EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104205/2016

Held in Glasgow on 5 and 6 April 2017 and 12 and 13 July 2017

Employment Judge: F Jane Garvie

Mr J Campbell	**Claimant** **In Person**
The Federation of Small Business Recruitment Ltd	**Respondent** **Represented by:** **Mr A Hardman – Advocate** **Instructed by:** **Mr T McArdle – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

(1) the respondent's application for expenses in terms of rule 76 (1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused;

(2) the claimant was not an employee of the respondent, having regard to the test set out at section 230(2) of the Employment Rights Act 1996 and nor was he in employment of the Respondent in terms of section 83(2)(b) of the Equality Act 2010 and according the claim must be dismissed and

(3) in light of the Tribunal's above determination the complaints in relation to failure to pay to the claimant notice pay and holiday pay cannot succeed and they are therefore dismissed.

REASONS

Background

1. In his claim, (the ET1) presented on 12 August 2016 the claimant asserts that he was employed as a Membership Advisor. He directed his claim against two respondents, the first being described as the Federation of Small Businesses and the second was the present respondent. In addition, he alleges that he was discriminated against on the grounds of age and associative disability. He further asserts that he was owed notice pay, holiday pay, arrears of pay and other payments.

2. The respondents lodged a single response, (the ET3) in which they explain that the correct name of the second respondent was the National Federation of Self Employed and Small Businesses Ltd t/a The Federation of Small Businesses and that the First Respondent (Federation of Small Business Recruitment Ltd is a wholly owned subsidiary of the second respondent and a separate legal entity. Both respondents deny that the claimant was employed by either the first or the (now former) second respondent, (see below) as defined by section 230(1) of the Employment Rights Act 1996 (the 1996 Act) and/or section 83(2)(a) of the Equality Act 2010 (the 2010 Act).

3. It was their position that the claimant was recruited by the first respondent and entered into a contract with them for the provision of his services as a self employed Membership Advisor in order to recruit new members for the second respondent. This was pursuant to a contract between the first and second respondents for the provision of Recruiter Services.

4. A Preliminary Hearing was held before Employment Judge June Cape on 13 October 2016 after which she issued various Orders and a Note dated 23 November 2016.

5. In terms of the Orders she directed that there should be a Preliminary Hearing with a time estimate of two days to determine the following issues:-

(i). Whether the claimant was an employee for the purposes of the complaints of unfair dismissal, failure to pay notice and claims under the 2010 Act or whether the claimant was engaged on a contract personally to do work in terms of the 2010 Act.

(ii). Whether the complaints of associated disability discrimination (failure to make reasonable adjustments, harassment, victimisation) should be struck out on the grounds that they were misconceived or have no reasonable prospect of success, or alternatively, whether the claimant should be ordered to pay a deposit as a condition of proceeding with that claim on the grounds that they have little reasonable prospect of success.

(iii). Any application to amend the claim form.

6. Judge Cape directed that the claim insofar as it was directed against the second respondent should be dismissed. For the purpose of this judgment and reasons, they are referred to as the Federation of Small Businesses (the FSB). Also, for the avoidance of doubt the present respondent is the Federation of Small Business Recruitment Ltd.

7. At that Preliminary Hearing the claimant withdrew the complaints of unauthorised deductions and arrears of pay but the complaints of notice pay and entitlement to holiday pay were not withdrawn, (see the Note at paragraph 10 on page 6). A Preliminary Hearing was to be held on 11 and 12 January 2017, restricted to the issue of "Employment Status". A postponement was sought by the respondent and granted as the claimant had no objection to its being postponed. The claimant sought to amend his claim. The respondent's representative, Mr McArdle suggested this be deferred pending a determination of employment status. The claimant agreed. The parties were informed there would be a one day Preliminary Hearing on this issue which was then amended to two days.

8. The parties were informed that the Preliminary Hearing was to be restricted to the following two issues:-

(1) Whether the claimant was an employee for the purposes of the complaints of unfair dismissal, notice being claims under the 2010 Act.

(2) Whether the claimant was engaged in a contract personally to do work in terms of the Equality Act.

9. It became apparent that it was not going to be possible to complete this Preliminary Hearing in the two days which had been allocated since during the Preliminary Hearing the claimant indicated that he was seeking a Witness Order for the attendance of a Mr Gardner Paterson to be a witness on his behalf. That Order was granted on 19 April 2017 and the Preliminary Hearing was continued to 12 and 13 July 2017.

The Preliminary Hearing in April and July 2017

10. It was agreed between the parties that the respondent's witnesses would give evidence first followed by the claimant and his witnesses. A joint bundle was produced which extends to 284 pages.

11. Evidence was given on behalf of the respondent by Mr Kevin Hall who is the Respondent's Head of Services, Mr Gerard Brennan who runs a consultancy service and also recruits members to the FSB, Mr Derek Carr who is a Marketing Advisor to the respondent and also runs his own business, Carr Management Services Ltd.

12. Evidence was given on behalf of the claimant by a Ms Vicki Docherty who had formerly been a Membership Advisor with the respondent. As indicated, Mr Gardner Paterson who is a Regional Sales manager with the Respondent was called as a witness by the claimant. In addition, the claimant gave evidence on his own behalf.

Findings of Fact

13. The Tribunal found the following essential facts to have been established or agreed

14. The claimant has considerable experience in sales and marketing. He knew Mr Paterson having worked with him elsewhere in the past. The claimant responded to an advertisement from the respondent, (page 34) which is entitled "SELF-EMPLOYED SALES AGENT OPPORTUNITIES – COMMISSION ONLY". It reads:-

> "Could you sell membership of the UK's most highly-respected small business pressure group, representing around 2000,000 business owners? Can you sell one of the most attractive business support packages available? Are you ready to become a self-employed sales agent?
>
> We are now seeking self-employed sales agents to help boost our membership numbers even further. We can offer
>
> - Attractive commission – successful agents currently earn in excess of £50k per annum.
> - Marketing campaigns to support sales leads.
>
> Successful candidates should be self-motivated and energised by working towards targets, be comfortable working independently and be passionate and knowledgeable about business. You must have your own car and mobile phone."

15. There were also details as to how to contact the respondent. The claimant e-mailed the respondent on 22 January 2014, (page 35). He attached a copy of his CV.

16. Subsequently, the claimant met Mr Paterson and by e-mailed dated 19 February 2014, (pages 41/42) Mr Paterson advised the claimant that he was offering him "the position of self-employed recruiter within the Glasgow and Ayrshire area". He explained that the respondent's HR would be in touch with him and in the meantime an initial recruiter training course in Blackpool starting 4th March had been pencilled in for the claimant to attend.

17. The claimant replied on the same date, (also page 41) confirming he would go on the course.

18. The claimant was given an e-mail address as well as a group e-mail, (page 43). He was also given 250 business cards, (pages 44 and 45). This gives the claimant's name and telephone number, (this is the claimant's own mobile number) and the e-mail address which was set up for the claimant's use.

19. The claimant emailed Mr Paterson on 10 March 2014, (page 47) advising that "I have NO target as I have never been given one for my area …. And just to remind you I never signed any contract". He then sent a further email on the same date, (again page 47).

20. Mr Paterson e-mailed the claimant and others in his team on March 10 2014, (page 48) indicating that it had come to his attention that some of them were not aware that there were targets set for Membership Advisors "astonishing as that may seem". His e-mail explained that each postal code area which was allocated to a Membership Advisor had a minimum target set of 20 new members per month (or 1 per working day).

21. His e-mail also explained that this was set for every region across the UK and he believed it had been placed for a considerable time. In the region for which Mr Paterson was responsible there appear to have been 16 Membership Advisors meaning there was a team target total of 320 new members per month or 3,840 new members for the year which, in turn, formed part of the 24,000 new members national target for the year 2014. Mr Paterson's e-mail also referred to contracts and explained that these had been completed and would be "rolled out in stages over the next few weeks". His e-mail continued as follows:-

> "Each region will have a nominated membership advisor to look over them first for feedback prior to rolling them out across the sales force. The new contracts are pretty straightforward with no hidden clauses so I expect that you will be in a position to sign and return quickly. I will advise when this is to happen in due course.

Hopefully this clears up any confusion and let's get on and burst the target folks" (all at page 48).

22. There was then further email correspondence. By e-mail dated 21 March 2014, (page 52)Mr Paterson wrote to those in his region as follows:-

> "Morning folks,
>
> Please see attached weekly reporting template used by advisors to report figures to me no later than 9.30 on Mondays. Can you save this as a PDF then put your details in and save again. Please fill in all the boxes i.e. no of members, value of sales, no of apts. Method of payment etc. This then accumulates up on a weekly basis to show a total for the month. Example – 2 this week followed by 5 next week would show a total at end of next week on the report of 7 for the month so far.
>
> Any problems, give me a call and I will go through it with you."

23. By e-mail dated 14 April 2014, (page 53) the claimant replied referring to a meeting which had been held and indicating that it was good to "meet the new guys and of course old friends. You have obviously taken the point about future meetings being on a Saturday and I suggest that as our Sales Targets are based on the number of working days, the targets for April and May (Training Event) ought to be reduced accordingly." Mr Paterson replied, indicating he could not accept the claimant's request, (again page 53).

24. Then by e-mail dated 22 April 2014, (page 54) Mr Paterson again addressed the Membership Advisors in his area. He referred to reporting figures and noted that everyone was using the official reporting template to report figures. His e-mail continued as follows:-

> "You will find this template handy to keep track of your running totals in the month as well as easier to report.

> On the subject of reporting, these figures need to be with me by Monday morning at 9.30 at the latest!! No exceptions. I need these in order to report your individual figures to (name redacted) by 10am. My suggestion would be to get it done on the previous Friday as most in the team do. This will free your time on Monday mornings for more customer visits."

25. The claimant signed a Recruiter's Agreement between himself and the former Second Respondent which is dated 23 June 2014, (pages 55/86). This Agreement is set out with various Sections and there are also five Appendices.

26. The respondent is referred to throughout the Agreement as "Recruitment" and the claimant as "the Recruiter". The geographic areas to be covered by the claimant is set out at Appendix 2. This includes postcodes within the Greater Glasgow area, some Kilmarnock postcodes and some postcodes for the Paisley area.

27. There is also reference to the Main Contract between the Respondent (referred to as Recruitment) and the FSB whereby there is an Agreement for the provision of Recruitment Services.

28. The second Recital, (page 57) states:-

> "(B) On the terms and conditions of this Agreement the Recruiter is to be appointed as the Recruitments sub contractor to provide some of the Recruitment Services pursuant to the Main Contract."

29. There is also reference to a Minimum Performance Indicator, (page 58) which is specified as meaning the targets specified in Appendix 1, (page 80). There is reference to "Nominated Substitute",(page 58) as follows:-

> "**Nominated Substitute:** shall mean a person nominated by the Recruiter to carry out the obligations and duties under this Agreement if the Recruiter is not able to do so during the Term. Such person to

be approved in advance of carrying out such obligations etc by Recruitment."

30. Under the heading, "Recruitment Services" it states:-

"**Recruitment Services:** shall mean the services of recruiting new Members who reside or have a place of business in the Area to be provided by the Recruiter as Recruitment's sub contractor pursuant to the terms of this Agreement", (page 58).

31. The term of the Agreement set out as Clause 2, (page 61) as follows:-

"**2. Term**

2.1 This Agreement shall take effect from the Commencement Date and subject to the terms of this Agreement shall continue until:-

2.1.1 terminated by either Party in accordance with the terms of this Agreement; or

2.1.2 terminated by either Party giving to the other party not less than one month's notice in writing."

32. At page 59, "Training" is defined as meaning "such training as the Company (this being a reference to the FSB) or Recruitment is required to provide to the Personnel pursuant to the Main Contract and any additional or refresher training as Recruitment considers to be necessary."

33. Under Section 1 "**Appointment**", (page 59) it states:-

"1 **Appointment**

On the terms and conditions of this Agreement Recruitment appoints the Recruiter and the Recruiter agrees to provide the **Recruitment Services** in the Area as Recruitment's sub contractor unless this Agreement is terminated by either party in accordance with Clauses 2 and 12 of this Agreement."

34. Clause 1.1 then deals with the **Appointment Approvals Process**.

Clause 1.5 states as follows, (page 60):-

> "Both parties agree that there is no employment relationship between the Recruiter and Recruitment and nothing in this Agreement shall render the Recruiter, or any of the Recruiter's staff, an employee, agent or partner of Recruitment and the Recruiter will not hold himself out as such. This Agreement does not create any mutuality of obligation between the Recruiter and the Company.
>
> 1.6 If the Recruiter is unable to perform the duties and obligation contained within this Agreement a "**Nominated Substitute**" must be appointed. The person appointed must be approved by Recruitment including required training and the period for which such substitution is being made. For the avoidance of doubt the Nominated Substitute shall have no entitlement to payment of commissions directly from Recruitment.
>
> 1.7 The Recruiter is responsible for the payment of all relevant tax and social security (including national insurance) contributions in respect of its staff and/or any payments made to the Recruiter pursuant to this Agreement and the Recruiter agrees to indemnify Recruitment against any PAYE and social security liabilities that may arise from this Agreement, including any interest, penalties or fines or gross up thereon."

