EMPLOYMENT TRIBUNALS

Claimant: Mr S Josic

Respondent: Capital Reinforcing (Ireland) Limited

HELD AT: Liverpool **ON:** 3 February 2017
26 May 2017
(in the absence of the parties)

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Mr M Mensah, counsel

RECONSIDERATON JUDGMENT

The judgment sent to the parties on 12 October 2016 is confirmed.

REASONS

The judgment sought to be reconsidered

1. At a Preliminary Hearing on 7 October 2016, I had to determine whether the claimant was a worker and the respondent his employer within the meaning of Section 43K of the Employment Rights Act 1996. In a judgment announced at the hearing and sent to the parties on 12 October 2016, I found that the claimant did not fall within this definition and accordingly that the Tribunal had no jurisdiction to consider his claim. On 22 November 2016, written reasons ("the Reasons") for the judgment were sent to the parties. Abbreviations in this document are explained in the Reasons.
2. One of the arguments advanced by the claimant at the Preliminary Hearing was that he had signed a written contract of employment with Red Rock. I shall refer to this contract as the "RREC". At paragraphs 5.2 and 11.2 of the Reasons I

rejected the claimant's contention. Paragraph 5.2 expressed my view that the claimant's evidence in this regard had been unreliable.

The reconsideration application

3. On 6 December 2016 the claimant submitted an application for reconsideration of the judgment. It consisted of two emailed documents each accompanied by attachments. The larger of the two documents ran to 32 paragraphs. Not all of these were easy to follow. It was, however, a clear theme of his application that he had evidence to support his contention that he had signed the RREC.

4. Attached to the claimant's application were the following:

   4.1. a copy of the RREC;

   4.2. part of a transcript ("the Alicija transcript") of a secretly recorded conversation on 6th December 2016 between the claimant and "Alicija", a worker at Red Rocks Leicester office;

   4.3. further schedules to the SJT1 terms;

   4.4. a further SMS exchange between 3 and 7 August 2015, in which Mr Thompson requested proof of the claimant's VAT registration and the claimant and Mr Thompson, made arrangements for the claimant's registration with Red Rock.

5. It is now conceded by the respondent that the claimant did sign the RREC on 7 August 2015. As will be seen, however there were several twists and turns in the evidence before the respondent made that concession.

The RREC

6. Here are some of the features of the RREC that I found to be relevant:

   6.1. the document was printed on a standard form supplied by Red Rock.

   6.2. The template included a blank space where the name of the employee was to be inserted. In handwriting the claimant wrote "SJT1 Limited".

   6.3. Immediately below the name of the employee, somebody had handwritten the claimant's date of birth.

   6.4. The final page of the document bore the claimant's signature. Next to the signature, the claimant handwrote "Director of SJT1 Limited".

   6.5. Below the claimant's signature was a further signature purporting to be on behalf of Red Rock. The signature has never been identified, but is clearly different from that of Mr Thompson.

   6.6. Both signatures bore the date 7 August 2015.

   6.7. By clause 6 of the RREC, "refusal of a suitable assignment by the employee without good cause may constitute gross misconduct under the disciplinary policy and procedure set out in the employee handbook and may result in the termination of the employee's employment without notice and without a payment in lieu of notice".

   6.8. Clause 7 of the RREC required the employee to contact Red Rock by 9 am every Monday morning which he had not worked for Red Rock to discuss whether or not any suitable work was available for the employee. In the event of the employee failing to make such contact, at the designated time,

the employee was to be regarded as unavailable for work and to have resigned their employment with Red Rock.

6.9. By clause 12, the employee was entitled to receive the Daily Pay in respect of each day worked payable weekly in arrears. There was no need for invoicing.

6.10. Clauses 35 and 37 of the RREC entitled the employee to take unpaid leave (by prior written agreement with Red Rock) or paid leave (on giving a minimum of two weeks written notice, and subject to Red Rock's right to refuse permission).

6.11. Clause 27 required an employee holding a grievance to present such grievance in accordance with Red Rock's written grievance policy.

