put by the Employment Tribunal.

Findings of Fact

6. After considering all the relevant evidence and documents the Tribunal made the following findings of fact:

6.1 It was agreed that Mr Flitcroft was the owner and director of G & J Properties Limited, and that Mr Jamie Powell was the owner and director of another building company by the name of Astley Bridge Building Services Limited. These companies will in this Judgment be referred to as G & J Limited and ABBS Limited.

6.2 Mr Flitcroft and Mr Powell first met in 2013 after they were introduced by a mutual friend. Their companies had mutual interests because they were both involved in the building industry. In 2014 G & J were undertaking two large building projects at two different sites. At both of these sites G & J Limited was constructing high end, high value homes for sale as a profit as part of its business. G & J Limited had an established list of subcontractors that it relied upon in connection with its building projects, and in order to secure and maintain the standard of

work which was necessary in view of the value of the homes which it was constructing for sale, the company placed a high regard and high value on its relationships with those subcontractors in order to be able to maintain the standards which were necessary in connection with the building work which the company was carrying out.

- 6.3 Mr Powell had, at the time of being introduced by a mutual friend, been recommended to Mr Flitcroft as someone who would be able to carry out building work to the high standards demanded by G & J Limited. In 2014 at the time that the two building projects were about to begin, Mr Flitcroft recalled the introduction with Mr Powell and agreed to meet him to discuss the works which would be necessary.
- 6.4 By 2014 G & J Limited had prepared and issued contracts of employment to those members of staff that it regarded as its employees. A signed contract of employment dated 1 September 2012 issued to Mrs Eileen Flitcroft appeared in the bundle at pages 103/104. A signed contract of employment in respect of Mrs Gillian Thorniley appeared in the bundle at pages 105/106. The company had also issued a signed contract of employment to Mrs Karen Flitcroft on 1 May 2013 (pages 107/108).
- 6.5 Although this is not relevant to the year 2014, the company subsequently prepared and issued signed contracts and apprentice documentation with Benjamin Lloyd in 2016 (pages 101-102) and with Thomas Flitcroft in July 2016 (pages 108-111).
- 6.6 During the evidence it became common ground that in November 2014 an arrangement/agreement was reached between Mr Flitcroft and Mr Powell. The agreement was for Mr Powell to provide his skills in joinery to G & J Limited and in addition to providing those skills Mr Powell would also exercise a project management role on site to ensure that the works on site, not just joinery, remained on track, on time and were completed to the necessary high standards required. Mr Flitcroft maintains that Mr Powell was engaged not as an individual but was engaged as a subcontractor and that the arrangement was not with Mr Powell as an individual but with his limited company, ABBS Limited, of whom Mr Powell was an employee. Mr Powell specifically acknowledged when giving evidence on oath that he was at all times an employee of ABBS Limited and that he took a salary from that company during the period November 2014 to September 2016, and that the level of that salary was dictated by the financial circumstances of his company, taking into account advice which he received from the accountant who provided financial advice in respect of the affairs of ABBS Limited.
- 6.7 During the course of the investigations by HMRC Mr Powell alleged that it was not his company that entered into a contractual arrangement with G & J Limited but that he entered into a personal contract for services with G & J Limited, and that he was an employee of G & J Limited from November 2014 to September 2016 onwards.

- 6.8 The Tribunal was urged by Mr Rowrell, counsel for HMRC, that it was not necessary for the Tribunal to determine this disagreement in order to enable the Tribunal to conclude whether during the relevant periods Joseph Banister was an employee/worker of G & J Limited. The Tribunal, however, fundamentally disagrees with Mr Rowrell and believes that it is essential for the Tribunal to determine what in its opinion was at all times the correct contractual position between Mr Powell and G & J Limited and ABBS Limited and G & J Limited. The Tribunal believes that if it were to conclude that Mr Powell was engaged as an employee and as an individual employee by G & J Limited that it would make it very much less likely that Joseph Bannister was during the relevant times an employee of Mr Powell's company; whereas if the contractual arrangement was that of a subcontractor between the two companies, and that during the relevant times Mr Powell was only an employee of his own limited company, that there was considerably greater scope for the Tribunal to reasonably and properly conclude that at the relevant times Joseph Bannister was not an employee of G & J Limited but was an employee of ABBS Limited. The Tribunal has, therefore, gone on to make the relevant findings of fact in order to determine what was, in the opinion of the Tribunal, the correct contractual relationship between G & J Limited, Mr Powell and Mr Powell's company, ABBS Limited.
- 6.9 It was agreed that at the time of the arrangement being entered into in November 2014 neither Mr Flitcroft nor Mr Powell nor either of their two respective companies entered into any written documentation whatsoever to record the nature of their relationship/relationships. There was therefore no contractual documentation to consider and the Tribunal therefore had to make its findings of fact based on the evidence of the witnesses and consideration of documents which were relevant.
- 6.10 One of the factors which the Tribunal took into account was its impression of the witnesses and not just the witnesses Mr Flitcroft and Mr Powell but also the witness evidence given by Mrs Elsie Bannister and by her son, Joseph Bannister. The Tribunal also took into account the reasonably, professional and in all the circumstances appropriate observations and concessions which were made by Ms McFadden during cross examination on behalf of HMRC.
- 6.11 There was consideration disagreement between Mr Flitcroft and Mr Powell, not only about the basis of their initial contractual arrangement but about significant issues throughout the length of their relationship between November 2014 and September 2016. Where those disagreements arose the Tribunal has below explained its reasoning for determining those factual disagreements on a case by case basis. It is, however, important and relevant in the opinion of the Tribunal to record the agreed relationships between Mr Powell, Mrs Bannister and her son, Joseph Bannister.
- 6.12 It was very clear from the evidence which they all gave that they were all members of a close knit family. The Tribunal was told that Joseph

Bannister had some learning difficulties and that as a result of those he had had an unhappy time at school and later at college where he had been bullied. The Tribunal was able to observe for itself those challenges when Mr Bannister was called to give evidence on oath. It became quickly clear that he was unable to comprehend questions which were put to him in connection with the history and nature of his relationship with Mr Flitcroft and with G & J Limited, and Mr Mahmood on behalf of G & J Limited responsibly recognised those difficulties and curtailed, quite appropriately, what might otherwise have been a longer period of cross examination. However, what was patently obvious when Joseph Bannister gave evidence was that the tone, language and content of his witness statement bore no resemblance whatsoever to Joseph Bannister as an individual. His statement comprised of some three pages and was produced to the Tribunal.

- 6.13 At the beginning of his evidence, in the normal way, counsel for HMRC got Mr Bannister to refer to his statement and to confirm that he had signed it and indeed that the contents of that statement were true. However, Mr Bannister's subsequent and short performance in the witness box very clearly indicated that this statement did not reflect the understanding, language, personality and perhaps most importantly the acknowledgement limitations of Mr Bannister. It was, in the opinion of the Tribunal, a statement which had quite obviously been prepared for him and that nobody had taken sufficient care, or indeed any care, to check that it accorded with those obvious characteristics of Mr Bannister. It was a statement which had very obviously been prepared "for him" and equally obviously, in the opinion of the Tribunal, had simply been presented to him for signature without anyone taking any steps to check that it was genuinely the evidence of Mr Bannister or that it genuinely reflected his knowledge and recollection of the incidents in question, or that it in any way genuinely reflected his obvious limitations. The Tribunal was therefore both unable and unwilling to place any weight on the evidence which was given by Mr Bannister in view of the obvious lack of any real connection between Mr Bannister as an individual and as Mr Bannister as presented by the content, tone and language of what purported to be his witness statement. In the opinion of the Tribunal, there had been a significant lack of care and attention paid by HMRC to the preparation and content of that statement, and to present that statement as genuinely being the evidence of Mr Bannister was, in the opinion of the Tribunal, a misrepresentation of what Mr Bannister was genuinely able to give as evidence to the Tribunal.
- 6.14 Returning to the events of 2014, Mr Flitcroft alleged that at the time that Mr Powell was engaged, he brought along with him Joseph Bannister, and that Joseph Bannister was introduced to Mr Flitcroft as a "colleague". It was put to Joseph Bannister in the limited cross examination which took place that Mr Bannister had indeed been introduced by Mr Powell as Mr Powell's "colleague", but for reasons already expressed clearly above, the Tribunal felt unable to accept any value to that evidence.