35. There is then reference under Clause 2, (pages 61/62) to "Recruitment's Obligations" and reference therein to an extract from the Main Contract, this being the contract between FSB and the respondent.

36. At Clause 3.3, (page 63) there is reference to "the Company" and it was suggested by Mr Hardman that this should have been reference to "Recruitment."

37. There is then reference to the "Recruiter's Obligations", (pages 63/64) and at Clause 5.3 as follows:

"The Recruiter shall attend such of the events referred to in clause 5.9 of the Main Contract as Recruitment notifies to the Recruiter."

38. At Clause 5.4, (page 64) it states:-

> "The Recruiter shall attend all **Training** and follow all reasonable instructions or directions provided during such Training and the Recruiter shall not provide any Recruitment Services until he has attended the Initial Training."

39. It is also states that the Recruiter (i.e. the claimant) must not actively seek to recruit prospective members who reside or operate a business in any location which is outside his area except as permitted pursuant to Clause 5.13.3 of the Main Contract.

40. Clause 6.1 refers to "**Attendance at Meetings**", (page 67) as follows:-

> "**6 Attendance at Meetings**
>
> 6.1 If so required by Recruitment the Recruiter shall attend any recruitment conference organised by Recruitment or the Company (subject to reimbursement of the Recruiter's reasonable travel and hotel expenses) approved in advance by Recruitment and team meetings called by Recruitment (expenses may be paid at the discretion of Recruitment)."

41. Clause 7 deals with "Assistance" and Clause 8, "Commission", (both at page 68) while Clause 9 refers to the **Minimum Performance Indicator.**

42. Clause 10 sets out a further extract from the Main Contract, (pages 69/77).

43. Clause 11 deals with **Assignment** as follows:-

"**11 Assignment**

11.1 The Recruiter shall not sell, assign, charge, sub licence or otherwise deal with this Agreement or any rights arising pursuant thereto."

44. Clause 12 deals with **Termination**, (page 78) and Clause 13 **Consequences of Terminations**, (Page 79).

45. This Agreement was signed by the claimant and by a Mr R Bailey on behalf of Recruitment (the former Second Respondent).

46. Appendix 3, (pages 82/83) provides definitions contained in the Main Contract and, in particular, "Recruitment Services" as follows:-

"**Recruitment Services**"	shall mean the services of recruiting new Members who reside or have a place of business in the Territory to be provided by Recruitment to the Company pursuant to the terms of this Agreement;
"**Region**"	shall mean the defined sub-divisions within the Territory as set out in Schedule 6.

47. Commissions dealt with at Appendix 4a indicates that Commission will be paid at the rate of 50% of the total revenue received in the financial year (being 1st October to 30th September) from Recruited Members (ie joining fee and first year's subscription) up to £49,999.

48. There is then information as to what happens when the revenue is more than that amount with an increased rate payable on three bands.

49. The current service providers who provide services to members of the First Respondent are set out at Appendix 4b, (page 85).

50. The claimant signed the Recruiter Agreement, (page 79) and it was signed on behalf of the respondent by an "R Bailey". The Agreement is dated 23 June 2014, (page 55).

51. By e-mail dated July 02 2014, (pages 88/89) Mr Paterson wrote to the claimant and others. A number of matters are addressed such as "TRAINING ROLE" and then "FIRST PORT OF CALL". This states:-

> "FIRST PORT OF CALL"
>
> Overt the past few weeks we have seen a number of changes happening within recruitment, some good, some not so good in my opinion however like any huge organisation that is working its way through modernisation it is important that we don't lose focus on what our primary goal is. Getting those new members in the door and those wages in the bank. We are without doubt the architects of our own destiny and can earn as much as we need too (*sic*)by putting in that extra bit of effort (just ask- name redacted). Where as I understand that some decisions are not to everyone's taste it is important that if you have a grievance you go through the proper channels first as any correspondence sent directly to the NFSM or recruitment chairman (or in some cases the board) will be passed directly back to me. I can then support you on any issues you have and also advise you on the best course of action. Maybe something to bear in mind going forward.
>
> SHOWS AND EVENTS
>
> We are getting to the time of year where a few local events and shows are taking place. With this in mind I have requested the local DM's in our areas to give me a list of these with a view to ultimately getting new members on your books."

52. In an e-mail dated August 18 2014, from Mr Paterson, (pages 90/91) this refers to an e-mail sent on behalf of National Field Sales Manager and refers to "some fantastic initiatives that we are implementing in order to support you in our drive to deliver the growth we need in our membership."

53. Under the heading, "Supporting You" Mr Paterson refers to "planning – redesigns to the web-site and how this impacts sales, review of territories

and opportunities there in, e-mail marketing and appointments, increase in sales enquiries, increase in sales appointments."

54. By e-mail dated 25 October 2014, (page 94) Mr Paterson acknowledged an e-mail from the claimant stating "I am currently on annual leave until Monday 3 November and will reply to you on my return for all other enquiries please contact Head Office."

55. By e-mail dated November 4 2014, (page 95) from Mr Paterson to the claimant and others he states:-

> "Guys, as you can see below, HO are looking for updates regarding Sept's appointments from you. Can you send this to (name redacted) asap please."

56. By e-mail dated November 13 2014 Mr Paterson, (page 97) referred to an e-mail from someone whose name was redacted at Head Office. He explained that as a result of a further e-mail from this person him that under the heading "Appointment Making Invoices – Very Urgent" there were still 26 investigations outstanding which was causing "a massive delay in sending out the new invoices to your MA's. It is imperative to get these boxed off urgently."

57. By e-mail dated December 09 2014, (page 99) Mr Paterson e-mailed the claimant and others as follows:-

> "Guys
>
> By the end of play tomorrow, please can you send me a mid week update (text or emails fine) on what you are on so far in this week and also the total number of members for December.
>
> This is valid for everyone in the two regions as I need these figures to present at the December NFSM meeting on Thursday in Blackpool.
>
> Don't' forget!!."

58. There is then a further e-mail from him dated December 17 2014, (page 100) which reads:-

> "Morning folks,
>
> Remember I need a midweek update from all by COB today please. Text, email or call will do just lovely. Let's keep pushing hard for new members.
>
> Hit 20 members by 19th December and receive a luxury John Lewis Hamper delivered to your door in time for Xmas. Hit 25 in the month and get another 100 of vouchers to spend too.
>
> DON'T FORGET TO UPDATE PLEASE!."

59. Next, by e-mail dated January 02 2015, (page 101) Mr Paterson wrote as follows:-

> "Morning guys
>
> I would like to have a one to one with each of you on Tuesday 6th to review performance from last year, share ideas and look to put together a success plan for you individually this year. Come back to me asap with your individual availability for Tuesday and I will come to your patch to meet."

60. On the same page, (page 101) there is reference to "the following Sales Lead has recently registered."

61. By e-mail dated February 25 from the claimant to Mr Paterson, (page 107) the claimant indicated "have attached for week as on hols. I've set up auto response as well".

62. By e-mail dated March 30 2015, (pages 110/111) Mr Paterson e-mailed the claimant and others as follows:-

> "Good morning,

> Over the past few months there is a pattern developing for "over reporting" from some MA's in 131, sometimes in rather large amounts per month. Obviously this impacts on our monthly and quarterly results. It's the processed members that we as the teams, and you as individuals are ultimately gauged against re performance, therefore "over reporting" has a hugely negative impact on the bottom line for us all.
>
> I will compare the last 3 months reported real-times from you all against individual commission statements and come back to you individually (if required) with my findings, for discussion this week."

63. By e-mail dated 15 April 2015 Mr Paterson replied to the claimant regarding Appointment charging – payments, (page 112).

64. The claimant was provided with a Tablet Computer and signed an Agreement dated 12 May 2015, (pages 113/120). This referred to a rental period of 24 months and explained that ownership of the Tablet remained with the respondent. There was also a purchase option at Clause 5, (page 117).

65. Clause 6 sets out "Use of the Product, (page 118). It states at 6.2:-

> "6.2 However the Membership Advisor is permitted to use the product for the Membership Advisor's own personal use (such as internet browsing, accessing personal emails etc). Should the Membership Advisor choose to use the product for their own personal use, the Membership Advisor remains solely responsible for backing up any personal information contained on the product."

66. There is then reference to "pre-loaded" applications at Clause 6.3. Clause 7, (page119) deals with Termination in that if a Membership Advisor ceases to act then the Agreement would terminate on date of departure and if the Membership Advisor had exercised the purchase option then all hardware

relating to the service plan such as the SIM card and the card reader were to be returned but otherwise it would be returned to the respondent.

67. The claimant used the services of an organisation called MJL Associates in Paisley to carry out Pre-payment Telemarketing for him. An invoice from that organisation to him was provided, (page 122) which covered the cost of a Set-up and Pre-payment Telemarketing for a total cost of £350.

68. There was further e-mail correspondence between Mr Paterson and the claimant and then by email dated August 17 2015 to the claimant and others, (pages 132/133) Mr Paterson set out reference to "TOP PERFORMERS". Next he mentioned a new Head of Sales (this being Mr n Hall), then "REGIONAL MEETINGS" and "LAST MONTHS PERSONAL INCENTIVE" and a final heading, "FINAL THOUGHTS" which reads as follows:-

> "What is that makes consistent performers like (name redacted) etc, really good at what they do? Is it that they have more to go at? Do they have a better area? Do they have help from appointment makers? Or could it simply be that they spend more time on patch? I I would suggest that there is not just one answer to this but a combination of many. One thing they do all have in common is a real hunger and ambition to be the very best MA they can be. Nothing is ever a barrier for them and they spend more time doing the right things and concentrating. The message is quite simple. Spend more time on the positives and less time on the negatives and your earnings will soar. Spend more time thinking on where and how you can find your next member and less time looking for excuses for not performing and you and the whole team will benefit greatly from your efforts. There is no room on our bus for passengers and we all must contribute in order to be successful as a team.
>
> Lastly, can I ask you if you are spending time away from business for whatever reason, that you let me know asap in order I can plan for your absence and account for it in the team figures. I can't go for Monday surprises in your real-time. Thanks. Lets make sure

everyone in the whole team does whatever it takes to get in on target, 15 new members each by close of play Friday and in turn 20 minimum by month end. With this in mind can I have a Wednesday update by text or email from all please. No exceptions please.

Thanks and have the very best of weeks in the field."

69. By e-mail dated October 1 2015, (pages 139/140) Mr Paterson wrote to his Membership Advisors, including the claimant referring to the new financial year and then set out an "OVERVIEW OF SEPTEMBER AND SOME REALISM TO CONSIDER". This reads as follows, (page 140):-

"The simple truth is that we have too many MA's in 131 not performing at the required level and really letting the side and the overall result down.

With the exception of NTA's, everyone's responsibility as an Membership Advisor is to reach the MPI of 20 new members per month and anything less is damaging to the team and also the FSB in terms of overall members. I can accept the odd blip for whatever reason as this happens from time to time but consistently underperforming MA's are damaging to the team. This is not acceptable and will be addressed individually by me over the course of October within individual monitored strategies put in place for immediate improvement. This is your own business within another massive business and in order for us all to succeed as a team you must perform at the minimum levels required. The sad truth is that these underperforming businesses would fail within a more conventional environment so we must address this now to guarantee success. Failure is not an option that is available to us and MPI's must be met to maintain the contracts. This opportunity is not a pension topper upper nor is it an additional small income alongside another one from elsewhere. This is your MAIN and ONLY business to run successfully and it should be treated as such, don't you agree?

Simply put, the MA's that perform and hit their individual targets are working harder, seeing more customers and taking their business more seriously than the ones that don't. It's not difficult to work out and it is not difficult to see who puts the work in as the results tell you everything you need to know. It's time to perform folks.

MOVING ON

This then deals with the 2014/15 financial year and then ends as follows:-

> "Don't know about you but I don't like missing a target so let's get serious about it and get out there and drag those members in. We need to be more focused on daily activities to ensure MPI is hIt and I will be talking to everyone in the team about this over the course of the next few days."

70. An e-mail was sent (this included the claimant) and was on behalf of Mr Hall on October 13 2015, (pages 143/144). It states:-

"EMAIL SENT ON BEHALF OF KEVIN HALL, HEAD OF SALES

Dear All

Historically it has proved difficult to recruit and retain suitable Membership Advisors in the Greater London area due to a number of different factors, the result of which is that we continue to fail to deliver the required level of new memberships for the FSB. As we strive to increase our membership base in line with our strategic growth plans it is crucial that we grow our membership in all territories within the UK, the greater London area in particular has very low penetration when compared to the potential that exists.

As a result of a strategic review of Greater London we have taken the decision to adopt a different sales approach to the current self-employed model which is simply not working for us, we will therefore be introducing an employed model with a structure of 2 Area Sales

> Managers reporting directly to the RSM in the current vacant territories that we have been unable to fill. The Area Sales Manager role will be very different to that of the current Membership Advisor role and will not be based upon a traditional commission earnings structure, in essence the earning potential will be considerably lower than those of our higher performing MA's. We will be recruiting for these positions imminently in order to maximise our growth opportunity as we move into the new trading year, it is our intention to have these posts filled prior to the end of the year."