Preliminary Consideration of the claimant's application

7. I gave preliminary consideration of the reconsideration application on 20 January 2017. By a written case management order sent to the parties the same day, I observed:

> "(2) In my view the claimant's application does have some reasonable prospect of success. If it is correct that the claimant signed a contract of employment with Red Rock at Red Rock's premises using Red Rock's standard terms, it is at least arguable that the terms on which the claimant worked were determined not by the claimant but by Red Rock. The claimant should not raise his hopes too high: the Tribunal will have to consider the effect of the claimant having signed in his capacity as Director of SJT1 Limited and will also have to consider whether the SJT1 terms superseded the contract of employment.
>
> (3) There is however an additional reason why it may be necessary in the interests of justice to reconsider the judgment. As the claimant makes clear in his application, the written reasons for the judgment at paragraphs 5.2 and 11.2 call the reliability of the claimant's evidence into question. If it is true that the claimant did in fact sign a written contract of employment at Red Rock's premises, that particular criticism of the claimant would be unfounded. Bearing in mind that, at the preliminary hearing, the respondent invited the Tribunal to read in full the reasons for a judgment in a different case involving the claimant as being relevant to the claimant's credibility, and also considering that the claimant has brought other claims at which similar considerations may well arise, it is only right that written reasons should not impugn the claimant's credibility when newly-disclosed documents suggests that he was right all along. It remains to be seen whether the respondent accepts or denies that the document recently produced by the claimant was in fact signed on 7 August 2015 by the people whose signatures the document purports to bear. The original document will be an important piece of evidence in this regard".

The reconsideration hearing and grounds for reconsideration

8. The parties attended a reconsideration hearing on 3 February 2017. At the outset of the hearing I attempted to clarify with the claimant the grounds of his application. From time to time during the hearing he added to his list of grounds until eventually he confirmed that the list was complete.

9. Here, then, is the complete list of all the claimant's grounds for reconsideration:

   9.1. He had in fact signed the RREC.

   9.2. The Reasons (paragraph 11) wrongly recorded the date of the claimant's visit to Red Rock's premises to complete his registration.

   9.3. Mr Thompson only signed the Schedules. He did not sign the SJT1 Terms themselves.

   9.4. The Alicija transcript showed that the substitution clause in the SJT1 terms was a sham.

   9.5. I had been wrong to conclude that there had been an agreement by exchange of text messages on 21 October 2015 leading to the assignment with the respondent starting on 21 October 2015.

   9.6. The SJT1 terms had been determined by SJT1 Limited rather than the claimant.

   9.7. I had made an error of law regarding offer, acceptance, and consideration in the law of contract.

   9.8. The Alicija transcript showed that the parties had no intention to create legal relations when agreeing the SJT1 terms.

   9.9. The claimant's email of 7 August 2015 "referred to at page 86AA of the original preliminary hearing bundle" explained the Schedules by reference to paragraph 29 of the SJT1 terms. A signature to the Schedules would only indicate an agreement if the original SJT1 terms themselves were signed.

   9.10. The Schedule was a variation of the SJT1 terms.

   9.11. Some of the Schedules had not been signed.

   9.12. Mr Thompson was no longer employed by Red Rock.

   9.13. The Reasons had been wrong to record that the claimant had attended Red Rock's premises for assessment. In fact he had gone there for registration.

   9.14. The Reasons were internally inconsistent. It was not open to me to find that the Schedules incorporated the SJT1 terms if those terms had not been signed.

   9.15. Paragraph 45.3 of the Reasons had observed, “Amongst other things, the heading, ‘Schedule’ begs the question, ‘Schedule to what?’ The SJT1 terms provided the obvious answer.” The claimant disagreed. A reasonable person would understand the Schedule as "pulling out a client from a really bad spot, nothing else".

   9.16. The terms on which the claimant worked were determined in part by a three-way agreement between himself, Red Rock, and the respondent. The terms and conditions of that agreement were set out in Red Rock's terms of business for the supply of agency workers which the respondent had signed.