- 6.15 The Tribunal considered that it was particularly significant that in his own witness statement Mr Powell at paragraph 2 indicated that at the time of the first meeting at which Mr Powell was engaged following discussions with Mr Flitcroft in the period June to October 2014 Mr Powell acknowledged that at that stage the nature of the relationship was one of a subcontractor and that the nature of the contractual relationship was one of a contract between G & J Limited and ABBS Limited. There was no suggestion of any personal contractual relationship with Mr Powell. Mr Powell in paragraph 2 of his witness statement confirmed that his own building company was already established and that he was working three or four days a week for Mr Flitcroft's company, but at the same time he was carrying out other building projects as his limited company, ABBS Limited. He confirms in paragraph 2 of his witness statement that during that period, June/October 2014, that he was "free to take up other work".
- 6.16 At paragraph 15 of his own witness statement Mr Flitcroft refers to 19 November 2014 as being a date which was "some time after the work commenced". In the opinion of the Tribunal, this is to reflect the fact that prior to that date there had been a subcontractor relationship between G & J Limited and ABBS Limited.
- 6.17 The Tribunal considered, therefore, the position of Joseph Bannister in that period between in or about June 2014 and 19 November 2014. The view of the Tribunal is that during that time Mr Flitcroft knew very little indeed about Joseph Bannister other than that he had attended the initial discussions which had taken place between Mr Powell and Mr Flitcroft in connection with the possible engagement of Mr Powell. Mr Powell in his evidence agreed at paragraph 7 of his witness statement that between June and October 2014 that Joseph Bannister was at college but at the same time would accompany Mr Flitcroft to the work that he was conducting on behalf of G & J Limited as a subcontractor simply for work experience. Mr Powell alleges at paragraph 8 of his witness that Mr Flitcroft agreed that Mr Bannister could accompany Mr Powell during that time effectively for work experience. At other times when giving his evidence, which the Tribunal will comment on subsequently, Mr Flitcroft gave evidence very clearly indeed that whenever he engaged subcontractors that he understood the nature of that contractual relationship and that it was in effect for each of the subcontracting firms to decide for themselves who they employed in order to carry out the work which the subcontractors had been engaged to perform. Mr Flitcroft was very clear indeed about this on more than one occasion. The view of the Tribunal is that Mr Flitcroft was simply reflecting that very clearly held opinion when asked about whether or not Mr Bannister could accompany Mr Powell. In effect Mr Flitcroft's opinion was that it was entirely up to Mr Powell what he did in performing his responsibilities as a subcontractor through his limited company. The Tribunal does not accept that it was therefore a formal request which required or was given detailed consideration by Mr Flitcroft. Any agreement given by Mr

Flitcroft simply reflected his very clear understanding of the autonomy of the subcontractors that he engaged.

- 6.18 At paragraph 9 of his witness statement Mr Powell says that as part of his role as project manager he recruited workers on behalf of Mr Flitcroft. This was of course not part of his responsibilities as a subcontractor in the period June/October 2014 when Mr Flitcroft openly acknowledges that during that time the contractual relationship was one of subcontractor between G & J Limited and ABBS Limited and that the nature of the subcontracting was joinery but also a limited project management of the building projects and the other subcontractors on site. Mr Powell then in his witness statement at paragraph 3 says that in November 2014 he then took on a “full-time” project management role. He alleges that the nature of the relationship, one of subcontractor, then changed at that time to one where Mr Powell became an employee of G & J Properties Limited. He uses in paragraph 3 the word “salary”. The Tribunal does not accept that this is an appropriate description of the financial arrangement which existed in November 2014 or after that date. The Tribunal finds that the use of that phrase is an attempt to use language which is most commonly associated with a relationship of employee/employer when in fact the normal characteristics associated with a salary simply did not apply. In the period when Mr Powell acknowledges that his company was a subcontractor and that he was at all times an employee of his own limited company receiving a salary (June/October/November 2014), Mr Flitcroft made payment to ABBS Limited for the subcontracting arrangements by making gross payments without deduction of any tax or national insurance to the bank account of ABBS Limited. That was agreed by all parties, and it was agreed that that continued to be the arrangement up to September 2016. Mr Powell in his witness statement at paragraph 3 acknowledges that there was no contract of employment or indeed any formal contract at all. He describes the ongoing arrangement as a “gentleman’s agreement”. He does not, however, provide any justification or reasoning for his use of the words “salary”. As the Tribunal has already indicated, the existing arrangement for payment of monies for the services of Mr Powell continued to be exactly the same from June 2014 onwards when his company was engaged as a subcontractor. Monies were paid gross into the bank account of ABBS Limited. There was no change in that arrangement whatsoever when, as Mr Powell alleges in his paragraph 3 of his witness statement, he then became entitled to receive a “salary”.
- 6.19 The Tribunal was also troubled by the use of the phrase “full-time”. This was a phrase which also used by Mr Rowrell of counsel on behalf of HMRC. The Tribunal does not recognise the phrase as being relevant or appropriate to the circumstances. Mr Powell himself recognises that he continued to be able to work “on other jobs at the weekend”. Patterns of work in 2014 onwards are not nowadays recognised as generally being patterns of work which are Monday to Friday. There is almost every possible pattern of working. Mr Powell acknowledges that he was still able to carry out other work through his limited company “at weekends”

and indeed it was equally possible for Mr Powell to continue to carry out other building work in the evenings. The Tribunal believes, therefore, that the use of the phrase “full-time” was an attempt, together with the use of the word “salary” to create an impression that there was a significant change in the nature of the contractual relationship in November 2014. Of course that contractual relationship from June 2014 was one of subcontractor with Mr Powell’s limited company, ABBS Limited.

- 6.20 Other than lengthening the number of days and hours that Mr Powell was agreeing to carry out his joinery work and project management responsibilities for G & J Limited, the Tribunal can find no other change to the relationship between Mr Powell and ABBS and Mr Flitcroft and G & J Limited by comparison to the acknowledged contractual relationship which existed between June/October/November 2014. The Tribunal does not believe that there are any grounds for suggesting that Mr Powell suddenly began to receive a “salary”. He continued to be paid in exactly the same way that he had been paid since June 2014, and that was by reference to payment of a salary to him from his own limited company, ABBS Limited. Payment for the services of Mr Powell, as an employee of his own limited company, were made by G & J Limited to Mr Powell’s limited company, ABBS Limited. Those payments were made gross without deduction of tax and national insurance. Mr Powell was at all times fully aware that that was the case. Mr Powell employed and relied upon financial advice from his accountant in respect of the affairs of his limited company. If, as he alleges, there was a significant change in the nature of his relationship with G & J Limited to make him an employee of G & J Limited in 2014 as he alleges, then the Tribunal finds it extremely troubling that that was not something which Mr Powell discussed with his accountant in order to ensure that the payment and deduction arrangements which would be commensurate with a relationship of employer/employee were reflected in the ways by which Mr Powell as an individual was subsequently remunerated. As the Tribunal has already indicated, however, there was no such change. The payment arrangements remained unchanged to those which existed for at least four months from June 2014. The Tribunal does not believe that there is any real significance in Mr Powell increasing his services through his limited company from what he admits in paragraph 7 of his witness statement was 2-3 days a week to then working five days a week.
- 6.21 On the morning of Thursday 17 May 2018 the Tribunal received additional documents from counsel for both the appellant and the respondent with its agreement. HMRC produced the accounts for each of the financial years ending March 2015, March 2016 and March 2017 relating to the company of Mr Powell, ABBS Limited. The Tribunal concentrated mostly on the accounts for the year ending March 2016 as the evidence of Mr Powell was that throughout that year his “full-time” job had been with G & J Limited. Those accounts, however, clearly showed that the income of the company in that year was £48,760 and that it had in the profit and loss account a figure of £5,613 for cost of sales. The building company of Mr Powell had been in operation since

1999 and was by now very well established. The cost of sales in respect of a building company would, as acknowledged by the parties, represented the cost of tools and materials which were purchased in order to generate the sales recognised in the accounts of the company. Despite Mr Powell therefore alleging that in that accounting period to March 2016 he had in effect been an employee of G & J Limited, he had nevertheless declared the monies which he had received, which he on oath had said were monies received for his project management/joinery services as the income of ABBS Limited. He had not in any way purported to account to HMRC for those earnings as earnings of an employee which were subject to the usual PAYE deductions. In the opinion of the Tribunal these accounts endorsed the judgment of the Tribunal which was that the contractual relationship in relation to Mr Powell did not change from that of subcontractor to that of employee in or about November 2014 onwards. In the opinion of the Tribunal, the relationship of subcontractor between ABBS Limited and G & J Limited continued in existence relating to the services of Mr Powell throughout the period June 2014 to September 2016.