71. By e-mail dated November 6 2015, (page 150) the claimant and his colleagues received the following information from Mr Paterson:-

> "Guys
>
> Please see attached this month's MA real-time reporting sheet and an example below of one that's filled in. As you can see I am looking for a bit more detail regarding OLJ's and DD's etc. Based on our new RSM reporting documents I now cannot accept text, verbal updates for the week. Any queries give me a shout.
>
> Thanks for your help."

72. Then in a further e-mail of the same date, (page 150) Mr Paterson wrote as follows:-

> "Hi Guys
>
> Please see attached the new MA Realtime Sheet.
>
> It is important that we get the MA's to complete this report accurately as we have had some anomalies in the past. To help and ensure its is explained to your teams, I have outlined the details required for each field. Please note that any grey cells should be avoided otherwise it will mess up the formulaes."

73. By e-mail dated December 7 2015, (page 154) Mr Paterson wrote to the team:-

"Anything less than 5 new members per week per territory, excluding welcome visit conversions to DD, greatly effects the figures nationally and 131 is now firmly on the radar.

If you are not performing to this level, expect a call from me shortly regarding your activity plans and your new member generation strategy for this week.

In addition, I am looking for a midweek update from all in 131 on Wednesday and expect no less than 3 new members from everyone at that point in the week with enough left in the tank to crush the MPI of 5 by Friday."

74. Then, under the Section entitled, "ACTIVITY", (again page 154) Mr Paterson continued as follows:-

"I am a firm believer that hard work fully deserves the rewards that it merits. Look at all the MA's that consistently do well every week and I will show you a level of activity from each of them that guarantees their great results. Busy, hard working, hungry and dedicated MA's get better results, less grief and higher commission paid every month. Fact!

The days when 5-8 appointments sat per week was acceptable are now over and we need at least 10-15 sat appointments minimum every week to make sure you sell enough memberships in your territory. That's only 2-3 sat appointments per day and anything less than this can't be considered for MA's even at a part time level. With the average appointment lasting an hour or so, including travelling in some cases, surely we could all be at least twice as busy with at least twice the results. This role is all about SELF GEN…Everything else takes care of itself if you concentrate fully on this. Just ask (name redacted) and many more……Get this right and its all gravy."

75. By e-mail dated 4 January 2016, (page 153) Mr Paterson wrote to the claimant and another individual whose name was redacted on the subject, "One to One Meetings."

76. This then explained that he had pencilled in Thursday, 7 January in the Glasgow office to meet them individually and discuss strategy for 2016. He offered various times.

77. By e-mail dated February 16 2016, (page 158) Mr Paterson wrote to the claimant and others as follows:-

> "Good afternoon Folks". He then referred to new members and continued as follows:-
>
> > "Folks, we need to address our activity in 131 now to get off to the best possible start and to ensure we do the weekly requirement. There is only so long that I will ask you to get this sorted and I do not think I can be any clearer in what is required. We need everyone on 15 set appointments for the week (that's only 3 per day) generated through all lead sources if we are to be successful. If you don't have this then you will not have enough on the go to hit the minimum monthly performance indicator in your contracts.
> >
> > In reality, there are always days and sometimes even weeks when it doesn't quite go to plan in the field and I can accept this, however I cannot accept low performance caused by low activity, lack of basic effort and lethargy. That's just not what we are all bout in 131 and NI is it!!
> >
> > Guys, I make no apologies for insisting that you achieve/attempt what is required of you as a MA on a daily basis. Anything less is simply at a level that is not acceptable. We need everyone in 131 on minimum 1 new member per day.

> Can I once again ask you to address this immediately and ensure the rest of week is highly productive please. In short, get off that couch right now and out into the field, speaking to everyone you can to ensure your business and the overall business is a success.
>
> Don't let me down please
>
> Thanks for reading and good hunting."

78. There was then a further e-mail from Mr Paterson to the claimant and others, (page 162) as follows:-

> "Good morning folks.
>
> Please see attached the daily RSM report that shows what we are and other teams register through MOJO every day."

This then sets out further information. It then continues as follows:-

> "Guys, I am getting sorely fed up of sending out emails to this top set of teams that are not as positive as I would like them to be and constantly banging on about activity levels to the same people (where some are sadly letting themselves down) and best practices in the field. I am also fed up having to justify and explain away some individual performances to the Head of Sales on a daily basis. This cannot continue and something has to give. I will support you as much as I can but I have got to see effort and results back from you in return. My patience is wearing thin re the lack of activity and associated results and I will discuss this in more detail individually later today and also at Saturdays meeting in Perth. This business is all about seeing as many customers as you can to ensure that you achieve a minimum of 5 per week (20 per month) to meet your contractual obligations and remain part of the business. MA's that are not doing this need to substantially up their game immediately to support the team and themselves so that we can all move forward.

WHAT YOU HAVE

You have everything you could possibly need to be successful here. A commission structure that is second to none, full commission OLJ's, Future DD full commission payments on welcome visits, new retention commission, service providers commission for simply providing leads, free data, a product suite that is unrivalled anywhere, a huge market place to go at, all marketing materials provided free, monthly incentives to go for and the backing of the largest and most highly regarded support organisation for SME's in the UK as localised support from me in your territory.

WHAT WE NEED FROM YOU

All you need to provide is a bit of effort and some pride in what you do. Not much to ask for now, is it??

Now, lets get going please. We are better than our current performance indicates and it's time for us ALL to prove it!! Go get the business now.

Can I have a midweek update on Wednesday from everyone please

79. The claimant and Mr Paterson met in April 2016 after which Mr Paterson sent an e-mail to him, (page 170) which referred to the meeting. This indicated that from their conversation the claimant was to offer his resignation finishing on 6 May 2016 rather than having a recorded termination of contract due to non-performance against target, (again page 170).

80. Then by letter dated 6 May 2015, (page 177) Mr Paterson confirmed the conversation that the claimant's Membership Advisor Agreement would be terminated with effect from 6 May 2016 and was in accordance with Clause 2.1.2 of the Agreement and "is consequent upon your failure to achieve the minimum performance indicator."

81. He then reminded the claimant of Clause 13 – Consequences of Termination and wished the claimant success in his future ventures.

Mr Kevin Hall

82. As indicated above, Mr Hall joined the respondent in August 2015. FSB is a national member led organisation which was established in 1974. It operates throughout the United Kingdom. Mr Hall's role is to ensure that new members are recruited. This is important as the new membership finances the core activities in lobbying for small businesses and sole traders. There are currently 170,000 members which is down from the original higher figure of 200,000 members. There are 33 regions throughout the UK with 194 branches. In total, the respondent has 200 employees. Its headquarters are in Blackpool. It also has an office in Westminster and other offices in Glasgow, Belfast and Cardiff.

83. The respondent arranges for the recruitment of new members on behalf of FSB. It does so using sub contracted Membership Advisors. Members of FSB may either be individuals or partnerships, sole traders or small limited companies. Many of the Membership Advisors are themselves members of the FSB. The claimant had himself been a member of the FSB in the past.

84. As indicated in some e-mails and the Recruiter Agreement, each Membership Advisor is allocated a number of postcodes. Each has a Regional Sales Manager, (an RSM). In the case of the claimant this was Mr Paterson. The RSM is responsible for ensuring that there is adequate cover in each region so as to deliver the required targets for new members is achieved. RSMs are employed by the respondent. They are not self-employed. In general, Membership Advisors are each expected to recruit 60 new members in each quarter. They receive payments by way of commission but only when new members are recruited. There is no base salary and no retainer. There is no sick pay or holiday pay provided to Membership Advisors. So far as Mr Hill was concerned, there was no employment relationship between the respondent and the claimant. The claimant was a self-employed sub-contractor. It is open to a Membership Advisor to run his own business either as a sole trader, as a small limited

company or partnership. Mr Hall understood that the claimant provides a tax return to HMRC as a self-employed individual.

85. The respondent can arrange for appointment making services whereby there is cold calling carried out for a Marketing Advisor who is then provided with a list of potential leads to visit with a view to recruiting them as members of the FSB. Any Marketing Advisor who chooses to use this service is charged a fee for the costs incurred by this appointment making service.

86. As and when a Membership Advisor decides to go on holiday either for a number of weeks or for a few days then that is a matter for each individual Membership Advisor and there is no obligation on him or her to inform the respondent they were doing so.

87. So far as the respondent is concerned, all that is required is that the Minimum Performance Indicator is met which requires that each Membership Advisor recruits 60 new members to the FSB in each 3 month period.

88. Mr Hall was aware that Mr Carr had recently been on an extended trip abroad and, in his absence, he appointed a substitute. Mr Carr is an experienced Membership Advisor and the respondent had no objection to his doing so, provided he was able to continue to meet the MPI target.

89. In relation to the issue of training, this was provided in relation to the services and products available to potential members of the FSB. Training was also provided so as to avoid mis-selling of products to potential members by Membership Advisors.

90. No training was provided on selling techniques or how to get one's "foot in the door". The purpose of the training, as indicated, was to prevent mis-selling and to ensure that the relevant parts of the Main Contract were complied with by each Recruiter/Membership Advisor.

91. An initial batch of 250 business cards is provided to each new Membership Advisor but thereafter Membership Advisors require to pay for further cards.

The MOJO tablet was provided as a way of introducing electronic devices rather than using paper based transactions when a Membership Advisor was signing up a new member to the FSB. These tablets have been in use for approximately 2 years. As indicated in the Recruiter Agreement, a Membership Advisor could either pay for a MOJO outright or pay it up over a period of 24 months. It is still feasible to sign up new recruits to the FSB using a paper based system. This involves the Membership Advisor contacting the respondent's Head Office in Blackpool and the relevant debit or credit card being use by the potential new member is then recorded and used for the new member's fees that are payable on that new members joining the FSB.

92. The respondent organises a number of events around the country aimed at recruiting new members to the FSB. It also has trade stands at such events where new members can be recruited/signed up. The claimant as a Membership Advisor would be told about such events by Mr Paterson. If he chose to attend such an event he could then approach those attending and enquire if they wanted to become members of the FSB. At such events the claimant and other Membership Advisors were not restricted to canvassing individuals based in their specific post code areas.

93. As indicated above, there was initial training given to new Membership Advisors which was carried out at the respondent's Headquarters in Blackpool. At the initial training the services and products available to FSB members are explained so that new Membership Advisors are familiar with the products and services that are available to FSB members

94. As the Head of Sales Mr Hall manages the various RSMs. The information provided through each MOJO is accessible to the respondent at all times as is an electronic system.

95. In relation to the advertisement to recruit employed Membership Advisors in Central London this was a specific pilot because the number of people who were prepared to work on a self-employed basis in London was limited and so it was decided to pilot the employment of two Membership Advisors.

However, this scheme has not been expanded since it was introduced in Central London.

Mr Brennan

96. Mr Brennan runs his own business which operates offering consultancy services. Through this business he generates new members to the FSB. He rents an office in Victoria Road in Glasgow and employs two staff who assist him with this recruitment of new members to the FSB. As with the claimant, he has specific geographic postal codes allocated to him in which to canvass new members to join the FSB. His two staff work as canvassers for him, seeking out and generating leads whom he then visits or contacts to see if they would be interested in becoming members of the FSB.

97. Mr Brennan had very little contact with Mr Paterson. He thought this was because his business is good at selling memberships to the FSB and so "Mr Paterson left him alone".

98. Mr Brennan has been in direct sales for approximately 30 years so he is well experienced in selling products and generating sales.

99. So far as Mr Brennan was concerned he was not somebody who took direction well and so it suits him to run his business on a self-employed basis.

Mr Carr

100. Mr Carr has spent most of his working life in England. From 1977 he worked for British Gas (which became Centrica). He worked in a variety of roles for them. Eventually, he became Head of their Sales team. He now runs his own company Carr BC Management Services Ltd. In April 2014 he joined the respondent as an employed RSM. He worked in that capacity for about 12 months. He then decided that he wished to run his own business and so he moved from being an employed RSM to becoming a self-employed Membership Advisor. By doing so he has control over his own diary and he is not directed by the respondent as to the number of hours he requires to work. He makes his own appointments and has no fixed hours. He was

aware that he requires to recruit 20 new members per month. His experience, both as an employed RSM and as a self-employed Membership Advisor, means that he has "seen both sides". So far as he is concerned, his current commitment is to provide 20 new recruits per month and, if more are recruited, then, so far as he is aware, the respondent is usually "quite pleased". He uses a variety of methods such as attending events run by the respondent. He himself is a member of the FSB.

101. When he goes abroad then he lets his RSM know that he will be away. Mr Carr is aware that there is the option of having someone stand in for him as a Nominated Substitute. In mid October 2016 Mr Carr went on a lengthy trip to Australia and his RSM was aware that he would be away for a period of time. There was no objection to his doing so.

102. Mr Carr utilises the appointment facility making service offered by the respondent and which is based in Blackpool at Head Office. He is invoiced for those services by the respondent. Most new recruits will either sign up using direct debit or, alternatively will pay by debit or credit card or cheque. Mr Carr calls the respondent's Head Office to let them know that he has a new recruit and they then take the customer's details. His understanding that the Head Office facility was open 9am to 5pm Monday to Fridays and this has now been extended to 9am to 6pm.