   9.17. The substitution clause in the SJT1 terms did not prevent the claimant from being a worker within the statutory definition because both Red Rock and the respondent had the right to veto any substitute supplied by the

claimant. In support of this ground the claimant relied on *Croke -v- Hydro Aluminium Worcester Limited* UKEAT/0238/05.

9.18. Mr Thompson in his text messages always asked if the claimant could do the driving and did not refer to anybody driving on his behalf.

9.19. Red Rock's terms of business with the respondent provided for invoicing and payment. It was these terms, and not the SJT1 terms or the Schedules that determined how invoices should be raised and paid.

9.20. Mr Thompson did not permit the claimant to invoice Red Rock monthly.

9.21. The terms of the Schedules and the SJT1 terms were a sham because they provided for SJT1 Limited to provide "IT equipment, maps, sat nav, PPE, basic tool". In fact, the claimant said, all he brought was his "hi vis", boots and navigation system.

9.22. Red Rock's standard terms of business with the respondent contained provision as to how the agreement should be terminated.

9.23. The Schedules had not been signed at the time of booking the claimant for an assignment, but once the assignment had already been completed.

9.24. In the second week of the claimant's assignment with the respondent, Mr Warren told the claimant that he had received an email from Red Rock attaching various documents relating to the claimant. This, argued the claimant, was evidence that the respondent had intended to be bound by Red Rock's standard terms of business, clause 3 and that the claimant was a party to that agreement.

9.25. Red Rock paid insurance in respect of the claimant's driving. That was inconsistent with the SJT1 terms, which provided that SJT1 Limited should pay the insurance.

10. At the reconsideration hearing the claimant gave evidence on oath. On the subject of the RREC, the claimant told me the following:

10.1. He had an audio recording of a conversation between himself and Red Rock's director, Mr Dan Brown. It was his evidence that he had asked Mr Brown during that conversation for disclosure of the registration pack which included the RREC.

10.2. He was not sure exactly when he had obtained the copy of the RREC which he had submitted alongside his reconsideration application. He was, however, sure that he had obtained it after the preliminary hearing on 7 October 2016.

10.3. On an unknown date after 7 October 2016, the claimant had visited Red Rock's premises in Birkenhead and spoken to an employee whom he knew as "Danielle". She had personally handed him the RREC.

11. Mr Thompson also gave evidence at the reconsideration hearing. He told the Tribunal:

11.1. He had not signed the RREC.

11.2. At all times he knew that he was contracting with a limited company. He therefore had no reason to provide the claimant with a contract of employment.

11.3. The standard recruitment pack used by Red Rock included sample contracts for different categories of work provider. These included construction industry scheme workers, sole traders, limited companies and employees.

11.4. The only employee called Danielle working at Red Rock's Birkenhead office was Danielle Murray. Ms Murray ceased to be an employee on 30th August 2016. In support of this evidence he produced an email from Ms Murray dated 3 February 2017.

12. In the light of this rather surprising clash of evidence, the parties agreed that the records held by Red Rock had become highly relevant and that steps ought to be taken to secure their disclosure. It was therefore agreed that the reconsideration hearing would be adjourned for the purposes of a specific disclosure application against Red Rock.

13. On 10 February 2017, the claimant emailed the respondent's solicitors about the RREC. His email informed them that, contrary to his oral evidence, he had obtained the RREC copy "one or two days before the hearing".

The hearing on 24 March 2017

14. The parties appeared again in front of me on 24 March 2017 for a specific disclosure application. Nobody from Red Rock attended. At the hearing, the claimant returned to the subject of when he had obtained the copy of the RREC. He said, "Last time I unawaringly [sic] lied to you that I got the contract after the hearing. I got it before the hearing. I thought there was overwhelming proof that my contract with Red Rock wasn't legally binding. By those rules, I put that aside. I got the contract on 12 September 2016".