- 6.22 The Tribunal was also provided by Mr Mahmood on behalf of the appellant with two invoices, again produced on the morning of 17 May 2018. They were invoices from ABBS Limited. It was in the view of the Tribunal relevant to note that on one of the invoices it indicated that Mr Powell, through his company, was claiming payment for seven days and that included consecutive days from 11-15 August which, in the opinion of the Tribunal, adopting the language of Mr Powell, would represent “full-time” working, and furthermore he submitted an invoice indicating that he worked Monday 8, Tuesday 9, Thursday 11, Friday 12 and Saturday 13 September 2014, which again would represent the description adopted by Mr Powell of “full-time”. The Tribunal does not believe, therefore, that there was any significant difference in the contractual relationship or the contractual nature of the relationship covering the period June 2014 to September 2016. In the view of the Tribunal that relationship at all times was that of a subcontractor.
- 6.23 Although chronologically out of turn, the Tribunal equally believes it relevant when considering the nature of the relationship relating to Mr Powell to consider the events at the end of that relationship. The Tribunal was urged by Mr Rowrell that conduct at the end of that relationship had to be viewed against the background that there was by September 2016 a significant, even very significant, disagreement between Mr Powell and Mr Flitcroft. However, in the opinion of the Tribunal whatever the nature of that disagreement that could not alter the nature of the genuine contractual relations. If Mr Powell was at that time an employee, which he was alleging, then the Tribunal found it extremely odd that against the background of that agreement Mr Powell, allegedly as an employee, felt entitled to simply absent himself from work as a result of that disagreement. Furthermore, he went away to Spain, again without arranging or requesting any holidays or requesting the approval of Mr Flitcroft. This is not conduct which could in any way be associated with

a contract of employment and mutuality of obligation. It is, however, conduct which is entirely consistent with the existence of a subcontract arrangement whereby if Mr Powell did not want to do work on particular days then he was able to do that, and if he wanted to go to Spain then he was free to do that as well. The conduct of Mr Powell, therefore, at the end of the relationship also contributes to the conclusion of the Tribunal that throughout the relationship the relationship was one of subcontractor and was never the relationship of employee/employer.

- 6.24 Returning to the contractual status of Mr Bannister, it was never suggested or argued that at any time he was a subcontractor or in any way attempting to operate his own business. It was agreed by everyone that that was an argument which had absolutely no merit. He was, therefore, at the relevant times of the Notices of Underpayment either an employee/worker of the appellant company or alternatively an employee/worker of Mr Powell as an individual or finally, in the alternative, an employee/worker of ABBS Limited. It was not suggested to the Tribunal or argued on behalf of HMRC that at any time Mr Bannister became an employee/worker of Mr Powell. The Tribunal therefore limited its findings of fact to the issue as to whether or not during the relevant periods Mr Bannister was an employee/worker of either G & J Limited or ABBS Limited.
- 6.25 Mr Powell was at all times very closely indeed related to Mr Bannister and to his mother. Quite understandably Mrs Bannister was concerned about the effect that bullying had had on her son, even at college, and was anxious for him to have the opportunity to make his way in life. Mrs Bannister was described by Mr Powell as his "auntie". It was accepted that there was a very close relationship between Mr Bannister, Mrs Bannister and Mr Powell. Mr Powell spent a great deal of time at the home of the Bannisters and was aware of the difficulties and challenges facing Mr Bannister. Indeed Mr Powell went so far as to accept some responsibility for offering Mr Bannister opportunities to make his way in life, and as part of the early months when Mr Powell was fulfilling his subcontract for joinery services and project management services Mr Bannister went along, effectively for work experience. He did some labouring duties under the guidance and watchful eye of Mr Powell He fetched tools. He watched and engaged with other subcontractors on site. In other words, he enjoyed the benefits of work experience.
- 6.26 Mr Powell confirmed that in November 2014 there was then a change in the working circumstances of Mr Bannister and he was then taken on for a trial period to see whether or not he could perform to a level where he could justify earning a wage rather than simply extending a period of unpaid work experience. That suggestion and that trial period was not discussed with Mr Flitcroft. It was a decision which was taken by Mr Powell alone. There was some confusion about the date and length of that trial period. There was no documentation in place. The Tribunal did not believe that those two aspects of the trial period were of importance in any event. At paragraph 11 of his statement Mr Powell says that it was

“agreed” that Mr Bannister would be paid £20 per day. However, the Tribunal finds as a fact that Mr Flitcroft was not involved in that agreement. It was an agreement which was reached, in the opinion of the Tribunal, between Mr Powell and Mr Bannister only. Mr Powell confirms in that paragraph of his statement that there was no firm offer of employment. Importantly, there was certainly no firm offer or indeed any offer of employment which was made by Mr Flitcroft to Mr Powell. Other than the sworn evidence of Mr Powell, there was no evidence at all of any discussion or agreement on the part of Mr Flitcroft to Mr Bannister being taken on for a trial period. In his witness statement Mr Flitcroft makes no reference to discussions about a trial period or indeed discussions about the initial engagement of Mr Bannister at all. The view of the Tribunal is that this was not discussed with Mr Flitcroft and that the decision to offer Mr Bannister a trial period was a decision which was taken by Mr Powell alone against the background of his very close association with Mr Bannister and his family and against the background of him wanting to give Mr Bannister an opportunity to show that he could make his way in the world of a building site.

- 6.27 The Tribunal was provided with absolutely no documentation whatsoever as to how Mr Bannister was paid for the period of that trial period, however long it lasted. The oral evidence of Mr Flitcroft was that Mr Bannister was paid by effectively being added on to the invoices which Mr Powell submitted through his limited company for the services of Mr Powell, and that on that basis Mr Bannister was effectively an overhead/cost of Mr Powell’s company. The Tribunal was not provided with any invoices to cover the trial period, either by Mr Flitcroft or by Mr Powell. The Tribunal was left therefore with the evidence of the two witnesses, Mr Powell and Mr Flitcroft. The Tribunal finds that during the course of the trial period Mr Bannister was paid by monies which were paid by the appellant company to ABBS Limited in addition to monies which were paid by to ABBS Limited for the services of Mr Powell. That was the evidence of Mr Flitcroft, and the Tribunal accepted it.
- 6.28 At page 125 there is then a document which was carefully and repeatedly scrutinised by the Tribunal. It was an email sent by Mr Powell to Mr Flitcroft. In addition to reporting various matters relevant to his project management responsibilities, the email ends by Mr Flitcroft being told that Mr Bannister has proved himself to be a “good all round honest little grafter” and asking “weather [sic] it’s worth taking Mr Bannister on full time”. There is a reference to Mr Bannister having worked with one of the other subcontractors in carrying out screeding work and to having done some other jobs with one of the other subcontractors. It was being suggested by Mr Powell that Mr Bannister would be good value “for £20 a day”. The email ends by “have a think about it”.
- 6.29 Mr Flitcroft in giving evidence made it very clear indeed that he never replied to that email to give his approval because his view was that Mr Powell was acting as a subcontractor and that if Mr Powell wanted to engage Mr Bannister then that was within his remit as project manager,

but that as those services were being performed by Mr Powell as a subcontractor that on that basis he believed that the expense of taking on Mr Bannister would be an expense of Mr Powell's limited company as a subcontractor. Mr Flitcroft made it clear that he did not interfere in the decisions of his independent subcontractors and that on that basis the reason that there is no evidence that he replied to that email was because it was a decision for Mr Powell to take and a decision for him alone bearing in mind that in his opinion Mr Bannister would become engaged as part of the subcontracted business of ABBS Limited.