Ms Docherty

103. Ms Docherty received training from the respondent in May 2014. She worked with them until June 2015 as a Membership Advisor. She has a background in sales and was given postcodes in the Glasgow area. She thought the training in Blackpool had lasted two days or that it involved an overnight stay. She found the training course very good. She had met Mr Paterson and discussed the postcodes that were being allocated to her and the best way to go about the role. It was her understanding that she required to recruit 5 new members a week or one a day. She did not recall being told that the target (Minimum Performance Indicator) was 60 a quarter but rather her recollection was that the targets were provided on a monthly basis.

104. She received an initial set of 250 business cards free of charge from the respondent. Although she received more cards later she did not think she had been required to pay for them but she did not seem to be certain about this as it was some time ago. Ms Docherty thought that she was employed because she required to provide updates to Mr Paterson every day and she felt that she was part of the respondent's organisation.

105. Ms Docherty also had a property company in Clackmannanshire and she was able to continue to operate that business on her own account as it did not conflict with her contractual obligations to the respondent.

106. She accepted that the Membership Agreement shown to her at page 57 does describe the role as one of self-employment. She believed that her core hours had been Mondays to Fridays 9am to 5pm. She had known Mr Paterson from previously working with him in the same organisation. He told her that he thought she would be good at the Membership Advisor role. So far as she was concerned, she could have worked at weekends as well if she had chosen to do so. She did not require to attend an office but she did speak regularly to Mr Paterson by telephone and there was also e-mail contact with him.

107. When Ms Docherty left the respondent she did so having been told by Mr Paterson that her figures were not particularly good as she was "not hitting her target".

The Claimant

108. The claimant accepted that he had signed the Recruiter Agreement and that he was paid commission by way of invoices which he submitted to the respondent. On average, he thought he was earning £100 per week. He believed there was a clear hierarchy and right of control over the day to day duties that he carried out and he did not see himself as being properly in a self-employed role. The claimant had previously worked on a self-employed basis until 2009 after which he was employed by various employers.

109. He was attracted to the respondent as he was already a member of the FSB which he believed provides great services and products to their members. As with Ms Docherty, he had worked with Mr Paterson before and so he replied to the "Box Advert" which he had seen and then met Mr Paterson.

110. He attended initial training in Blackpool but this did not take place until approximately July 2014 which was after he had commenced working as a Membership Advisor in March 2014.

111. So far as the claimant was concerned, he believed that the contract was set up so as to disguise that it was properly an employed role rather than one of self-employment. He did not seem to appreciate that there was the possibility of his appointing a Nominated Substitute, albeit he accepted that the Recruiter Agreement makes such provision. So far as the claimant was concerned, this was never disclosed to him specifically although as indicated, he accepted it is set out clearly in the Agreement.

112. In any event, the claimant never had occasion to appoint a Nominated Substitute on his behalf. The claimant accepted that he completed a tax return on a self-employed basis. In answer to whether he received payslips, his position was that he received commission statements

113. So far as the claimant was concerned, Mr Paterson as the RSM was his Line Manager. Any meetings they had were held occasionally in an office in Glasgow. The claimant used his own car at his own expense to travel on business. On average, he worked 6 hours per day depending on his circumstances as the claimant also has caring responsibilities for his father.

114. When he attended a meeting on April 22 2016 with Mr Paterson he was informed that "they (the respondent) would not support me any more". He recalled that he was informed that he could "come back when his circumstances changed." He replied that he wanted time to think about matters. He had gone to the meeting thinking it would be "a bog standard meeting, innocuous" and so he was shell shocked to be told that his figures were not acceptable to the respondent in that he was not meeting the MPI target.

115. The claimant disagreed that there was no one "controlling" what he did. So far as he was concerned, he was obliged to perform according to the contract by recruiting 60 new members per quarter. The claimant did not see himself as being self-employed no matter what the terms of the Recruiter Agreement specified.

Mr Gardner Paterson

116. Mr Paterson has been an RSM for respondent since December 2014. This is an employed role. He joined the respondent in March 2013. His remit is to oversee the Membership Advisors in his area or region so as to ensure that they comply with their contractual Agreement and, in particular, that they meet the MPI specified in the Agreement.

117. So far as he was concerned, the Membership Advisors were not given employment status but rather they are self employed contractors. Mr Paterson had met the claimant at a network event, having previously worked with him elsewhere. He explained to the claimant that he was representing the FSB. He did not say that he was an employee of the respondent. There are core benefits available to FSB members such as using Abbey Legal and various other third party providers which, in turn, offer a range of benefits to FSB members.

118. Mr Paterson understood that Membership Advisors cannot compete with the respondent and this is specified in the Agreement. The claimant and Mr Paterson had originally met when they both worked in BT. As indicated, they had met in February 2014 when the claimant was attending an event organised by the respondent in his capacity as a member of the FSB. Mr Paterson was clear that he had informed the claimant that he would be expected to achieve 60 new members per quarter or 20 a month and that was what he advised the claimant was the requirement. He did not recall saying anything about wages or working hours. In relation to the e-mails which he sent to the claimant and others within his team, he did this not specifically to motivate them but more to state a point in relation to the need to achieve their MPI's.

119. The reference in the e-mail correspondence to the requirement to make 15 appointments or having 3 appointments per day was made by him because, in his experience, that is what was required in order to achieve the targets.

120. The MOJO is an essential tool when recruiting a new member as paperwork was being replaced by electronic communication.

121. So far as Mr Paterson was concerned, it was up to individuals such as the claimant, to decide the hours they worked since the claimant was self-employed and not an employee. Individuals such as the claimant did not require to obtain permission from Mr Paterson to go on holiday nor to take time off and he did not recall the claimant ever doing so. So far as Mr Paterson was concerned, if the claimant was not working then that could have an impact on his income but, so long as he produced the requisite target numbers, that would mean that the contractual requirement was met.

122. Mr Paterson, in turn, reports to his Line Manager with the figures for the area for which he is responsible and this accounted for much the contents of the e-mails which he sent regularly to the claimant and others within his team.

Closing Submissions

123. In addition to the written submission set out below, Mr Hardman addressed the Tribunal orally on 12 July in relation to his written submission. The claimant was then to provide his submission but indicated he was unable to do so then. It was agreed that the Tribunal would be adjourned until 11.15 am on 13 July so as to allow the claimant to consider what Mr Hardman had set out to the Tribunal. On 13 July the claimant explained that he had been unable to prepare overnight and he sought time to provide a written submission. While it would have been helpful to have been able to have concluded the Preliminary Hearing on 13 July, the Tribunal was alert to the fact that the claimant wanted time to consider his position in light of the respondent's written and oral submissions. Mr Hardman then advised the Tribunal that, if this was the claimant's position, then he was instructed to seek expenses. His submission on this aspect is also set out below.

124. The respondent's submission, including their application for expenses, is set out first followed by the claimant's submission and his response to the expenses application since this was the order in which they were each presented. There was later further correspondence from the respondent's instructing solicitor and Mr Hardman and the claimant was afforded the opportunity to respond to this. Neither party sought to have a further hearing in person to deal with the issue of expenses. This was understandable as it would only have increased the time spent by the parties on what was already a lengthy Preliminary Hearing, spread as it has been over nearly 4 days rather than the original 2 days that were envisaged.

Respondent's Submissions

The Issues

The issues to be determined by this Preliminary Hearing concern the status of the Claimant vis-à-vis the Respondent. Was the Claimant employed, as defined by Section 230(3) of the Employment Rights Act 1996? Was he 'employed', as defined by Section 83(2)(b) of the Equality Act 2010? Or was he an independent contractor providing a service to the Respondent?

The Respondent contends that he was not employed, did not provide personal service to the Respondent, but was an independent contractor providing a service to it.

The First Issue – s.230 of the Employment Rights Act 1996

Section 230(2) of the Employment Rights Act 1996 is at the core of the first issue - whether the Claimant was an employee of the Respondent.

In order to be so, the Claimant required to work for the Respondent under "…*a contract of service*….. (commonly known as a contract of employment) …, *whether express or implied, and (if it is express) whether oral or in writing*."

- There can be no dispute that in this case, the relationship between the Claimant and the Respondent was governed by the Recruiters Agreement (pp55-86). That is an express contract in writing. Unless it can be said that

the reality of the situation was different from what is set out in that Agreement, then the parties are bound by the express terms of that contract. (See **Autoclenz Ltd v Belcher [2011] UKSC 41 at paras 18-21)**

In my submission, the reality of the relationship between the Respondent and Membership Advisors such as the Claimant was not different in any substantial way from that set out in the Recruiters Agreement. (See submission on facts below) Accordingly, consideration of this case must centre around the terms of the Recruiters Agreement.

- As was stated in ***Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, at para 47 and para 48***, it is first necessary for the Tribunal to determine what type of contract existed between the parties. A contract of employment must necessarily relate to mutual obligations to work and to pay for it. (the "wage-work" bargain).

I say this Recruiters Agreement was an agreement between FSBR and Mr Campbell to introduce new members to FSB, and to be paid a sum for each new member he introduced. It was not a contract of service, or employment.

The ingredients necessary for a contract of service or employment are these:

1. Personal Work. - In consideration of some remuneration the employee agrees that he will provide his own work and skill in the performance of some service for his employer.

   In this case there was no agreement to work, and no payment of a wage. (See submission on facts below)

2. Sufficient Control - The employee agrees that in the performance of that service he will be subject to the other's control in sufficient degree to make that other his employer.

In this case there was no control over when, where, or how Mr Campbell was to achieve the contract's purpose - to introduce new members to FSB. (See submission on facts below)

3. Trappings of Employment - The other provisions of the agreement are inconsistent with its being a contract of employment.

In this case there was no place of work, no uniform, no tools were supplied, no holiday arrangements, no working hours, no required training or method, and no restriction on other work. (See submission on facts below)

The authority behind these principles is ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] 1 All ER 433 at pp.439-441***

- In summary on this issue, the evidence in this case does not support any contention that there existed a contract of service (or employment) between the parties in this case. The claim under the Employment Rights Act must thus fall.

The Second Issue - Section 83(2)(b) of the Equality Act 2010

As to the discrimination claim - for the purposes of the ***Equality Act 2010***, 'employment' is defined more loosely than under the ***Employment Rights Act***. The relevant section of the Equality Act is *section 83(2) – "Employment' means … (a) employment under a contract of employment ….. or a contract personally to do work."*

- The loosening of the definition comes from the provision that, under this statute, 'employment' can simply be a contract personally to do work.(although see below concerning an independent contractor)

- One of the most recent relevant authorities on this issue (which also addresses the issues described above) is the Court of Appeal decision in ***Pimlico Plumbers Ltd & another v Smith [2017] EWCA Civ 51.***

As part of a comprehensive review of the authorities, this decision seeks to clarify the requirement of personal work. **See para 84** as explained in the previous paragraphs 73 – 83.

In short, the nature and degree of any right to substitute another person to perform the services is relevant to whether the contract is for personal service or not.

In my submission, the evidence in this case (See submission on facts below) does not suggest any material restriction on the right of the Claimant in this case to substitute another to recruit new members for FSB in his place.

- Finally, the case of ***Clarkson v Pensher Security Doors Ltd UKEAT/0107/09*** was a decision relating to the definition of 'worker' under the Employment Rights Act. As such, it is not directly in point in the present case. However, that judgement did consider the status of a person providing personal service to another as a business undertaking. It was decided that Mr Clarkson was such a person, and thus was not a 'worker' under the Act. The decision is helpful in this case in illustrating the Respondent's contention that the relationship in the present case was that of an independent contractor and a client, rather than one of personal service. It is noted in ***Harvey as a footnote to the discussion on s.83 of the Equality Act*** that cases relating to the 'worker' definition may be relied upon in considering the definition of 'employee' under the Equality Act.

  See paras 4-11, and 20-22. The facts in ***Clarkson*** mitigated more in favour of defining the Claimant as a worker, that the facts in this case, and yet, the tribunal concluded that, although close to the dividing line, the Claimant was not a worker. In my submission, the facts in this case take the Claimant even further from the dividing line than in ***Clarkson.***

Submission on Facts

I take into account that it is solely for the Tribunal to reach a view on the facts, but urge upon the tribunal the following submissions on the evidence produced and heard.

1. The parties entered into an agreement, entitled the Recruiters Agreement, which governed their relationship from 23 June 2014 until the relationship ended on 6 May 2016.