15. In the absence of any opposition from Red Rock, I made an order for specific disclosure in the terms requested. The documents covered by the order were:

"

(1) the employment records of Danielle Murray so far as they are relevant to the dates on which she was employed by [Red Rock];

(2) any documents that formed part of the claimant's registration pack completed on or about 7 August 2015, or confirmation that no such documents exist; and

(3) any documents evidencing the use of substitute drivers by employees or contractors of Red Rock Partnership Limited and/or Rainbow People Limited, or confirmation that no such documents exist."

Disclosure by Red Rock and parties' written submissions

16. On 2 May 2017 the parties sent their written submissions to the Tribunal. By this time Red Rock had complied with the disclosure order. A number of Red Rock's documents accompanied the written submissions. These included:

16.1. the claimant's application for employment with Red Rock;

16.2. a pre-employment questionnaire completed by the claimant;

16.3. the claimant's agreement to opt out of the statutory 48 hour week;

16.4. a certificate of incorporation of SJT1 Limited, the company's VAT registration certificate and;

16.5. a brief numeracy and literacy test completed by the claimant.

17. All these documents bore the dates 7 August 2015 or 8 August 2015.

18. The submissions also attached Red Rock's employment records for Ms Murray. These included a letter from Mr Brown to Ms Murray terminating her employment with effect from 26 August 2016.

19. The claimant's written submissions were brief. He claimed that "something really fishy is going on regards Ms Daniel employment". It was hard to understand the basis upon which he made that assertion, but it appeared to rely on transcripts of telephone calls. The claimant continued, "and also regards substitute drivers, you can see, that that was all fabricated … they never had them nor they are going to". He pointed out that in the registration pack he had been treated like an employee.

20. Attached to the claimant's written submissions were four ".ODT" files, described as transcripts of various conversations. Later that day, the Tribunal emailed the claimant to inform him that the attachments could not be opened. He was asked to re-send them in either PDF or word document format or by another method. The claimant did not reply.

21. The respondent's submissions conceded that the claimant had signed the RREC on 7 August 2016. Nevertheless, it was the respondent's case that the original judgment should stand. The RREC did not alter the analysis. According to the respondent, the parties never seriously intended to be bound by its terms. In any event, it was superseded by the SJT1 terms.

Relevant Law

22. The old Employment Tribunal Rules of Procedure 2004 required that judgments could be "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle in civil litigation deriving from *Ladd v. Marshall* [1954] 3 All ER 745, CA.

23. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

24. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. Dealing with cases fairly and justly, to my mind, includes allowing, where possible, parties to rely on all the evidence upon which they wish to rely that is relevant to the issues to be decided. It also, by rule 2, includes

putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

25. Since the Judgment and Reasons were sent to the parties, the case of *Day v. Health Education England* [2017] EWCA Civ 329 was decided by the Court of Appeal. In addition to the reconsideration grounds, I have taken the initiative to examine whether, in the light of *Day* (if the pun can be forgiven), the Judgment ought to be varied or revoked.

26. *Day* is authority for the proposition that a worker can have two employers under section 43K of ERA. These may be both the agency (supplier or introducer) and the end-user (person for whom the work was done). Both may substantially determine the terms under which the individual worked. It therefore does not matter which of the two employers determined the terms to the greater extent. Put another way, the tribunal should not ask itself whether the worker's terms were substantially determined by the end-user as opposed to the agency or *vice versa*. What matters is whether either of those two entities substantially determined the terms as opposed to the claimant. As Elias LJ put it at paragraph 11, "…if the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within this extended definition of "worker". That is so even if the end-user and/or introducer can also be said substantially to determine the terms of engagement."

Conclusions

27. Having taken account of all the new evidence and arguments, I have reached the view that it would not be necessary in the interests of justice to revoke the original judgment. I address each ground in turn.

Ground 1 - the RREC

28. I should immediately acknowledge that my finding expressed in paragraphs 5.2 and 11.2 of the Reasons cannot stand in its present form. The claimant did sign the RREC on behalf of JST1 Limited on 7 August 2015.