- 6.30 It was then common ground that Mr Bannister was indeed engaged and paid £20 per day for five days' work, £100 per week. That continued to be the case until as a result of his performance the rate of increased to £30 a day, £150 per week.
- 6.31 At paragraph 14 of his witness statement Mr Powell says that Mr Flitcroft did not pay Mr Bannister the National Minimum Wage and that on "many occasions I reminded Gary but I was always told 'I will sort it out'". Mrs Bannister when giving evidence said that she was also aware, almost from the time that her son began working for £20 a day, that her son was not being paid the National Minimum Wage and that she was aware of that information from having read articles in national newspapers. Mr Flitcroft was adamant that there had never been any discussions with him whatsoever about failures to pay the National Minimum Wage and that the first time that was mentioned was in 2017 after a complaint had been made to HMRC about alleged failures by the appellant company to pay Mr Bannister the National Minimum Wage. The Tribunal rejects that evidence of Mr Powell as being either accurate or honest. The Tribunal was shown a significant number of emails during the 22 months from November 2014 to September 2016 and exchanges of text messages, and yet there was no reference whatsoever in any of those exchanges to the National Minimum Wage or any complaint whatsoever about the fact that Mr Bannister was allegedly being underpaid. The Tribunal believes that to include that statement in his witness statement is a deliberate and dishonest attempt on the part of Mr Powell to persuade the Tribunal that the question of the National Minimum Wage was well known to Mr Flitcroft, was discussed with him and that he ignored it. The Tribunal rejects that as being true.
- 6.32 The Tribunal was equally dissatisfied with the evidence of Mrs Bannister. The Tribunal finds it incredulous that if she was of the view that her son was now in employment and was being underpaid and was well aware of the requirements of the National Minimum Wage that at no stage did she raise this or in any way approach Mr Flitcroft about it. The Tribunal does not believe that she discussed it with Mr Powell and that Mr Powell then for some reason failed/refused to discuss it with Mr Flitcroft. The Tribunal finds that in view of the very close and supportive relationship between Mr and Mrs Bannister and Mr Powell that if indeed the subject of the National Minimum Wage had at any time been raised prior to the termination of the relationship between Mr Powell and Mr Flitcroft, that

there would have been considerable evidence about that and that it would have been raised and that it would have been recorded in writing bearing in mind its obvious importance. The Tribunal does not accept the evidence of Mrs Bannister's about this either, and believes that her knowledge of the National Minimum Wage only arose after September 2016 and after her son stopped having any relationship with Mr Flitcroft and/or G & J Limited. By then it was accepted by all parties that Mr Flitcroft and Mr Powell were seriously at loggerheads.

- 6.33 On 17 November 2016 (pages 193/198) Mr Bannister sent to Mr Flitcroft an email relating to the National Minimum Wage without any reference whatsoever to Mr Bannister. He sent it out of the blue. Mrs Bannister in cross examination was asked about this email and about the National Minimum Wage generally. Her answers were evasive and uncooperative and, in the opinion of the Tribunal, deliberately so. She was asked whether she had discussed the National Minimum Wage with Mr Powell and she said "probably", and then changed that to confirm that she had. She confirmed that she was aware of the dispute between Mr Powell and Mr Flitcroft. She asked whether Mr Powell was the person who had gone to HMRC on behalf of Mr Bannister. Mrs Bannister did not answer that question other than to say, "we discussed it". She was quite understandably asked why she had waited some 2½ years from when Mr Bannister had first started working at building sites operated by the appellant company to refer to the National Minimum Wage, and she said that this was because she thought that Mr Flitcroft would eventually pay what was due. The Tribunal rejected this evidence of Mrs Bannister as being an inaccurate and even dishonest description of what happened. The overwhelming conclusion of the Tribunal is that the question of the National Minimum Wage did not arise until after the termination of Mr Bannister's relationship with the appellant company and until after the serious dispute arose between Mr Powell and Mr Flitcroft. The Tribunal could understand why both Mrs Bannister and Mr Powell would be unwilling to admit that because it would obviously put both of them in a very poor light, but it was more important than that because Mr Powell in his witness statement had said that he had discussed the National Minimum Wage on many occasions with Mr Flitcroft and that Mr Flitcroft had allegedly said that he would "sort it". The Tribunal rejects that evidence.
- 6.34 In connection therefore with discussions about the National Minimum Wage the Tribunal finds that there were no such discussions with Mr Flitcroft and that the issue was not raised with him until a formal complaint was made by HMRC. The Tribunal finds that one of the determining factors for raising that complaint was the ongoing dispute between Mr Powell and Mr Flitcroft which the Bannister family decided to assist Mr Powell with. Mr Powell and the wider Bannister family bore a grudge against Mr Flitcroft and saw the issue of the National Minimum Wage as an opportunity to potentially get back at Mr Flitcroft and to further the dispute which was acknowledged by both parties as being a bitter dispute.

- 6.35 This evidence is only relevant in the opinion of the Tribunal as if it were true it would obviously have raised in the head of Mr Flitcroft the rate of pay which Mr Bannister was receiving, who was responsible for it, and it would certainly have raised with him the suggestion that Mr Bannister was being underpaid and that, in the opinion of Mr Powell, Mr Flitcroft's company was obliged to make the correct payments of wage. Clearly, in the opinion of the Tribunal, if those issues had been raised then the issue of who employed Mr Bannister would obviously have arisen and would have been the subject of very clear and obvious disagreement between Mr Flitcroft and Mr Powell. The fact that no such disagreement arose until well after the relationship between them had ended again persuades the Tribunal that there were no discussions or issues raised with Mr Flitcroft at all about the National Minimum Wage until after September 2016 when the relationship ended. To that extent the Tribunal finds the evidence of Mr Powell and Mrs Bannister to be misleading, inaccurate and even deliberately misleading in order to point the attention of the Tribunal away from the possibility of ABBS Limited being the employer of Mr Bannister, and obviously in the direction of the appellant company being the employer of Mr Bannister.
- 6.36 Insofar as the payment arrangements of Mr Bannister in the early days are concerned, Mr Powell in his interview with HMRC (page 137 onwards) confirms at page 139 that the monies due to Mr Bannister were paid by the appellant company to the account of ABBS Limited, and that Mr Powell then paid Mr Bannister from that bank account by way of his income. Mr Powell confirmed that that was the arrangement up until Mr Powell sent an email to Mr Flitcroft on 7 January 2015 (page 128). In that email Mr Powell asks whether or not it is possible for Mr Flitcroft to write Mr Bannister "cheques from now on or pay into his bank otherwise I'm going to be liable for paying tax on his wages". He follows that up by an email on 9 January (page 126) in which he provides Mr Flitcroft with Mr Bannister's bank details. He goes on to confirm that it will be perfectly acceptable to pay Mr Bannister by cheque; or he provides Mr Flitcroft with a third alternative which is to pay the monies to Mr Powell as he has done in the past but not into the account of ABBS Limited but into a separate bank account operated by Mr Powell which he holds with Nationwide. In that email of 9 January, therefore, Mr Powell is offering Mr Flitcroft three possible ways in which Mr Bannister should now be paid.
- 6.37 Having said above that the Tribunal did not consider the dates of the trial period of Mr Bannister to be relevant, the issue of the trial period is relevant to this exchange of emails in January 2015. During his interview with HMRC (page 137) Mr Powell confirms firstly at paragraph 7.2 on page 139 that he has never employed anyone and was not aware of the National Minimum Wage or how this operated. This again is obviously directly contradictory to the evidence which he gave on oath by reference to his witness statement in which he alleged that he had discussed it with Mr Flitcroft on many occasions and had been given appropriate

assurances by Mr Flitcroft. This is another example of the evidence of Mr Powell being directly contradictory.

- 6.38 The Tribunal considered further the evidence given by Mr Powell in his interview with HMRC. At paragraph 6.1 Mr Powell confirmed that prior to that email at page 128 on 7 January 2017 that the monies due to Mr Bannister had indeed been paid by Mr Flitcroft to the bank account of ABBS Limited and that in turn Mr Powell had then passed them on to Mr Bannister. In paragraph 6.1 Mr Powell then seeks to suggest that the perspective and background of that email on 7 January is that now that Mr Bannister's trial period has ended that the payment arrangements "would have changed at this date". Mr Powell goes on at paragraph 6.1 to explain that he is not the employer of Mr Bannister and that he needed to have the arrangement changed in order to ensure that he was not liable for his tax. Mr Flitcroft, persuasively, in his own witness statement points out that this evidence on the part of Mr Powell is inconsistent. Mr Flitcroft gives that evidence in paragraph 33 of his witness statement. The documents to which Mr Flitcroft relates are accurate and persuasive. Initially the trial period was suggested to have been June 2014 to October 2014 but in any event it had certainly ended by 19 November 2014 as it was on that date that Mr Powell wrote to Mr Flitcroft suggesting that Mr Bannister be taken on full-time and be paid "£20 a day" (page 125). Mr Powell was then in his interview suggesting to HMRC almost two months later that the perspective for asking for a change to the payment arrangements was so that Mr Powell would avoid paying tax and national insurance on Mr Bannister's earnings. That is not consistent with the end of the trial period. The suggestion being made by Mr Powell is that the status of Mr Bannister changed from that of somebody on a trial period to effectively being a permanent full-time employee of the appellant company, and that on that basis the payment arrangements now needed to change.
- 6.39 There was indeed, however, a change in those payment arrangements. It was agreed that Mr Bannister was unfortunately unable to responsibly manage his income and that at the request of his mother the monies were to be paid to her so that she could manage it and then effectively gave Mr Bannister spending money of a reasonable and sensible amount. Thereafter, up to and including the termination of the arrangement in September 2016, Mr Bannister was paid by cheque from ABBS Limited. The payee on the cheque was left blank but it was openly agreed by all parties that the blank cheque was passed on by Mr Powell to Mrs Bannister, and she then inserted her own name in the payee section of each cheque and then paid it into an account which she managed with her husband. From approximately January 2015, therefore, there were no monies being paid to Mr Powell for Mr Banister into his business account. Instead the monies were paid by cheque directly from the appellant company.
- 6.40 The Tribunal was not provided with copies of each of the cheques which had then been issued in that way, and so the Tribunal was only able to

ascertain the exact date when that change of arrangement began and when the payments into the account of ABBS Limited stopped by agreement with the representatives of each of the parties by reference to bank statements. The date was therefore not in issue as reflected in the language and dates in the Judgement above. What was clear, however, was that the payment arrangement changed permanently up to the end of the relationship in September 2016.