2. That agreement contained the following provisions:

    a. The Claimant was appointed as the Respondent's sub-contractor (Recital, p57)

    b. He was appointed to provide recruitment services in a particular area (Cl.1, p59)

    c. Recruitment services was defined as recruiting new members (to the Federation of Small Businesses) in that particular area. (p58)

    d. Parties agreed there was no employment relationship between them, and no mutuality of obligation (Cl.1.5, p60)

    e. The Respondent was to be responsible for all tax on payments made to him under the agreement, and any tax/n.i.c. for his staff (Cl.1.7, p60)

    f. Cl.1.6 provided: "I*f* the (Claimant) *is unable to perform the duties and obligations contained within this Agreement a* "**Nominated Substitute**" *must be appointed. The person appointed must be approved by (the Respondent) including required training and the period for which such substitution is being made. For the avoidance of doubt the Nominated Substitute shall have no entitlement to payment of commissions directly from* (the Respondent)."

g. **Nominated Substitute** is defined at the beginning of the agreement (p.58): "*shall mean a person nominated by the* (Claimant) *to carry out the obligations and duties under this Agreement if the* (Claimant*) is not able to do so during the Term. Such person to be approved in advance of carrying out such obligations etc by* (the Respondent)."

h. The obligations on the Respondent were to provide certain training, procure that the Claimant received from the Federation of Small Businesses advice, assistance and information about the benefits of membership of that Federation, and data to assist in recruiting members. (s.3, pp61,62)

i. The obligations and restrictions on the Claimant were mainly set out in s.5 (pp 63-67, see sub-para k below), and s.9 (p69, see sub-para n. below) These requirements were broadly to act in good faith and with propriety, so as to avoid mis-selling, and not to sell competitive services.

j. The Claimant was also required to provide information to enable the Federation of Small Businesses to check on the quality of recruitment service it was receiving (s.4, pp62, 63), and to attend certain meetings if so required (s.6, pp 67,68).

k. S.5 required that the Claimant attend the training described at h. and i. above, (s.5.4, p64) and otherwise attend certain events organised by the Federation of Small Businesses (s.5.3, p63), and adhere to certain standards of behaviour (see 5.1, 5.2, and 5.5-5.8, pp63-67)

l. The Claimant was to receive commission for each new member of the Federation of Small Businesses recruited by the Claimant. Commission was based on the first year subscription of that new member. (s.8, p68)

m. The Claimant was required to recruit 60 new members for the Federation of Small Businesses every three months (s.9, p69 and Appendix 1, p80)

n. The Claimant was to take the place of the Respondent in respect of certain obligations of the Respondent to the Federation of Small Businesses as set out in s.10, pp69-74.

o. [There is an anomaly in the reference in the Agreement to incorporation of s. 5.8 of the Main Contract (p65). That clearly requires the Respondent to ensure adequate cover over a Region or Territory. It is clear from the evidence that neither the Claimant nor any other recruiter was responsible for covering a Region or a Territory. In my submission, this anomaly is irrelevant to the issues before the Tribunal.]

p. The agreement between the parties was to terminate automatically in certain circumstances as set out in s.12, p78, or otherwise on one month's notice by either party as set out in s.2, p61.

q. Certain general provisions of the contract between the Respondent and the Federation of Small Businesses were incorporated into the agreement between these parties (s.10, pp74-77)

r. In particular, there was an 'entire agreement' provision, whereby the parties' agreement could not be modified in any way except by the consent of both parties evidenced in writing.

s. There is no evidence of any such consent.

3. In particular, the parties made no agreement on a number of matters:

a. There was no requirement that the Respondent would provide any work at all to the Claimant. There was no such obligation on the Respondent.

b. There was no requirement that the Claimant would work at any particular time, or for any particular time in each week or month. The Claimant could work whenever, and wherever, he liked, or indeed not at all. His only onerous obligation was to procure that 60 new members were recruited to the Federation of Small Businesses every three months.

c. There was no requirement that the Claimant should do any work personally. He simply required to procure the recruitment of 60 new members for the Federation of Small Businesses every three months. There was no practical impediment to this being done by staff employed by him (see 2.e above), or by a substitute nominated (i.e. selected and trained in the detail of the benefits to be offered) by him. (see 2f and g above and para 9, below)

d. The Claimant did not require to select a substitute from a restricted pool. He only required to name the substitute and provide minimal training. The Respondent would then approve the substitute. (evidence of Mr Carr and Mr Hall)

e. The Claimant was not restricted from working in other fields, or with other organisations, provided these other organisations did not compete with the Federation for recruits. Other recruiters (such as Mr Carr, Mr Brennan, and others – see pp236-238) did so.

4. While there were some small differences in practice from the express terms of the Recruiters Agreement – for example, the requirement to obtain approval for a substitute – para 2.f above, and the requirement to attend training, para 2k, the Agreement did not differ in any substantial

way from the arrangements between the respondent and its membership advisors in practice. (Evidence from Mr Dunn, Mr Carr, Mr Brennan and Mr Paterson)

5. The Claimant accepted that he was self-employed. (Cl.1.5, p60, and pp241at 242, 253, and 259 at 262, 273)

6. The Claimant paid his own car expenses, rent and rates, office costs, and accountancy fees as a self-employed person. (p254, and 273)

7. The only "tools' a recruiter could receive were: (a) a 'mojo' computer tablet to enable him to input new member details direct into the Federation's computer system instead of using a paper form. He required to pay for this tablet; and (b) a small initial number of business cards bearing the Federation's logo, his name, and the designation "Membership Advisor". If he wished to use such business cards after the first 250 or 500, he required to buy these from the Federation (the Respondent's parent company).

8. The Claimant did not operate as a limited company, or employ staff to assist him, but he could have. (Evidence of Mr Hall, Mr Carr, and Mr Brennan)

9. As to attendance at training events, or meetings, or reporting on progress towards targets, the reality of the situation was that after receiving an initial explanation of the benefits to be offered to potential new recruits to the Federation, a recruiter could choose to attend to such matters, or not (evidence of Mr Hall, Mr Brennan and Mr Carr)

10. As to the matter of carrying out work personally, the reality of the situation was that the Respondent was not concerned, and had no power to check, whether the Claimant or other recruiters personally achieve the contracted target of 60 recruited new members to the Federation of Small Businesses every three months.

11. If a recruiter, such as Mr Brennan, for example, decided to take time off to go to Ireland, he would simply do so. If a recruiter, such as Mr Carr,

for example, decided to take an extended trip to Australia, the reality of the situation was that he would simply arrange a substitute to achieve the contracted target in his absence, train that substitute in the benefits to be proposed to prospective new members, and inform the Respondent as a matter of courtesy of his intention.

12. As to the matters of integration into the organisation of the Claimant's employer, and appearance to outsiders, there was no reference to the Respondent on any materials. The only reference to a business other than the Claimant's was to be on business cards. That reference was to the Federation of Small Businesses (for whom the MA recruited), and not to the Respondent. Such reference did not suggest the Claimant or other recruiters were employed. Instead, reference was only to "Membership Advisors". As explained by Mr Carr in evidence, such a matter was of little or no significance to potential recruits to the Federation.

13. There was no suggestion that the Clamant or any other recruiter provided any advice or service for, or on behalf of, the Respondent or its parent, the Federation of Small Businesses. Their role was clearly and solely to procure the recruitment of new members.

Summary

The Respondent contends that the evidence fails to support a classification of the relationship between the Claimant and the Respondent as either employment for the purposes of the Employment Rights Act 1996, or a contract personally to do work for the purposes of the Equality Act 2010.

The 'personal work' test

The statute and the authorities make it clear that to establish jurisdiction under either heading in these proceedings, the Claimant must demonstrate a contract between him and the Respondent which required him personally to do work.

There is no such evidence.

The only onerous obligation upon the Claimant under the agreement between him and the Respondent was that he procure 60 new members of the Federation of Small Businesses every three months. This could be done by him, or by his staff. It did not require to be done by him personally.

If he should decide, for whatever reason, that he was not able to procure these new members (for example because he wished to take an extended holiday) he could nominate a substitute and 'train' that substitute as to the benefits to be explained to potential new members.

Thus, although there was some conditionality to some part of the Claimant's right to substitute somebody to procure new members in his place, that conditionality was sufficiently limited to be inconsistent with an undertaking to do work for the Respondent personally.

Reference is made to paragraph 84 of ***Pimlico Plumbers***. Such conditionality as there was is akin to the position in cases following the line developed in **Express & Echo Publications Ltd v Tanton [1999] ICR 693,** rather than in cases following the line taken in **Macfarlane v Glasgow City Council [2001] IRLR 7.** See paragraphs 76-83 and the cases referred to therein.

<u>The 'sufficient control' test</u>

The evidence does not demonstrate any control by the Respondent over the way in which the Claimant was to procure new members for the Federation of Small Businesses.

Although there was some initial 'training', that amounted to an explanation of the benefits available to new members, such as free banking. There was no requirement to attend presentations of additional explanations of new benefits, or meetings, although these were available if the recruiter chose to attend.

Although the Area Sales Manager would seek to monitor the number of new members recruited in his area, he had no power, and no contractual right, to insist that the Claimant or any other recruiter assist him.

Apart from protection against mis-selling or competition, there was thus no control over what the Claimant or other recruiters did.

The Claimant could achieve his target how he liked. There was thus no control over how the Claimant was to deliver new members to the Federation.

The Claimant could work when, and where, and with whom he liked. The Respondent neither knew, nor cared, about that. There was thus no control over when, where, or through whom the Claimant was to deliver new members to the Federation.

The 'trappings of employment' test

The evidence demonstrates none of the normal trappings of employment.

The Claimant considered himself self-employed. He paid tax as a self-employed person. He claimed expenses for running his business. He could employ staff. He did not require to work in a particular place, nor within particular times. He had no holiday entitlement or restriction. There was no evidence of any provision for sick pay. He had no uniform, nor any method of identifying himself as an employee of the Respondent. He was not integrated into the respondent's organisation. See paragraph 11 of essential facts, above.

There were thus none of the ordinary trappings associated with an employment relationship.

The 'wage-work bargain'

The evidence does not characterise the relationship between the Claimant and the Respondent as a 'wage-work' bargain.

Instead, the relationship was one where the Claimant was to procure a certain result in exchange for certain payments. This is entirely consistent with the stated relationship of main contractor-sub-contractor (see the recital to the Agreement,

p.57). The relationship is properly characterised in that manner, rather than as a 'wage-work' bargain.

In all these circumstances, the Claimant has failed to demonstrate any employment relationship with the Respondent, nor any contract personally to do work. The Employment Tribunal thus has no jurisdiction to hear this Claim. The Claim therefore falls to be dismissed.

Further details of Application for Expenses by the Respondent

At close of proceedings in this Preliminary Hearing on 13 July 2017, an application was made on behalf of the Respondent for Expenses/Cost under Rule 76(1)(a), as noted by the Employment Judge.

The purpose of this additional submission is to set out the amount sought as an award against the Claimant, and the reasons why the Respondent respectfully requests that an Order in that amount be granted.

Amount Sought

The Respondent seeks expenses/costs amounting to £ £1,710 plus VAT (totalling £2,052). This is based on: -

The Respondent's agent's fee for attending the second day of the Continued Hearing, 13 July 2017 amounting to £960 (excluding VAT), calculated at 8 hours at an hourly rate of £120.

The Respondent's counsel's fee for the further procedure caused as a result of the consideration of and responding to the Claimant's written submission - £750 (excluding VAT)

Neither of these fees would have been incurred by the Respondent had the Claimant made submissions during the afternoon of 12 July, as would have been reasonable.

In the alternative, one or other expense has been incurred unnecessarily. The agent's expenses in remaining for the second day would not have been incurred had the Claimant chosen to exchange submissions in writing at a later date at the

conclusion of evidence on 12 July, when discussion was held, and agreement reached, for the Claimant to make them orally the following morning. Had he elected for exchanging written submissions in writing at this time, while counsel's fee would have been incurred, there would have been no need for either the Respondent or its agent to remain for the second day.

Further or in the alternative, Counsel's additional fee would not have been necessary at all had the Claimant proceeded to make his submissions on 13 July 2017, as he undertook to do on conclusion of the evidence on the afternoon of 12 July.

The total amount of both fees is £1,170, which together with VAT amounts to £2,052. This fee would not have been incurred by the Respondent had the Claimant acted reasonably in his conduct of proceedings on 12 and 13 July 2017.

Ability to Pay

Under Rule 84, the Tribunal may have regard to the Claimant's ability to pay.

I contend that the amount of the Order should be the amount sought - £2,052.

Firstly, the Claimant has, despite prompting, failed to prepare a proper accounting of his income and outlays. It is not possible to glean from the information provided whether the Claimant is in a position to pay the sum sought or not.

Secondly, such failure suggests a lack of frankness on the part of the Claimant.

The Employment Judge has a discretion as to whether to have regard to the Claimant's ability to pay or not. As is set out in Harvey under the notes to Rule 84:

"…..it is also possible for the tribunal to decide not to take ability to pay into account, e g where the party did not appear and had previously behaved outrageously in the proceedings: Mirikwe v Wilson & Co UKEAT/0025/11 (11 May 2011, unreported)."

In my submission, the Claimant's unwillingness to provide a frank disclosure of his financial position provides justification for not taking his ability to pay into account.

ARGUMENT

Claimant's Submissions

FIRST ISSUE

The Recruiters Agreement, I agree, in terms of obligations on the claimant, governed the relationship however; in addition, the working practices demonstrate the true nature of the actual working relationship which is that of employment as defined by Section 230(3) of the Employment Rights Act 1996.

Submission on Facts

I take into account that it is solely for the Tribunal to reach a determination on the facts, but urge upon the Tribunal the following submissions on the evidence produced and heard.

Unless otherwise noted I agree with the numbered submissions in the Respondent's Submission on Facts.

2.