29. In the light of this finding I have reflected anew on the reliability of the witness evidence in this case.

30. I must now take Mr Thompson's evidence with care. His evidence that Red Rock had no reason to use a contract of employment is clearly wrong. Somebody from Red Rock did sign one. That may be because they had a different practice to that of Mr Thompson for dealing with limited companies, because they were unused to dealing with limited companies, or because Mr Thompson did not want to admit to the tribunal that he had treated the claimant as an employee.

31. Even taking this cautious approach, I remain convinced by Mr Thompson's evidence that at all times he believed he was dealing with a limited company. His actions in chasing SJT1 Limited's VAT registration on 3 August 2015 lends support to his oral evidence in this regard.

32. Mr Josic has laid to rest one concern I had about his credibility, but in doing so, has caused others to emerge in its place. His evidence about when he obtained the copy of the RREC was inconsistent. He also appears to have changed his version of why he did not disclose that document at the preliminary hearing on 7 October 2016. Unfortunately, I have no note of any explanation given by the

claimant as to why he had not disclosed it. The context suggests that the claimant's explanation at that time was that he did not think that the document was relevant. At the hearing on 3 February 2016, the clear impression being given by the claimant was that he had not got the document at the time of the preliminary hearing and therefore had no opportunity to disclose it. On 24 March 2017, his explanation was that he thought there was overwhelming proof that the RREC was not legally binding.

33. In my view the RREC was a sham. Neither party can have intended that a limited company should be an employee. This was not intended to be an agreement with an umbrella company, which in turn would employ the claimant. The terms and conditions in the RREC were clearly directed at an individual employee and not an umbrella company. The claimant's remarks on 24 March 2017 rather suggest that the claimant himself acknowledges that the RREC was not binding.

34. A closer look at the terms of the RREC confirms the position:

    34.1. The SMS exchanges do not show regular contact from the claimant to Red Rock on Mondays whilst he was not working on assignment.

    34.2. On 9 October 2015, 12 October 2015 and 16 to 19 October 2015, (Reasons paragraphs 23, 25 and 27) the claimant declined offers of driving assignments giving a variety of reasons. There was no enquiry as to whether the claimant had good cause for declining these offers. Neither party seriously believed that by declining assignments in this way the claimant might be committing gross misconduct.

    34.3. Even if on 7 August 2015 the parties can be taken to have intended to be bound by the RREC, those obligations were in my view superseded by the SJT1 terms and/or the Schedules. The mechanism by which this happened is set out at paragraph 45 of the Reasons.

Ground 2

35. Paragraph 11 of the Reasons wrongly records the date. It should be 7 August 2015. In my view, the real date only strengthens the ultimate conclusion. The claimant offered the SJT1 terms on the same day that he signed the RREC on his company's behalf. The close proximity in time demonstrates in my view the lack of serious intention that the claimant should enter into an individual contract of employment.

Ground 3

36. This argument was advanced at the preliminary hearing. I dealt with it at paragraph 18 of the reasons, and at paragraph 45, explained, how, in my view the SJT1 terms became part of the contract despite not having been signed by Mr Thompson.

Ground 4

37. I do not agree that the Alicija transcript demonstrates that the substitution clause in the SJT1 terms was a sham. The claimant's conversation with Alicija occurred over a year after the SJT1 terms were agreed. Alicija was employed at a completely different office. The claimant did not make clear in the conversation that he was contracting on behalf of a limited company.

Ground 5

38. Paragraph 45.6 of the Reasons mistakenly refers to an agreement having been reached on 21 October 2015. It is clear, however, from paragraph 28, that I found that the agreement had actually taken place on 20 October 2015. In any event, one day's difference does not alter the analysis.

Ground 6

39. The claimant appears to be arguing that, if the terms on which the claimant worked were substantially determined by SJT1 Limited, they were not determined by him. In my view, this argument misses the point of the test in Section 43K. The claimant's case is that the "third person" who introduced or supplied him to do the work was Red Rock. It was never his case that the introducer or supplier was SJT1 Limited. The question is whether the claimant substantially determined the terms on which he did the work as opposed to either Red Rock or the respondent: see *Day.* It is not enough for him to show that the terms were substantially determined by SJT1 Limited as opposed to himself.