- 6.41 As the Tribunal has established, Mr Powell was engaged on a contract with his own company, ABBS Limited, to provide joinery services, as that was his specialist area of building work expertise. He was in addition to that engaged to provide project management services. The Tribunal was given a paucity of evidence about what that actually involved, and it was described to the Tribunal in general rounded descriptions rather than with any particularity. The emails which were exchanged between Mr Flitcroft and Mr Powell clearly demonstrated that as part of those responsibilities he was expected to monitor the work of the subcontractors and was also expected to report back to Mr Flitcroft and indeed to seek instructions and guidance and decisions from Mr Flitcroft from time to time. Mr Powell even went so far as to purchase building materials on the ABBS account for the building project on the clear understanding that of course he would then be reimbursed for those. In the accounts for the year ending March 2016 of ABBS Limited the cost of sales is reflected at £5,613 and as the evidence of Mr Powell was that he was engaged exclusively for work on behalf of the appellant company during that financial year, then in the opinion of the Tribunal those sales must at least in part have represented the cost of materials and equipment purchased by Mr Powell and for which, by agreement, he then received reimbursement from the appellant company.
- 6.42 Evidence was given that Mr Powell as part of his project management responsibilities was entitled to engage people to provide services which were needed in order to complete the building projects in question. However, there was no evidence given that Mr Powell had in any way received monies to pay those people. The only evidence available to the Tribunal was that whilst Mr Powell may have engaged and authorised the engagement of people to work on the building sites, payment to those individuals, including subcontractors, was made directly by Mr Flitcroft through the bank account of the appellant company. In the opinion of the Tribunal, therefore, the authority to recruit, subject to the ultimate and final approval of Mr Flitcroft, was part and parcel of the project management responsibilities of Mr Powell. He was not, however, also acting as paymaster. The paymaster was at all times the appellant company, and indeed Mr Flitcroft confirmed that he had a bookkeeper who prepared cheques and ran the financial side of the business, and that not surprisingly Mr Flitcroft's company also received the advice and assistance of a firm of accountants. ABBS Limited therefore continued to pay Mr Bannister by cheques. Those cheques were given to Mr Powell to pass on and it was then Mrs Bannister's decision to complete her name as the payee for those cheques, pay them into her account and

then manage the financial affairs of her son up to and including September 2016.

- 6.43 In effect the relationship between Mr Bannister, Mr Powell and Mr Flitcroft continued to be operated in that way from sometime in January 2015 up until September 2016 when the arrangement ended. Mr Bannister worked with a number of different subcontractors. He did not work exclusively for Mr Powell by only performing duties in connection with his subcontract joinery work. Mr Bannister was a general labourer and he was generally available to provide labouring duties to any of the subcontractors where his services could be usefully engaged.
- 6.44 The relationship between Mr Flitcroft and Mr Powell and their respective limited companies broke down significantly in September 2016 over financial disagreements and other matters. They are not important to this judgment of the Tribunal. The Tribunal finds that no doubt led and encouraged by Mr Powell that Mr Bannister did indeed absent himself to go to Spain with Mr Powell almost towards the end of that arrangement. Clearly that would not be consistent with an employee/employer relationship between the appellant company and Mr Bannister. However, in the opinion of the Tribunal and having observed Mr Bannister for themselves, Mr Bannister would not be someone who had any appreciation of the fine detail of the responsibilities of an employee under an employment contract, and the Tribunal finds without any hesitation that if Mr Powell suggested to Mr Bannister that to absent himself to go to Spain was something which he was invited to do then in the opinion of the Tribunal Mr Bannister did not do that for any other reason than the encouragement and suggestion of Mr Powell.
- 6.45 The Tribunal was presented with evidence that Mr Powell had freely advertised his work on the building sites operated by the appellant company as work associated with his own limited company, ABBS Limited. The Tribunal agrees that that is what has happened but the Tribunal has equally found that this was consistent with its own findings of fact which were that Mr Powell provided his services of project management and joinery services as a subcontractor of the appellant company up to and including September 2016, and that on that basis as the contract between the appellant company was with ABBS Limited that the advertising of that work does not, in the opinion of the Tribunal, contribute to the decision required by the Tribunal about the employment/worker status of Mr Bannister. It contributes to the decision about the employment status of Mr Powell but not the employment status of Mr Bannister.
- 6.46 The Tribunal recognises that Mr Bannister was not issued with a contract of employment whereas other employees of the appellant company were. The Tribunal acknowledges that Mr Bannister was paid wages gross and was paid wages without deduction of tax and national insurance, and was paid by reference to a rather unusual arrangement of cheques being issues without any named payee. However, the

Tribunal finds that Mr Flitcroft and/or his financial assistant did this in the knowledge of the personal challenges of Mr Bannister and the request that he be paid in that way. In the opinion of the Tribunal it is obvious that the appellant company was aware of the reasons for issuing cheques where the payee was blank. If the company was not aware of the unusual personal arrangements then it would simply have written out cheques payable to Mr Bannister, or alternatively made payments to Mr Bannister's personal bank account, details of which were given by Mr Powell to Mr Flitcroft in the email in early January 2017.

The Law

7. For ease of reference and without any objection from Mr Rowrell, the Tribunal acknowledged the statements of law included in the appellant's skeleton argument helpfully submitted by Mr Mahmood. It repeats and adopts the language under the heading "Relevant Law" at pages 3, 4 and 5 of that skeleton. Furthermore, the Tribunal adopts the statements set out about the tests to be applied by the Tribunal in order to determine whether someone is an employee or a worker at pages 6, 7, 8 and halfway down page 9.

8. The Tribunal recognises that if it finds either of the two notices of underpayment to be unjustified that it is required to rescind the notice under section 19C(7) of the National Minimum Wage Act 1998.

9. In order for there to be a contract either of employment or a contract establishing Mr Bannister as a worker between the appellant company and Mr Bannister, there must first of all of course be a contract. It must be a contract to personally perform work "for another party". In this case the Tribunal would have to be satisfied, therefore, that it was a contract to perform work for ABBS Limited. The third limb of the legal test would be to consider whether or not ABBS Limited were a client or customer of the business of Mr Bannister. That was not an argument which was advanced on behalf of the appellant company.

10. The issues therefore for the Tribunal to determine were whether or not there was a contract in existence where Mr Bannister was personally required to perform work for ABBS Limited.

11. There was no argument put forward that Mr Bannister was not required to provide personal services, and there was no suggestion put forward about his right or ability to send a substitute.

12. The requirement to provide personal service is a key element in the legal test to be applied and considered by the Tribunal. This would include whether or not there was a requirement to attend work during certain hours. It would include who was issuing instructions to the person concerned and who was saying how the work should be done. As indicated, there was no suggestion that Mr Bannister was at any stage entitled to reject work if it was offered to him or that he could send a substitute. These were just not issues which were relevant to the issues to be determined by the Tribunal.

13. The Tribunal reminded itself that it was essential to consider the date of the formation of a contract. In the opinion of the Tribunal there were two separate dates which had to be considered. The first was the start of the trial period although that date could not be ascertained with any accuracy. The best the Tribunal could do, on the evidence of Mr Powell, was that the trial period began some time in October after a period of work experience which spanned June to October 2014. The second date which the Tribunal had to consider was a date after the exchange of emails in January 2015 when the appellant company stopped providing funds to Mr Flitcroft's company to pay Mr Bannister and instead established a system of payment by cheque with Mr Bannister effectively being used as the courier for the cheque from ABBS Limited into the safe hands of Mrs Bannister who would then control the monies in an account in the name of herself and her husband.