Unless otherwise noted I agree with the lettered provisions in the Respondent's Submission on Facts.

f. Page 60 Clause 1.6 provided: **[***If the (*Claimant*) is unable to perform the duties and obligations contained within this Agreement a "Nominated Substitute"* ***must be appointed*** *(*the Respondent*). The person appointed must be approved by (*the Respondent*) including required training (t*he Respondent*) and the period for which such substitution is being made. For the avoidance of doubt the Nominated Substitute shall have no entitlement to payment of commissions directly from (the Respondent)***]***.*

As per page 59 and Clause 1 [Recruitment appoints the Recruiter] the burden of *"must be appointed"* in Clause 1.6 falls solely to the Respondent. The claimant would not be in a position of authority to appoint another individual. Should the Claimant have responsibility for any subsequent appointing it would be clarified in Clause. In addition:-

- The practicability of Right of Substitution, specifically relating to p60 Clause 1.6 defines [must be approved] (Respondent as per page 57 heading [Operative Provisions] – [Appointment Approval Process] as in Appendix 5 page 86). This lack of practicability is also evidenced throughout this submission however examples are:
    - page 168 where the Tablet Computer has a required update.
    - page 170 at the top where this has to be done by me personally. No other person would be authorised.
    - page 172 where, again, authorisation would need to be given alongside passwords for a secure Intranet as well as prescriptive process.
    - page 175 at bottom "Own cloud" is a password protected cloud-based site solely for the use of individuals.

As well as attendance at events / meetings / conferences etc.

- [required training] (Respondent) as per page 64 Clause 5.4 [and the Recruiter shall not provide any Recruitment Services until he has attended the Initial Training]. This training involved a 2 – day residential course in FSB Head Office in Blackpool. This course was a training course purely for both knowledge of each of the then Service Providers (page 85 Appendix 4a) and their offerings as well as sales training and methodology (Ms Docherty). This

would not be possible to train another individual as it wasn't a 'train the trainer' course. There was never a mention, either on this course or any subsequent training, meetings or events, of nominated substitutes and their training. In addition, page 90 at the bottom, *"will help us to develop the skills we require",* and page 88 under "*TRAINING ROLE*", page 93 under "*CALLPRO v2 TRAINING PLAN"*. This negates, from the Respondent's Skeleton Argument point 11 of *"the reality of the situation was that he would simply arrange a substitute to achieve the contracted target in his absence, train the substitute in the benefits to be proposed to prospective new members, and inform the Respondent as a matter of courtesy of his intention"*. This is completely against the Recruiters Agreement which governs the employment relationship as in Clause 1.6, 5.4, 5.7 and 11.1 as well as the practicalities of personalised business materials, e.g. leaflets / email / cards. This, on top of evidenced direct management instruction and a password protected Tablet Computer as an essential business tool which was non-transferable as per page 119 clause 8.2.

- [the period for which such substitution is being made]. This, in personal or medical circumstances, would not be practical or potentially even possible e.g. page 49 dated 10th March 2014 2/3rd way down, page 125 dated 2nd July 2015, page 159 bottom of page email dated 8th February 2016,

As per the Respondent's Skeleton Argument 3d, which is in direct conflict with the Recruiters Agreement, and in the absence of any substantive evidence to support this assertion by the Respondent *(e.g. page 63 Clause 5.1, page 75 clause 10.1.9 clause 21 (Approval) 21.1 / 21.2 over page)* relating to, what is essentially, the process authorising an individual for selling of Recruitment Services as a substitute then there is no dispute that this is governed by the Recruiters Agreement as in pages 55 – 86. In relation to Mr Carr's testimony, it was obvious that this first and isolated

case of 'substitution' in the history of FSB took place after the material fact. A point to note is that I worked in an environment where several people had bouts of long-term sickness, one proved to be critical after the material fact, the Right of Substitution was never, to reiterate, even broached. The above facts lead me to believe that the example mentioned of an actual substitute being put in place was in direct reaction to this matter being brought to court.

j. As per page 63 4.1 of The Main Contract from reference page 62 Clause 4.1 of The Recruiters Agreement, This gave the Respondent unfettered Management Right of Control of page 58 Recruitment Services **[**provided by the Recruiter**]**. This was evidenced extensively and clearly shows that, over time, this practice became more onerous as in page 150/151 titled *"New MA real time sheet"*. As per Section 4.1 of The Main Contract it's not consistent with the Respondents notion of a self-employed, autonomous, self-directed sub-contractor.

Ref: Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 (27 July 2011) and in particular paragraphs 20, 23, 37 and 38. In which it demonstrates that having the Right of Substitution inserted into a contract has no bearing on the relationship or the working practices.

k. The Recruiters Agreement clarifies that, as per page 64 5.8 (page 66 5.15.12), the non-compete nature of this agreement then in 3e of the Respondent's Skeleton Argument the Respondent refutes this fact regarding non-compete. The Respondent clarified the "conflict of interest" in several examples of this non-compete, i.e. accountant / IFA / HR company. (Mr Paterson)

The actual working practice of this was, at the material fact, that there were no allowances for any **[**directly or indirectly**]** working association beyond the Respondent.

l. As per page 68 Clause 8 [Commission] entitlement is stated, including contractual deductions; further clarification on page 84 [Appendix 4a] As per the evidence on page 112 at bottom of page email it clearly states, **[**then the charge will be deducted from commission as per the current process**]** In reference to the 'Agreement For the provision of a Tablet Computer' page 116 3.2 and 3.4. There was a clear breach of the Recruiters Agreement with neither mention nor amendment mutually agreed for the Recruiters Agreement as per page 69 section 10.1 and transposing parties to page 75 19.3. The Respondent *(Mr McArdle in court)* stated, page 62 clause 3.2 of the Main Contract, [reasonable administrative costs] however these are pertaining solely to 'Service Provider' payments, i.e. from 3rd parties. The [reasonable administrative costs] detailed are clearly for the handling of these payments and associated administration. I'm unaware of the HMRC implications of these deductions at source from commission, Service Provider commission (page 61 **[**Recruitment's Obligations**]** page 62 3.2 and 3.3) and personal expenses without a clear invoice from me, which wasn't an option.

m. This isn't for dispute however the actual working practice has been evidenced extensively and there is no mention in multiple communications of 60 per quarter.

n. Page 69 Clause 10.1 clearly states the incorporation of parts of The Main Contract also referenced and in conjunction with page 79 Clause 13.1. For the most part this is nonsensical and inoperable, e.g Page 71 Clause 16 of The Main Contract and, in particular, page 74 Clause 19 of The Main Contract. This same transposition of parties is apparent on:

- page 61 under **[**Recruitment's Obligations**]** Clauses **[**3.1.1, 3.1.2, 3.1.5 and 3.1.6 of the Main Contract**]**
- page 62 Clause 4.1 **[**the review referred to in clause 4.1 of the Main Contract**]**
- page 62 Clause 4.2 in reference to clause 4.2 of The Main

Contract

- page 63 Clause 5.2 **[**The provisions of clauses 5.6, 5.7, 5.8, 5.9, 5.10, 5.13 and 5.15 of the Main Contract shall apply to the Recruiter…**]**
- page 64 Clause 5.5 in reference to clause 5.13.3 of The Main Contract
- page 64 Clause 5.8 in reference to clause 5.15.1

  2 of The Main Contract
- page 68 Clause 7.1 in reference to clause 7.3 of The Main Contract.

o. In reference to my point 'n' above there is no single anomaly should this point from the Respondent be taken as accurate. This point is in reference to page 63 Clause 5.2. For example page 65 clause 5.9 of The Main Contract clearly creates Mutuality of Obligation under the same transposition *(**note:** clause 3.1.3 of The Main Contract not evidenced in the Recruiters Agreement)*

These transpositions, as above, occur in numerous parts of the Recruiters Agreement and equate to over 60% of the working contract terms. The Respondent states, from the Respondent's Skeleton Argument, that *"There can be no dispute in this case, the relationship between the Claimant and the Respondent was governed by the Recruiters Agreement. This is an express contract in writing...the parties are bound by the express terms of that contract"* therefore, this being formally adopted as the submissions from the Respondent that in the entirety of the Recruiters Agreement, including above clauses, governs the relationship.

Regarding page 65 clause 5.8 of The Main Contract this clearly demonstrates Mutuality of Obligation and I don't believe that any of these clauses are *"irrelevant"* in a legally binding contract as the

Respondent would wish the court to believe. This is completely contrary to the statement's made by the Respondent on page 48 about the Recruiters Agreement being, *"pretty straightforward with no hidden clauses".*

On pages 66/67 clauses 5.13.1 – 5.13.3, 5.15.1 – 5.15.16 of The Main Contract creates Mutuality of Obligation.
On page 101 titled *"New Sales Lead"* passed to me by FSB from the *"Lead Generator Marketing Campaign"* as referenced on page 90 and evidenced in court.

q. There can be no dispute that page 69 Clause 10.1 (as referenced in my point 'n' above) means, [any reference to Parties shall shall mean the parties to this Agreement]. This is a deliberate attempt, by the Respondent, to mislead the court as to the nature of this transposition of obligations. At no point, within the entire Recruiters Agreement, has The Main Contract been designated as "this Agreement" beyond the clauses of The Main Contract as in, from same page and Clause, **[**The provisions of the following clauses from the Main Contract (mutatis mutandis) form part of this Agreement and shall be deemed to be incorporated herein**]**

r. I agree as per my point 'q' above and evidence in reference to my point 'l' above.

s. I disagree, page 92 is clear evidence that the Recruiters Agreement was amended by both parties as referenced in my point 'l' and evidenced in court.

3. Unless otherwise noted I agree with the lettered provisions in the Respondent's Submission on Facts.

As way of response I maintain and will prove on evidence the actual working relationship between the parties that there was Mutuality of Obligation, a sham of Right of Substitution, extensive Management Right of Control, Integration, Tools, Defined Geographical Area and provision to provide Personal Service.

a. I disagree as referenced in my point 'o' above.

b. I disagree as referenced in Ms Docherty's testimony regarding Monday – Friday 9 – 5. Also evidenced by Mr Paterson's testimony regarding page 118 clause 6.5 and the FSB office hours of 9 – 5 at the material fact, e.g. signing up a member who wishes to pay via card. In addition to this I was dealing with small businesses who had 9 – 5 as their core hours and self-employed individuals whose core hours were primarily like most other businesses. There will be very few businesses who would want their personal time encroached upon to discuss Recruitment Services and therefore state that, excluding travel time, my hours (barring other responsibilities) would be 9 – 5.

Also, as per my questions to Mr Paterson:

Page 284 regarding Monday – Friday and “1 business per day” and “Minimum target 1 new member per day”

Also, as per the written evidence of management instructions regarding working practices and requirements:

- page 48 *“one per working day?”*
- page 140 *“daily activity”*
- page 154 *“3 new members by this point” “The days when 5-8 appointments sat per week was acceptable are now over and we need at least 10-15 sat appointments minimum every week to make sure that you sell enough memberships in your territory. That's only 2-3 sat appointments per day and anything less than this can't be considered even at a part time level”*

- page 158 *"We need everyone on 15 set appointments for the week (that's only 3 per day), "what is required of you as an MA on a daily basis" and "1 new member per day"*
- page 162 *"you achieve a minimum of 5 per week"*
- page 166, *"The MA opportunity isn't part time...this is a full time business opportunity"*

Regarding wherever I could work this is defined and evidenced as in page 57 **[**Area**]** and page 81 **[**Appendix 2**]**

Regarding not working there was an MPI as has been evidenced as has:
page 140 "*"everyone's responsibility as a Membership Advisor is to reach the MPI of 20 new members per month and anything less is damaging to the team…..this is not acceptable and will be addressed individually by me over the course of October with individual monitored strategies put in place for immediate improvement"* Monies were also paid monthly and we worked to cut-off points for payment.

c. I disagree as per points 2a and 2b of the Respondent's Skeleton Argument as per:
   - page 59 Clauses 1, 1.1 and 1.2
   - page 62 Clause 4 [Review]
   - page 63 Clauses 5.1, 5.2 and 5.3 [The Recruiter shall attend]
   - page 64 Clause 5.4 [The Recruiter shall attend] which also impedes Right of Substitution
   - page 67 Clause 6.1 [The Recruiter shall attend]
   - page 69 Clause 9.1 [The Recruiter shall be required] and incorporated Main Contract clauses

Page 78 Clause 11.1 which impedes, in essence via the use of, trademark which I had no authority to use beyond myself, and included personalised business cards,

business email, personalised literature provided free from the Respondent as tools which, in turn, negates the Right of Substitution

Page 113 – 120 'Agreement For the provision of a Tablet Computer' this is, like the Recruiters Agreement, a personal contract which could neither be transferred nor the essential tool utilised by anyone other than me and, therefore, a clear impediment.

My point 'f' above relating to a clear sham of a Right of Substitution clause whose sole intent is to disguise the true nature of the employment relationship (as per **Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 (27 July 2011)**). The burden was on the Respondent to appoint, approve and train an alleged substitute as per page 60 Clause 1.6 and, as in page 64 Clause 5.7 none of this was evidenced by the Respondent regarding any nominated substitute and is also another clear impediment.