Ground 7

40. At paragraph 45 of the Reasons I set out my analysis of the offer, acceptance and consideration for the SJT1 terms and Schedules. If the claimant believes I have erred in law in this regard, he can make that point in his appeal to the Employment Appeal Tribunal.

Ground 8

41. The claimant confirmed that this ground was essentially the same as Ground 4. I reject it for the same reasons.

Grounds 9 and 10

42. These two grounds appear to be making the same point. The claimant's argument, as I understand it, seems to me to be entirely circular. He appears to be saying that Schedules that were expressed to be pursuant to Clause 29 of the SJT1 terms could not be binding, despite their signature, because they only derived their force from Clause 29 itself. If the SJT1 terms were not signed, then Clause 29 would have no effect, thus robbing the Schedules of their status as amendments to the SJT1 terms. This argument appears to be based on the premise that the status of the Schedules is governed by Clause 29. If Clause 29 did govern the Schedules, it must mean that the SJT1 terms were binding. If Clause 29 did not govern the Schedules, the Tribunal has to determine what the contractual effect of signing the Schedules was, against the background of all the preceding emails and texts. The reasons at paragraph 45 set out my conclusions in this regard.

Ground 11

43. The Reasons already took account of the fact that not all of the schedules were signed.

Ground 12

44. I cannot see the relevance of Mr Thompson no longer being employed by Red Rock.

Ground 13

45. In my view it does not matter what label one attaches to the claimant's visit to Red Rock's premises on 7 August 2015. Whether it is called "assessment", "induction" or "registration", the effect is the same. The RREC was a sham and the SJT1 terms were binding.

Ground 14

46. This ground appears to advance nothing new and I reject it for the reasons already given.

Ground 15

47. The claimant appears to agree with paragraph 45.3 of the Reasons, in that he appears to accept that a reasonable person would understand the Schedules to have been intended to be read alongside something else. Where the claimant parts company from the Reasons is in trying to ascertain what that "something else" would be. My view was that a reasonable person would think that the Schedules were to be read alongside the SJT1 terms. The claimant's opposing argument is that a reasonable person would think that the Schedules were a reference to "pulling out a client from a really bad spot, nothing else". I cannot see how any reasonable reader of the Schedules would interpret them in that way.

Ground 16

48. This is one of a number of grounds that stands or falls on the question of who were the parties to Red Rock's standard terms of business. The claimant's case is that it was a tripartite contract. I disagree. It is noteworthy that the standard terms expressly excluded any rights of third parties. They were never expressly agreed by the claimant. The parties were stated to be Red Rock and the respondent. I cannot see why it would be necessary to imply that such a contract existed between the claimant and either of those parties. The terms clearly regulate the obligations of Red Rock and the respondent between each other and nobody else. The relationship between Red Rock and the claimant is capable of being explained by the SJT1 terms.

Ground 17

49. The substitution clause in the SJT1 terms is consistent with a genuine right of substitution. The fact that Red Rock and/or the respondent had a limited right to satisfy themselves reasonably of the skills and experience of the substitute did not make the right of substitution meaningless. Nothing in *Croke* alters the position. *Croke* concerned the question of whether the worker had been introduced or supplied by a third person. The existence of a limited right of substitution was not incompatible with the notion that the third person had supplied the worker. There was no issue as to whether the third person had substantially determined the terms under which the worker had worked. In this case the question is who determined those terms. The relevance of the substitution clause is not to the question of supply but to who determined whether the right of substitution should exist or not. That term, in my view, was determined by the claimant on behalf of SJT1 Limited and not either the respondent or Red Rock.