14. The Tribunal reminded itself that when considering the employment/worker status of Mr Bannister that it was essential not to apply any form of rigid or specified checklist. The obligation on the Tribunal is to look at the picture that is painted by the relevant factors. The Tribunal is required to stand back, view the picture from a distance and then make an informed, considered and qualitative judgment of appreciation of the whole picture which is painted by all the relevant factors. The Tribunal reminded itself that all details are of equal importance but that not all details should be given equal weight. However, some of the factors are still relevant to almost all situations and the Tribunal reminded itself that these included control, mutuality of obligation and personal performance.

Judgment

15. The judgment of the Tribunal is that Mr Bannister was an employee/worker of ABBS Limited, the limited company of Mr Powell, from the start of the trial period in or about October 2014 up to and including the date when the appellant company stopped paying monies for Mr Bannister into the bank account of Mr Powell's company, ABBS Limited.

16. From the date on which that arrangement began the judgment of the Tribunal is that Mr Bannister was an employee/worker of the appellant company. The reasoning of the Tribunal is as follows:

- (a) The Tribunal does not find that Mr Flitcroft was aware of nor engaged in the arrangements for Mr Bannister to come on site under the terms of a trial period. There is no evidence in the opinion of the Tribunal to show that he was involved in any decision making about that exercise. In the opinion of the Tribunal, this was something which in view of his connections with the family and in particular in connection with his personal knowledge of Mr Bannister that Mr Powell saw as an opportunity for Mr Bannister to prove himself under the auspices, guidance and even protection of Mr Powell. It was to some extent a make or break opportunity for Mr Bannister. If Mr Bannister was able to prove his worth then at that stage Mr Powell would feel sufficiently confident in making a proposal to Mr Flitcroft that his expense could be justified. During that trial period the work which was being carried out by Mr

Bannister was work directly associated with the joinery subcontract of ABBS Limited which was being performed by Mr Powell.

- (b) The findings of the Tribunal are that the services provided during that trial period were largely joinery services for Mr Bannister even though, with increased confidence, it is clear that Mr Bannister was then able to provide wider labouring work for other subcontractors. That is clear from the email at page 125 on 19 November 2014 when there is reference to two other subcontractors having observed the work of Mr Bannister and having approved it to the point where, in addition to his own observations, Mr Powell then felt able to suggest an extension of responsibilities to Mr Flitcroft in that email in November.

17. The Tribunal has accepted the evidence of Mr Flitcroft which was that he did not discuss that matter with Mr Powell and neither did he reply. He regarded Mr Bannister as being engaged by Mr Powell's company and that on that basis it was a decision for Mr Powell to take and not a decision which Mr Flitcroft wanted to interfere with. From the evidence which was given to the Tribunal it was not clear how the decision was made, but nevertheless a decision was made that the monies to then be paid to Mr Powell's limited company for the services of Mr Bannister would increase to £20 a day for five days' work, £100 per week. The monies continued to be paid to Mr Powell's company for onward payment to Mr Bannister. The Tribunal was not provided with any evidence as to how those monies were passed on to Mr Bannister or to Mr Bannister's family, but that was irrelevant.

18. In the opinion of the Tribunal, therefore, Mr Bannister continued to be an employee of Mr Powell's limited company, the only change being that he was now incurring an increased expense for Mr Flitcroft's company at the agreed rate of £20 per day. The monies continued to be paid to ABBS Limited and ABBS Limited continued to pay them then to Mr Bannister or to Mr Bannister's family.

19. The Tribunal was urged on behalf of the appellant company to conclude that the email exchange between 7 and 9 January 2015 (pages 122/124) represented an obvious attempt at tax evasion by Mr Powell. To be more accurate, the full extent of the relevant email appeared at pages 126-128. At that stage Mr Powell is asking Mr Flitcroft to now pay Mr Bannister other than by paying wages to ABBS Limited as otherwise Mr Powell is "going to be liable for paying tax on his wages". Whilst the Tribunal has commented on the inappropriate use of the word "salary" to describe what was paid to Mr Powell, the Tribunal finds that the use of the word "wages" is entirely appropriate by reference to the monies which were being paid to Mr Bannister. That is what the man in the street would understand that he was being paid. He was being paid wages for the work he was carrying out. Mr Powell is then flagging up in that email his potential liability for the payment of tax and national insurance.

20. In the opinion of the Tribunal that email obviously flagged up that someone or some company would have to be responsible for the payment of tax and national insurance for wages which were being received by Mr Bannister, bearing in mind that nobody ever suggested that he was self-employed and running his own business. Both Mr Flitcroft and Mr Powell had been running their own businesses for some time. Mr Flitcroft had issued contracts of employment to staff and not only had an accountant

but also had a bookkeeper. Those members of staff that he recognised as employees and who had been issued with contracts of employment would clearly be paid their “wages” after the deduction of tax and national insurance in the normal way. The Tribunal has no doubt whatsoever that Mr Flitcroft would understand that and that his bookkeeper would understand that, as indeed would the company’s accountant when reconciling the books of account of the company year on year to recognise and reflect the payment of “wages” to those people who were recognised as employees.

21. In the opinion of the Tribunal, the email from Mr Powell was clearly indicating that the payment of tax and national insurance was an obvious issue which related to the payment of wages to Mr Bannister. In the opinion of the Tribunal it was not something which could be ignored. Tax and national insurance was an obvious issue of concern which needed to be resolved. Mr Powell was telling Mr Flitcroft in very clear terms that he was not prepared to allow monies to be paid into his account. The Tribunal does not find, despite what it was urged to do on behalf of the appellant company, that this was an attempt at tax evasion on the part of Mr Powell. The Tribunal finds that it was an understandable issue for Mr Powell to raise bearing in mind that the trial period had gone well and bearing in mind that Mr Bannister had continued to perform satisfactorily and that there was no reason to think that his engagement was going to be anything other than long-term. It was agreed evidence that Mr Bannister was not only providing joinery services by way of assistance to the subcontract of Mr Powell but was providing labouring services across the building site in question, wherever his services could usefully be engaged. He was therefore providing labouring services for and on behalf of ABBS Limited who owned the site and who stood to make significant profits from its successful development. Mr Bannister was certain not a subcontractor in his own right. In the opinion of the Tribunal, Mr Bannister was not an employee of ABBS Limited because the services that he was providing were not services which were uniquely linked to the joinery subcontract of Mr Powell’s company, and they could not be said in any way to be linked to the project management services which were being provided by Mr Powell. Mr Bannister was not assisting Mr Powell with project management of the site. He was working as a builder’s labourer. The Tribunal cannot find any grounds for associating Mr Bannister’s work with the project management contract which Mr Powell was performing. That was a senior overarching contract across all the services on the site. In the opinion of the Tribunal it had nothing to do with the general low grade labouring work which was being carried out by Mr Bannister. That was work which was for the benefit of the appellant company.

22. In the opinion of the Tribunal, the change in payment arrangements was significant, even very significant. It removed Mr Powell and Mr Powell’s company from any arrangements in connection with payment other than the fact that the cheques were handed over to Mr Powell to pass on to Mrs Bannister. The Tribunal does not find that there was any significance in that arrangement other than in effect Mr Powell acting as a courier to prevent Mr Bannister having to be given a cheque. No reasoning was given to the Tribunal by Mr Flitcroft as to why he did not simply pay the monies directly into Mr Bannister’s bank account, even though those details were provided by Mr Flitcroft. Nevertheless, the simple fact is that the monies were paid by cheque and the cheque, week after week, was drawn on the account of ABBS Limited. That arrangement continued from some time after the emails in early January 2015 up to September 2016 when Mr Bannister’s arrangement was terminated.

23. In the opinion of the Tribunal the management of Mr Bannister by Mr Powell from sometime in January 2015 onwards was part and parcel of the project management contract. However, the management of Mr Bannister by Mr Powell did not make Mr Bannister an employee simply by that arrangement any more than Mr Powell 's management of other subcontractors made them an employee of Mr Powell's company either. He was simply there to manage all the people on site irrespective of their different contractual arrangements. In the opinion of the Tribunal, that is the role of a project manager. They are there to problem solve. They are there as a face to face on site liaison with Mr Flitcroft. That project management even went so far as Mr Powell purchasing materials to ensure the smooth running of the site. All those arrangements and more are consistent with project management, but in the opinion of the Tribunal have nothing to do with the services which were provided by Mr Bannister. All Mr Powell did was to manage that work, but he was doing so as part of his contract to manage all the people on site. The simple fact of management of Mr Bannister by Mr Powell does not, in the opinion of the Tribunal, justify a conclusion that Mr Bannister continued to be an employee of the limited company of Mr Flitcroft.