On page 86, aside from the first requirement, it's imperative from the company's perspective and in accordance with the nature of the contract, that these checks, as a bare minimum, are carried out for advanced approval; this is further impediment especially due to the time taken to carry out these checks.

d. I disagree as, this apparent substitute was after the material fact as well as no substantive evidence being provided and has no bearing on this matter.

e. please refer to my point 'k' above

4. The Respondent clearly acknowledges that there was advanced approval required for a nominated substitute and that there was obligation to attend training. At the material fact this didn't differ in actual working practices beyond these express terms. In addition, the Respondent continually claims that the Recruiters Agreement governs the employment relationship and yet, on this point, chooses to suggest otherwise.

5. I agree that this initial assumption was accurate however, as per my ET1 page 14 paragraph 3 onwards and page 15 bulleted points, this is refuted in its entirety.

7. I disagree, everything that was provided by the Respondent was 'tools' to further the active process. These 'tools' such as initial and ongoing training, a Regional Sales Manager, personalised business cards, business email, personalised literature, pre-cleansed data, appointment makers, Intranet (including Case Studies and Sales Training), booking calendars, email marketing and a Tablet Computer referenced extensively in evidence. There was also no payment requested for my payment of business cards.

Regarding a Tablet Computer, I was compelled to use this essential tool. It had 100% uptake from around 100 individuals within the company. There was a cost of £30 per calendar month associated with this. The likelihood, if paper based applications was an ongoing option (page 118 clause 6.1), of having this uptake, would be zero.

8. As was established, these occurrences were after the material fact and have no bearing on this matter. The fettered Right of Substitution would also preclude this in a situation where a nominated substitute would be required as per page 60 Clause 1.6. In the case of Mr Brennan this wasn't in relation to a nominated substitute.

9. As per my point 4 above, the Respondent continually claims that the Recruiters Agreement governs the employment relationship and yet, on this point, chooses to suggest otherwise. I disregard the evidence from witnesses as being after the material fact (excluding Mr Paterson). I was required to attend events and meetings at the request of the Respondent; this wasn't optional.

10. I disagree. If the *"Respondent was not concerned"* why would there be individual targets, individual and ongoing performance plans as in pages 101, 140, 153 and 162 in evidence as well as standards regarding daily

performance (see my point 3b above) and daily weekly reporting which was individualised and directly fed to the NFSM and beyond; which disputes this ability to check as in page 162 detailing *"individual performances to the Head of Sales on a daily basis".* In fact, the significant requirement for management reporting and the manner in which it was done demonstrated an employee/employer relationship. This is notwithstanding the obvious approval process.

11. I disagree, at the material fact there was a necessity to perform daily regarding both MPI and reporting. As in page 127 and page 133 if time was to be taken out of the business this had to be documented. In addition, a message had to be left on email (as evidenced) to inform prospective members or staff of this absence as well as instruction as to how to contact FSB during this period. This was a management instruction and had to be complied with. Regarding the alleged substitution had to adhere to Page 60 1.6 of the Recruiters Agreement as well as trained and vetted as evidenced in page 64 5.4.

12. I agree, there was no material difference between FSB and FSB Recruitment Ltd, as I mentioned in the original hearing with Judge Cape; they were indistinguishable. The point is that this integration was with my employer, i.e. FSB Recruitment Ltd in both a management right of control and hierarchical reporting. Some examples of this, that aren't restrictive, interchangeability disprove this point are found on:

- page 41 at bottom *"FSB HR will be in touch"*
- page 43 "To access your FSB email", MyFSB", "all data, leads and correspondence will be directed to your FSB email address", "Departmental Administrator, Sales Federation of Small Businesses", www.fsb.org.uk,
- pages 44/45
- page 91 *"Head of Commercial Services Federation of Small Businesses"*

- page 184
- page 188 with Mr Paterson's own email epitomising this interchangeability.
- page 190
- page 192
- page 277, 278, 279 and 281 – 284

as well as the numerous evidenced examples of reporting. As per Mr Paterson's testimony, he confirmed that he managed and interacted with the employed Area Sales Managers, whose roles are identical; aside from being employed. Mr Paterson's email generally states his working for FSB Recruitment Ltd, A wholly owned subsidiary of the FSB *(albeit, as was established in evidence, that this wasn't the case).* The Area Sales Managers work directly for FSB and this is another example of no actual difference in both employed/self-employed roles as well as, aside from Mr Paterson's personalised email, no reference to the Respondent. In addition, this integration was apparent in events and extraneous meetings. Albeit Mr Paterson's opinion varied regarding how people perceived me, an ordinary man in the street wouldn't, and never did in my experience, question my employee status. The fact that everything, as per questions in court, was badged FSB, e.g. personalised leaflets, business cards, FSB mobile stands (for events), folders, tie-pin, lapel pin (which was issued to everyone after successful training course) was so extensive that I was asked, several times, *"how long have you worked for FSB?".*

Alongside this, as per page 69 Clause 10.1.1 **[**clause 12 (Indemnity and Insurance) (but not clause 12.1.1)**]** I was fully insured by the Respondent and, as per page 117 clause 4.3 my tools were insured by the Respondent. **Ref: Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217 (05 March 2004)** paragraph 72 highlights that even vicarious liability proves status however I was directly insured.

I find that this point is irrelevant from the Respondent as I was clearly a fully integrated employee.

13. I would strongly disagree with this. The main contractual objective of the role was to procure new members. The skill to to both explain membership benefits and how this would fit into an individual company was where advice/service would come in. To enable an individual / company to make an informed decision regarding FSB membership required a systematic and structured approach. This approach, from initial training course and subsequent training sessions as well as professional experience, enabled me to factually analyse the prospective members business requirements and match these requirements to the extensive, and continually growing Service Providers (page 85) that FSB brokered; as well as the benefits that FSB provided as “Right of Membership” (also from Service Providers). These Service Providers, in the main, required extra cost from the prospective member and training sessions were continually being given to us, from these 3rd Party Providers – via the Respondent – to enable me to promote these services. Generally included in these prospective member meetings were anecdotal references, i.e. Case Studies, that were made available via the FSB Intranet (MyFSB and along with actual sales training) that is evidenced, e.g. page 99 at bottom titled *“Social media Training”* whose purpose was to advice prospective customers on how best to use.If there was nothing other than transfer of information in prospective member meetings then the FSB would have no problem in reaching targets via untrained individuals running through the Service Provider's services (aka Feature Bashing); this was the first thing that we were told not to do on initial training with prescriptive methodology explained (my point 'f' above). As has been proven in multiple email evidence this wasn't the case even with highly trained and experienced individuals as was also intimated by Mr Paterson's recruitment requirements in testimony.

Summary

The Claimant contends that there is extensive evidence supporting an employment relationship between the parties under both acts.

To open this summary, the main reason why I asked the court to extend my final submissions was that I was completely unfamiliar with any of the following tests. In further researching, to provide both answers to and reinforce my own argument, I'm no further forward; which leads me to believe that they don't officially exist? *The '"personal work' test", "The 'sufficient control' test," "The 'trappings of employment' test"* In addition, Mr Paterson's belated testimony was extensive and had to be included within this submission.

With regard to tests I did complete both HMRC Employment Status Indicator as well as IR35 status (as if ltd) both show, when inputting the criteria, employment status as opposed to either worker or self-employed. In the case of HMRC this involved a phone call to them. In this phone call, as the status was not determined, I was told that there was not a *"genuine right of substitution"* therefore I was an employee.

<u>The 'personal work' test</u>

As per the evidence above this refutes both assertions regarding procurement and substitution, I would highlight the following from the:

<u>Recruiters Agreement</u>

The relationship, as has been established, is governed by the Recruiters Agreement. This clearly demonstrates an ongoing personal contract with FSB Recruitment Ltd. This was extended further by another unrelated personal contract for a Tablet Computer.

The Recruiters Agreement contains numerous obligations such as: attending training, attending meetings, attending conferences/events, offer of work via area and pre-cleansed data, must respond to all ongoing enquiries leading to Mutuality

of Obligation, prior written authorisation for use of trademark, prior, onerous and complex approval proving a sham of Right of Substitution, an unfettered management right of control, exclusivity and non-compete leading to restraint of trade (additionally post 6 months of leaving), the requirement to use tools such as personalised marketing materials and Tablet Computer (page 118 clause 6.1 “to replace the current paper application system”, a defined geographical area, uninvoiced payments made for work carried out with no deductions, a Minimum Performance Indicator, promotion and provision of specific services, mutual consent required to modify this agreement, an inoperable transposition of rights from the Main Contract to this agreement.

Ref: Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 (27 July 2011) and **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1967] EWHC QB 3 (08 December 1967)**

The 'sufficient control' test

I disagree with the Respondent on this point. There is significant evidence of the management right of control, the ways of working, expectations, management instruction, location of activities, required advanced notification of absences/holidays (pages 127 and 133), and manner of approach. Regarding training, please see my points 2f and 13 above on this matter with contractual obligations to attend. The evidence shows, specifically, the numbers regarding daily appointments required to achieve the MPI, the complex process for signing new members which was defined via an essential tool (Tablet Computer), an unfettered right of both control and reporting as per my point j above and, additionally the 'Regional Sales Manager' sought to, regularly, as evidenced e.g. my point 3b above, exercise this right, and enforce the obligations by the use of recognised management tools such as individual 'Performance Improvement Plans' and reviews, daily management instruction and communication regarding these activities and obligations as above, specifically including targets, the direct instruction to achieve these daily, coding the individual/team targets as per page 51/52, an historic example of, *“A week in the life of a Membership Advisor”* on page 192 highlighting the full-time aspect of this role. Ever increasing reporting

referenced extensively, e.g. my point j above. The actual working practices reinforce the clauses and obligations within the contract and are indicative of employee status. It places all of the obligations of employment on me and none of the obligations of an employer on the Respondent other than providing work as per page 63 Clause 5.2 and subsequent parts.

Therefore there was significant management control on how I had to deliver new members to the Federation and I completely refute the Respondent's last assertion as I had no control over *"when, where through whom"* and rely on above evidence regarding this matter.

Ref: Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 (27 July 2011) paragraphs 37, 38, Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217 (05 March 2004) paragraph 70 and 71

The 'trappings of employment' test

As per my paragraph 5 above I refute that I considered that I was self-employed and refer to my paragraph 12 above regarding integration. I state that I had significant trappings of employment including tools, obligations, ways of working, full integration (structural and practical), all of which are key indicators of employment status. **Ref: Cable & Wireless Plc v Muscat [2006] EWCA Civ 220 (09 March 2006) paragraph 20** and **King v The Sash Window Workshop Ltd [2017] EUECJ C-214/16 (8 June 2017)**

The 'wage-work' bargain

I refute this point. I was given monthly consideration (as defined by Respondent on page 88 as *"wages"*). Unlike an actual self-employed individual I never invoiced my employer. I was provided with all paperwork via a wage-slip (remittance). Any 3rd party monies owed were also administered by the Respondent at no cost, as per my point 2l above. There was also no charge for any marketing materials required ongoing. I was also insured by the Respondent as per my point 12 above for both liability and tools.

The employer also deducted, without prior or written consent, any monies owed to them, as per my point 2l above. **Ref: Cable & Wireless Plc v Muscat [2006] EWCA Civ 220 (09 March 2006) paragraphs 15, 31 and 35,**

Conclusion

As background for the court, FSB Recruitment Ltd was set up in 2011 to buffer between the alleged self-employed individuals and the FSB. The 'Main Contract' is the legacy from the FSB – Recruiter (who employed the Consultants) – Consultant relationship that was in existence; being eventually replaced in 2014. This was purposeful to avoid rights and obligations owed to these individuals. Considering the self-employed model that was in place when I started in March 2014, and the introduction of this woefully over-engineered contract and micromanagement practices, it prompted multiple complaints (page 88 *FIRST PORT OF CALL*) and it became apparent that this was an employed role both contractually and actually.

Another standalone point is how I was dismissed. From page 170 on April 22nd 2016 in a meeting with Mr Paterson (also referenced on page 169), to personally requesting this email via phone to Mr Paterson (not evidenced) to page 178 (which references *"did not want to show as being terminated"*), to page 179. Page 180 is my written response to Mr Paterson and Mr Paterson confirming that Monday 16th May as end date (24 days from meeting on April 22nd) to page 183 where I reference page 177 and the retrospective letter issued equating to 14 days. My point is that the Respondent has chosen, again, to completely disregard the Recruiters Agreement which governs the relationship. I would point out that, at no point, was a 30 day notice given to me.