50. Part of my order for disclosure was for Red Rock disclose documents in relation to the right of drivers to send substitutes. It is not entirely clear what, if anything,

Red Rock disclosed in that regard. The claimant interprets Red Rock's disclosure (or lack of it) to mean that drivers in practice did not send substitutes. That is one possible interpretation. Another might be that Red Rock did not keep records when limited companies with whom they dealt sent alternative drivers to perform the services on their behalf. I am inclined to agree with the claimant that the former interpretation is more likely. Red Rock probably would have wished to keep sufficient documentation to demonstrate that, where a service provider did send along a substitute driver, they had undertaken some basic checks to satisfy themselves that the driver was suitably qualified. This finding only gets the claimant so far, however. He still has to bridge the gap between the lack of evidence of substitutes being used in practice and an intention on his part and that of Red Rock that the substitution clause in the SJT1 terms should be meaningless. The claimant insisted that the work he did should be governed by the SJT1 terms. For the reasons given in paragraph 47, my view was that the SJT1 terms were not a sham.

Ground 18

51. I do not have a note of it being put to Mr Thompson that he only ever asked for the claimant to do the driving. The SMS exchanges contain a number of enquiries by Mr Thompson into the possibility of other drivers besides the claimant being able to cover the work. An exchange on 24 August 2015 is an example. One possible explanation is that the claimant was being asked for an alternative driver who could contract separately with Red Rock. Another is that SJT1 Limited was entitled to send that driver to do work on its behalf. Cross examination of Mr Thompson on that point would have helped establish the context. I cannot say that it is so incompatible with a right of substitution as to make it necessary in the interests of justice to revoke the judgment

Ground 19

52. This ground relates to the Red Rock terms of business with the respondent. I have already expressed my views in this regard.

Ground 20

53. I am not sure that I follow this ground. The Schedules to the SJT1 terms provided for weekly invoicing. Refusal of the claimant's request for monthly invoicing, if it occurred, would be consistent with the Schedules. The alternative would appear to be that the method of payment was to be governed by the RREC. It is unlikely that either party intended this eventuality. If that is what the parties intended, the claimant would not have submitted regular invoices on behalf of SJT1 Limited.

Ground 21

54. I see no contradiction between the equipment provided for in the Schedules and the equipment actually supplied by the claimant.

Ground 22

55. This is another ground that depends for its success on the Red Rock terms of business creating rights and obligations for the claimant. My view is that they do not.

Ground 23

56. This is an argument that the claimant made at the preliminary hearing. The Reasons at paragraphs 45 and 46 explain why I did not agree with that argument.

Ground 24

57. Clause 3 of Red Rock's standard terms of business provided:

> "When making an introduction to the hirer [Red Rock] shall inform the hirer of the following …
>
> > that the agency worker has the experience, training, qualifications and any authorisations which the hirers considers are necessary … to perform the services."

58. On the claimant's version, which I have no reason to disbelieve, Red Rock's conduct (in forwarding the claimant's driving documents to the respondent) was consistent with Red Rock being bound by clause 3.

59. Where this ground falls down is on the same point as before – the claimant was not a party to the standard terms. The fact that the respondent informed the claimant of Red Rock's actions (which happened to comply with clause 3) is, to my mind, beside the point.

Ground 25

60. Part of the fee paid by the respondent to Red Rock included a payment in respect of liability insurance for the claimant's driving. The claimant makes a good point that the respondent appears to have given Red Rock something of a windfall, because the SJT1 terms already provided that SJT1 Limited would ensure that its drivers were adequately insured. One possible reason is that Red Rock did not seriously believe that the SJT1 Limited would really put insurance cover in place. Another is that they wished to adopt a "belt and braces" approach. It would be better for a driver to be doubly insured than not insured at all. Taking all of the circumstances into account, including those in Reasons, paragraph 47, my view remains that the SJT1 terms were not a sham and were genuinely intended by the claimant to be binding.

61. For all of these reasons my conclusion is that the original judgment should be confirmed.

Employment Judge Horne

Date: 9 June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 July 2017
FOR THE TRIBUNAL OFFICE