24. The Tribunal carefully considered the various tests which it was obliged to consider and then, as directed, stood back and looked, from a distance, at the overall picture which was painted.

25. There was no written contract of employment between ABBS Limited and Mr Bannister. The Tribunal acknowledges that there were contracts of employment between the appellant company and its other employees, but the Tribunal concluded that the reason that there was no contract of employment with Mr Bannister was simply because Mr Flitcroft never turned his mind to whether or not, by applying the appropriate tests, Mr Bannister was or was not his employee. As he always regarded Mr Bannister as being employed by Mr Powell, then on that basis the absence of a contract is of no significance. In the opinion of the Tribunal, therefore, there was a contract of employment between Mr Bannister and the appellant company from sometime in January 2015 onwards. It was an oral contract. It was a contract of employment. In the opinion of the Tribunal Mr Bannister was an employee. He was not just a worker. The traditional and typical qualities of a worker are someone who has some significant elements of the characteristics of self-employment and in that regard the Tribunal has in mind the recent Uber and Pimlico Plumbers cases. In each of those cases there are some elements which potentially suggest self-employment or operating your own business. There was a complete absence of any such factors relating to Mr Bannister with everyone's agreement. In the opinion of the Tribunal, therefore, Mr Bannister was not a worker, he was an employee.

26. There was no dispute that Mr Bannister was required to perform the work personally. As the Tribunal has already noted, the question was which "other party" Mr Bannister was performing that work for. It is the judgment of the Tribunal that from sometime in January 2015 he was performing that work for the appellant company.

27. Th appellant company cannot, in the opinion of the Tribunal, avoid the establishment of a contract of employment simply by saying that it was never the intention of the appellant company to enter into a contract of employment with Mr Bannister. The responsibility of the Tribunal is to ask itself whether or not on the basis of the facts a contract of employment was actually established. It would be quite wrong,

in the opinion of the Tribunal, for an employer to be able to evade responsibility as an employer simply by indicating that it never had the intention to create a contract of employment. The appellant company certainly had the intention and knowledge to create some form of legal relationship with Mr Bannister even if it was as an employee of a subcontractor. It was the nature of those legal relations which the Tribunal was required to accurately establish.

28. The Tribunal was satisfied that Mr Bannister was required to attend during certain hours. He was required to follow the instructions not only of Mr Powell as one subcontractor but also to follow the instructions of other subcontractors. Indeed as the owner and operator of the site Mr Flitcroft had the ultimate responsibility to make decisions about everyone who worked on site, including the subcontractors. That ultimate decision making power and ultimate control therefore lay with Mr Flitcroft on behalf of the appellant company. To provide that guidance and instruction was part and parcel of the project management responsibilities which Mr Powell was paid to perform as a subcontractor. However, that did not mean, as the Tribunal has already indicated, that those subcontract responsibilities turned Mr Bannister into an employee of ABBS Limited.

29. The Tribunal has carefully concentrated on the date of the formation of the contract and, as indicated above, has come to two separate conclusions about two separate periods which might be described as the very early days of the relationship relating to Mr Bannister and then the period from sometime in January 2015.

30. In the judgment of the Tribunal the project management was obviously and very clearly being carried out for and on behalf of the appellant company. Rather than project managing the site himself Mr Flitcroft's company appointed Mr Powell to do so. Following the engagement of Mr Bannister and the day-to-day control of his work and the day-to-day control of his hours of work was obviously the responsibility of Mr Powell. He equally had overall responsibility for the work which he carried out, but that was in exactly the same way that he had overall responsibility for checking and having a view on the work and timetable of work which was carried out by all subcontractors. If that role and the control and influence which Mr Powell had then turned Mr Bannister into an employer of ABBS Limited, then the obvious argument to follow would be that anyone on site over whom Mr Bannister exercised control or supervision would in those circumstances become an employee of ABBS Limited. The Tribunal considers that argument to be without merit.

31. The Tribunal regards Mr Bannister as having been integrated into the employer's business. The fact that he did not have a contract of employment and was not issued with holiday or sick pay and was not issued with any policies or procedures of the company was not, in the opinion of the Tribunal, significant. The reason why they were not issued was because Mr Flitcroft did not ever regard Mr Bannister as an employee, and on that basis the non issue of those documents and policies does not, in the opinion of the Tribunal, assist Mr Flitcroft.

32. The Tribunal therefore in conclusion reminded itself of the requirement to stand back, view the picture from a distance and make an informed, considered and qualitative appreciation of the whole picture. The Tribunal when doing so believes that the picture which is painted is one of employment of Mr Bannister from a date in

January 2015 until September 2016. The standard arrangement which applies to the relationship of employer and employee is that an employee turns up for work and performs the work which they are directed to carry out. In return the employer pays that employee wages for the work which they have carried out. In the opinion of the Tribunal, that is not a simplistic analogy or explanation. In the opinion of the Tribunal, that is exactly what Mr Bannister did. He had been the responsibility of Mr Powell's company until such time as he had been able to prove himself, perhaps most importantly to Mr Powell who clearly would not want to risk his own reputation unless Mr Bannister was genuinely able to perform to a satisfactory standard. In the opinion of the Tribunal, when Mr Bannister was taken on full-time as a result of the email in November 2014, there was in effect a further trial period. This would be consistent with what Mr Powell said to HMRC when he was interviewed. In effect there was a different trial period which applied once Mr Bannister was taken on full-time. He may have been able to perform adequately under a trial period when he was only working directly under the guidance of Mr Powell, but once he was taken on full-time he may not have been able to then keep up the necessary level of performance. However, Mr Bannister demonstrated that he was able to do that and by January 2015 the judgment of the Tribunal is that having proved himself, and Mr Powell having accepted the responsibility and risks associated with those trial periods, that the time came then for Mr Powell to ensure that arrangements were made which did not directly or indirectly associate him with payment of monies to Mr Bannister. In the opinion of the Tribunal, therefore, there was a complete change of circumstances in or about January 2015 when Mr Bannister ceased to be an employee of ABBS Limited and instead became an employee of the appellant company. The Tribunal has been able to ascertain the exact date when that change of status took place with the agreement of both parties and that is reflected in the wording of the Judgment. It has been provided with evidence of the first date on which Mr Bannister was paid direct by the appellant company by cheque, in effect couriered by Mr Powell to the safe hands of Mrs Bannister.

33. The Tribunal believes it appropriate to address the points raised by counsel for the appellant company in his skeleton argument from paragraph 13 onwards and the comments, observations and conclusions of the Employment Tribunal are as follows:

- (a) The Tribunal accepts the view of HMRC that from sometime in January 2015 Mr Powell did indeed act as an intermediary/courier only in respect of the wages of Mr Bannister.
- (b) The reference to Mr Powell returning back to running his own company is not, in the opinion of the Tribunal, relevant to the decision about the employment/worker status of Mr Bannister. In any event the view of the Tribunal is that too much importance is sought to be placed on the interpretation of that wording. The Tribunal has in any event concluded that Mr Powell was at all times continuing to operate his own company. The words used by Mr Flitcroft do nothing more, in the opinion of the Tribunal, that to reflect his own view of the contractual relationship between the parties, a view which the Tribunal has already indicated it does not agree with.

- (c) The Tribunal has carefully considered and attaches considerable weight to the failure by Mr Flitcroft to produce any invoices at all which he says were submitted from January 2015 until September 2016 relating to the work allegedly carried out by Mr Bannister for ABBS Limited. The Tribunal finds it quite extraordinary that whilst running a limited company Mr Flitcroft is unable to produce any of the relevant documentation which would be essential to preparing proper and reasoned sets of accounts for his company. The Tribunal was urged to conclude that invoices had been produced when in fact the only documentation related to broad and unspecified email exchanges between Mr Powell and Mr Flitcroft in Mr Powell's capacity as project manager. Mr Flitcroft will be well aware of what is meant by use of the word "invoice" and would be well aware of the need for invoices and proper documentation to be maintained and retained in connection with the use of subcontractors, as that documentation would be essential to the preparation of proper and accurate accounts to HMRC. The Tribunal agrees with counsel for HMRC that it is indeed extraordinary that Mr Flitcroft has not been able to produce any invoices whatsoever from the period January 2015 to September 2016 which make any reference whatsoever to supporting the assertion made by Mr Flitcroft that throughout that period his company was receiving invoices from Mr Powell's company for the continuing services of Mr Bannister. The absence of such information persuades the Tribunal to reject that allegation/suggestion, and the only conclusion of the Tribunal is that in coming to this judgment it has no evidence at all to support that proposition.
- (d) It is acknowledged that Mr Powell had the ability to influence the hours of work of Mr Bannister, but that was part and parcel of his responsibilities as project manager. The rates of pay were not specified, ultimately, by Mr Bannister, and at the time of the suggestion of pay at the rate of £20 per day that was put to Mr Flitcroft as a suggestion for agreement. Ultimately Mr Flitcroft had control over the monies which were spent by his company. If at any time he did not believe that the monies which were being spent, whether they were being paid to a subcontractor or not, were fair or reasonable then he had ultimate control to stop those payments and indeed to stop any payments being made to Mr Bannister. In the opinion of the Tribunal, therefore, ultimate control about the amount of payments made to Mr Bannister lay with the appellant company.
- (e) The absence of a written contract of employment or payslips or sick pay or holiday pay, or in reference to a staff handbook, do nothing more, in the opinion of the Tribunal, than to reflect the opinions of Mr Flitcroft of the employment status of Mr Bannister. It is, however, the responsibility of the Tribunal to determine whether Mr Flitcroft's opinions accurately reflect the picture painted by all the relevant circumstances.
- (f) The Tribunal has taken account of the fact that there were, particularly towards the end of the relationship, circumstances relating to Mr Bannister which would not be consistent with a contract of employment.

They included a trip to Spain, not attending for work and carrying out work for other projects related to the business of Mr Powell. However, the Tribunal had the opportunity of observing Mr Bannister when he gave evidence, and in the opinion of the Tribunal there is no doubt at all that those decisions on the part of Mr Bannister would have been heavily if not completely influenced by the conduct and opinions of Mr Powell who by then was in significant dispute with Mr Flitcroft. Mr Bannister was not an individual who understood the standard obligations of an employee working under the terms of a contract of employment. That was very clear when he gave evidence to the Tribunal and his performance recognised and demonstrated his learning difficulties and challenges. The Tribunal believes that when looking at the complete picture that it is appropriate to take into account those challenges and to reflect on how much, if any, of the decision making was decision making which was made by Mr Bannister or whether indeed it was decision making which was effectively made by Mr Powell. The Tribunal does not accept that Mr Bannister made those decisions in the knowledge of the standard obligations of an employee and in the knowledge of the standard obligations imposed by a contract of employment. The Tribunal accepts that it is one factor to take into account but not that it is a factor to which it should attach any great weight.

- (g) The Tribunal adopts the same view of the absence of any notice given to terminate his employment contract by Mr Bannister. There was no evidence available to the Tribunal that Mr Bannister was aware of the need to give notice or aware, as already indicated, of the standard obligations on an employee under the express and implied terms of a contract of employment.
- (h) The Tribunal notes that Mr Bannister was required to obtain some of his own tools. His work as a labourer, however, did not require any considerable expense and it was clear that he was able to use the tools which were available to him from other subcontractors. The Tribunal acknowledges that this is a relevant factor but not one to which any great weight should be added.
- (i) The Tribunal acknowledges that the final invoices for bonus payments came on notepaper for Mr Powell's business, but those bonuses were not relevant to the question of employment status relating to Mr Bannister. They were bonuses which were claimed by Mr Powell and/or by his limited company under the terms of the contract between Mr Powell and his company and the appellant company. Those bonuses or the notepaper on which they were written were not, in the opinion, relevant to the question of the employment status of Mr Bannister.
- (j) There is, in the opinion of the Tribunal, no doubt whatsoever that the complaint raised with HMRC was motivated by Mr Powell and supported by the Bannister family as a result of the significant disagreement between Mr Powell and Mr Flitcroft. In the opinion of the Tribunal it is abundantly clear that that was the motivation for raising the complaint.

However, the reason for motivation is not relevant to the judgment which the Tribunal has to reach. The simple fact to be determined by the Tribunal is whether or not the Notices of Underpayment are valid or not. There are a number of issues which, with hindsight, could and should have been dealt with in a much more satisfactory manner from June 2014 onwards. The absence of any contractual documentation of any sort is obviously a matter by now of significant regret for all parties involved. The fact that the National Minimum Wage was not raised at any time by anyone with Mr Flitcroft during Mr Bannister's employment is equally an obvious matter of regret, not least for Mr Bannister who would have been able to enjoy the benefit of his increased income. Alternatively, if Mr Flitcroft did not believe that in return for payment of the National Minimum Wage that the services provided by Mr Bannister were adequate then he would have been in a position to make a decision about that, as ultimately he had control over every aspect of the building sites which he was operating for the profit of his limited company, and therefore in turn for his own personal profit and gain. By failing to address the employment status of Mr Bannister at an appropriate time all these opportunities were lost by Mr Flitcroft, by Mr Powell and by Mr Bannister's family on his behalf. That is a matter of particular regret for the Employment Tribunal.

34. The Tribunal believes it fair and appropriate to comment on the evidence of Mrs McFadden from HMRC. It is regrettable that in her statement she described Mr Powell as in her opinion receiving a "salary" and she was honest and fair enough to acknowledge that that was not the word which ought to have been used to describe payments to Mr Powell. Furthermore, throughout her statement she indicated that she had "established" various matters. She agreed that the use of that phrase was unfortunate and that at best she ought to have replaced that phrase with "formed an opinion". The Tribunal wishes to make it clear that it was not influenced by the views or opinions of the HMRC investigator one way or the other. The only relevance of Mrs McFadden's statement was to introduce the interviews of the witnesses involved, in particular Mr Powell and Mr Flitcroft, and to introduce various documentation. The opinions and views, established or otherwise, of Mrs McFadden form no part of the reasoning or judgment of the Employment Tribunal. The Tribunal was well aware that it was its own responsibility to make its own findings of fact and to reach its own conclusions. That is the task which it performed as reflected in this Judgment and Reasons. The Tribunal does however believe that HMRC were far too quick to point the finger of responsibility at Mr Flitcroft and failed to investigate all the circumstances with the essential element of impartiality that Mr Flitcroft was entitled to expect. The part played in the making of the claim was not properly considered by HMRC who were far too quick to accept what Mr Powell said to them. His evidence and that of the Bannisters should have been considered with a great deal more care which the Tribunal finds was absent.

35. Finally, the Tribunal refers to the Case Management Order made at a Preliminary Hearing on 7 November 2017. At that Preliminary Hearing an order was made for third party disclosure against Mr Powell to provide documents relevant to employment covering the period from 27 October 2014 to 4 September 2016. This order was clearly made in order to ensure that all relevant documentation was placed

in front of the Tribunal. At paragraph 2 of that Order the parties, including the appellant company, were ordered to send lists of all documents under their possession, custody or control which were relevant to the issues. It was in the opinion of the Tribunal, therefore, perfectly obvious to the appellant company and to its representatives from as long ago as 7 November, over six months prior to this hearing, that if the appellant company was going to rely on the existence of invoices that it was its responsibility to ensure that those invoices and all other relevant paperwork was produced to the Employment Tribunal. The appellant company had six months in which to do that prior to the date of hearing. There has been criticism made of both Mr Powell and Mr Flitcroft of failing to produce relevant documentation, but the Tribunal is reminded that the burden of proof in an appeal against Notice of Underpayment is a burden of proof which is placed on the shoulders of the appellant company. One of the central planks of the appellant company's argument was that the wages at all times paid to Mr Bannister had been the subject of invoices which had been submitted, including the period January 2015 to September 2016, to the appellant company by ABBS Limited. It was one of the central planks of argument that this obviously demonstrated that Mr Bannister was, during that period of time, an employee of ABBS Limited. However, despite even being given the opportunity during the course of the hearing in May 2018 to produce such invoices, the appellant company was unable to produce one single invoice covering the period January 2015 to September 2016 which made any reference whatsoever, in any format whatsoever, to wages/payments made to Mr Bannister. The Tribunal considered that to be a significant element to the overall picture painted which the Tribunal was required to stand back and consider before reaching its judgment.

Employment Judge Whittaker

Date ___5th June 2018_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 June 2018

FOR THE TRIBUNAL OFFICE

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