I have demonstrated in my argument that I have met 3 essential criteria of a contract for personal service because I had agreed remuneration as set out in page 68 Clause 8 and page 84 Appendix 4a. In addition, I was employed directly to provide Recruitment Services personally as per page 59 Clause 1 **[**Appointment**]** within a defined geographical area on same page and page 81 Appendix 2 **[**Areas**]** that also states my employee number; which identifies me personally. Work was carried out in a very prescribed way by the right of management control on evidence and witness testimony (Mr Paterson, Ms

Docherty). The rights and obligations were consistent with that of personal provision of service, including, the obligation to attend the work provided, as per my point o above and, **Ref: Cable & Wireless Plc v Muscat [2006] EWCA Civ 220 (09 March 2006) paragraphs 48 – 54** and **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1967] EWHC QB 3 (08 December 1967)** *paragraph 88, "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*

… As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind."

and **Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 (27 July 2011) paragraphs 35 – 39.**

It's clear that the Recruiters Agreement is fundamentally unfair. It is wilfully written by the Respondent to disguise an employee – employer relationship. I would question the motives of FSB doing this at the expense of legitimate individuals who are treated less fairly for undertaking activities for FSB Recruitment Ltd as an employee; it also didn't reflect the totality of the obligations of the relationship. There was an alleged right of substitution which was clearly fettered and a sham as per my points 2f, 2j, 3c and 8 above Ref **Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 (27 July 2011) paragraph 37, 37**

I would also ask the court to review Ref: **Aslam & Ors v Uber BV & Ors ET/2202550/15 and Dewhurst v Citysprint UK Ltd ET/220512/2016** in relation to this matter, I believe, therefore, that the Tribunal has jurisdiction in this matter and request that the court considers this on the merits and actual evidence and award employed status.

Claimant's Response to Respondent's Application for Expenses

At close of proceedings in this Preliminary Hearing on 13 July 2017, an application was made on behalf of the Respondent for Expenses/Cost under Rule 76(1)(a), as noted by the Employment Judge.

I don't believe that this application should succeed. This is based on:

- On 30th September 2016 @ 10:05 both the court and the Respondent received my Preliminary Hearing Agenda. Within this Agenda was a request for both a Witness Order and an estimated time for these witnesses. The Respondent, for reasons only known to them, chose not to comply with this request; albeit Mr Gardner Paterson was cited by them as a witness.

- As the court time is documented for the halting of proceedings on 6th April 2017, when Judge Garvie confirmed that the court had erred regarding this matter, it is apparent that these proceedings would have concluded on 6th April. This is also based on my time under cross-examination by Mr Hardman on 12th July 2017 as well as by Judge Garvie on 6th April 2017. Considering that I only found out about Mr Paterson's absence on the day of the hearing, as a litigant, I then had to adapt questioning that should have been for Mr Paterson. It was also confirmed that Mr Paterson was the author for the vast majority of correspondence within the bundle and that I should have a right to question him; and the further days were as a direct result of this witness not appearing.

- As well as this, as I've already highlighted, considering that new details, i.e. Mr Paterson's questioning and the 'tests' detailed by the Respondent prompted me to review and detail further information. This closing argument couldn't have been done on 13th July 2017 due to the complex nature of the case; an opinion not shared by the Respondent.

- I was presented with the Respondent's, in my view, complex and detailed closing arguments at the end of the day on 12th July. As both the court and

Respondent are aware, I had obligations which took precedence on the evening/night of 12th.

- As a written response was acceptable I don't see whether submitting it on the day or after bears any relevance. The Respondent has chosen to respond to my submissions subsequently incurring charges and the Agent was scheduled to be at court on 13th July.

Regardless of how this situation happened it is both unreasonable and fundamentally unfair for me to be penalised financially. I also don't believe that I've acted, as the Respondent suggests, unreasonably in these proceedings. Providing a written submission in a reasonable timescale, which was allowed by Judge Garvie, isn't unreasonable for a litigant in a clearly complex matter.

Regarding ability to pay, I have complied with what the court has asked. I can't simplify the bank statements any more and believe that it's reasonable that I redact personal transactions. I was in contact with the bank and the Tribunal to ensure that this was both legible and printable. The amounts paid into this one and only bank account that I have amount to my total income. It is clear to the Respondent and the court that I am unable to meet any reasonable payment schedule however, should the court decide to grant this unreasonable expenses award, I'm open to any further scrutiny to verify my personal financial situation.

With regard to outgoings I have added a monthly breakdown:

Total Income	(all bank accounts/pensions/other)	**£417.56**
Expenditure	* Approx ** Approx contribution	
Telephone/Mobile/TV/BB	**	£60
Gas/Electricity	**	£40
Child Maintenance		£28
Travel	*	£90
Food/Housekeeping	**	£75
Personal Care	*	£10
Sundries (including child access	*	£90
Total Outgoings	*	**£413**

On all of the above grounds I respectfully object to this order being granted.

Additionally and respectfully I refute the points in the Respondent's response to my submissions weren't raised as my ET1 clearly states otherwise. I would also point out that an entire section of questioning was deliberated regarding a Nominated Substitute which included and culminated in my dismissal. The Respondent also, under cross-examination, chose not to mention any of this.

Respondent's Reply to Claimant's Response to Application for Expenses

Having reviewed the Claimant's representations we consider their points relied on do not justify the Claimant's actions on 12 & 13 July, and his repeated refusal to make his submissions orally, as agreed at the closure of evidence on the afternoon of 12 July. In regard to the justifications relied on, we would make the following brief points: -

1. Had Mr Paterson given evidence at the initial hearing in April, the Claimant would have been expected to make his submissions at that time. The adjournment in April to allow for Mr Paterson to be called therefore provided the Claimant with 3 further months both to prepare to cross examine Mr Paterson, and to prepare his submissions. The reconvened hearing on 12 and 13 July was expressed for such purpose in correspondence from the Tribunal. The Claimant should therefore have been prepared, and cannot seek to rely on the earlier adjournment in April as justification for why he was not subsequently prepared in July.

2. It is simply not correct that "closing argument couldn't have been done on 13th July 2017 …". As mentioned, the 2 day reconvened Hearing had been called with the intention for submissions to be made during the time allocated. The Claimant had 3 further months in which to prepare them than if the Hearing had concluded as originally anticipated in April. There was no requirement to put them in writing and C agreed to make them orally at the conclusion of the evidence on the first day of the reconvened Hearing. The reason given the following day for not being in a position to make his

submissions was Counsel's Skeleton Argument, a document Counsel for the Respondent agreed to provide the Claimant early, so as to allow him additional time to review it. Had the Claimant not consented to make submissions orally on the afternoon of 12th July, he would not have had sight of Counsel's Skeleton at that point in time, but only later, upon exchange of Written Submissions. Were it not for Counsel's act of reasonableness in providing his Skeleton to the Claimant to consider over-night, the Claimant would have had no reason not to proceed with giving his submissions orally on 13 July, as agreed on 12 July, after the options were discussed with him, and a decision reached.

3. Regarding the Claimant's statement that the Tribunal and Respondent were aware he had obligations that took precedence on the evening of 12 July, this too is not strictly correct. The Claimant gave no reason for why he was unavailable on the evening of 12 July when discussing the approach to be taken to submissions. Indeed, it was to assist the Claimant that it was suggested the hearing reconvene at the later start time of 11.15 on the second day, to allow the Claimant further time to prepare his submissions, which the Respondent's consented to. Neither the Tribunal nor the Respondent have seen any evidence of what prevented the Claimant from being able to focus his attentions on his Claim on that evening.

4. As regard the suggestion that the Agent's charges would have been incurred for the second day in any event, this too is incorrect. Unlike Counsel, the Agent's fees are not incurred until the day. Consequently, had the Claimant not agreed to present his submissions orally on 13 July, and to do so in writing at a later date, the Agent would not have been required to remain in Glasgow for the second day, and the Respondent not incurred the costs associated with doing so.

The Claimant was warned of the potential costs consequences of refusing to give his submissions orally and provided with numerous opportunities to reconsider and to give his submissions on the day, to which he confirmed he understood, but was still not prepared to do so. He was therefore aware of the consequences and, we

can only assume, chose to act in this manner on the assumption no Award would be made against him because of his finances. However, a lack of funds does not justify or excuse a party who has acted unreasonably, and the Respondent would therefore reiterate its applications for expenses incurred unnecessarily as a consequence of the Claimant's unreasonable conduct in refusing to give his submissions orally on 13 July 2017, having agreed to do so at the close of evidence the previous day, 12 July 2017.

We confirm this email has been copied in to the Claimant in accordance with Rule 92

Claimant's response to Respondent's Further Correspondence

Further to the Respondents correspondence of 16th August. I am providing some final points to fully clarify. I didn't wish, as was intimated by Judge Garvie, for this to turn into a game of ping-pong and subsequently put additional burden on the court. I will give my final thoughts in the knowledge that this will now be a matter for the court to decide; unless otherwise asked by the court.

- It was stated in the Preliminary Hearing in April and subsequent correspondence that the closing submissions could be in writing. I wasn't aware that these submissions should have been made on the actual day; my understanding was that they could be submitted within a reasonable period at the end of the Preliminary Hearing. I will elaborate further on why oral submissions never took place on 13th July however in reading both through the correspondence and Booklets T424 and T425 I can't see anything indicating that this written submission should be immediate.

  If I'm misinterpreted or have missed this point then I can only apologise.

- As I've stated the hearing was additionally rescheduled for 12th & 13th July and the Respondent would have been present for both days; they chose to make additional comment on my closing argument.

- I never stated my reasons for not reviewing the Respondent's Skeleton Argument however I did have caring responsibilities to attend to; I was

never asked by Judge Garvie why I wasn't reviewing this on 12th July. The Respondent should, by now, be fully aware of my responsibilities as it's evidenced extensively.

- I did, on the morning of 13th, attempt to review this information and have stated my confusion around 'tests'. I informed both the court and the Respondent when I realised that this was, considering the verbal argument that I had already prepared, more complex after both Mr Paterson's questioning and aforementioned Respondent's significant Skeleton Argument.. I stated that this is, for me, a complex matter and to respond I believe that I should, as a litigant, be able to do so in a reasonable amount of time; which the court agreed. The complexity of this case was documented extensively to the court.

- I have evidenced my financial status via a Statement of Means and it's evident that I would require an extended period to pay however, at no point have I said that this is an unwillingness to pay should the court so order.

- I believe that I have acted reasonably and in accordance with the process agreed in April. I never had either the resource or the legal expertise to respond fully after additional information received on 12th July. I also believe, considering the actual court proceedings, that final submissions, for me, would be more appropriate in writing. As previously stated, as a litigant, I don't have the ability to articulate this complex matter and believed that it was in both the courts and Respondent's interest that this matter be clarified in detail.

- To reiterate, the information imparted by both Mr Paterson's questions and the Respondent's Skeleton Argument saw me adding a substantial amount to my prepared oral submission. To clarify this matter, I didn't have *"3 further months"* to prepare submissions, I had up till 11:15am from a standing start from information received on 12th July, an oral submission, I'm sure, would have been lost in translation with my attempting to put points across. I have already stated that both this 3 month period and subsequent

hearing wouldn't have happened if the Respondent had done as they had already stated they were doing with witnesses. Considering that, as has been determined, the bulk of the email correspondence from the bundle had Mr Paterson as the author. It is also fact that Mr Paterson both hired me and subsequently dismissed me retrospectively as in evidence. The Respondent hasn't offered any substantive explanation to the court regarding why this witness failed to attend in April.

- I'm also still unclear regarding the Respondent's point of *"Exchange of Written Submissions"*. This point was brought up by me when the Respondent was allowed further time to respond to my written submissions. Should this have been the case for both parties then I'm confused regarding this aspect of an expense claim.

I therefore object to the additional burden of these unreasonable costs and rely on the courts judgement in this matter.

The Law

125. Section 230 of the 1996 Act is as follows:

"230 Employees, workers etc

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

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrase "shop worker" and "betting worker") means an individual who has entered into or works under (or where the employment has ceased) worked under –

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by the individual;

and any reference to a worker's contract shall be construed accordingly."

Section 83 (2) of the 2010 Act states:-

"83 Interpretation

(2) "Employment" means-

(a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

Costs Orders, Preparation Time Orders and Wasted Costs Orders are specified in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 201 at rules 74 to 84.

In this case the respondent's application is made under rule 76 on the basis that it is submitted that the claimant acted unreasonably in not providing his closing submission to the Tribunal on 13 July 2017.

Deliberation and Determination

126. The Tribunal was grateful to the parties for providing such detailed submissions. The Tribunal concluded that it was necessary to set these out in full rather than attempt to provide a summary or precis.

127. It was apparent to the Tribunal that there was a huge dichotomy between the structure which the claimant and Ms Docherty thought operated and that which was explained applies in relation both to Mr Carr and Mr Brennan's

evidence as well as to Mr Hall's understanding of the contractual arrangements between the respondent and Membership Advisors. Messrs Carr and Brennan were very clear that they work on a self-employed basis and they run their own successful businesses, taking on what they see is sub-contracted work from the respondent to recruit new members to the FSB. It was also apparent that they are both highly successful sales people and they did not appear to encounter difficulties in reaching their targets unlike the claimant and Ms Docherty who did not seem to find it easy to recruit new members at the rate set out in the Recruiter Agreement.

128. In relation to Mr Paterson it was apparent to the Tribunal that he is also a very successful sales person and his role as an RSM for which he is employed by the respondent is one which involves him sending a considerable number of e-mails on a very regular basis to his team which, at one time, included the claimant. It may be symptomatic of previous employment experience that Mr Paterson referred to members of his team earning "wages" in one of his e-mails. Certainly, the clear impression which the Tribunal formed was that he is a very driven individual who was determined to ensure that his team achieved results which he, in turn, had to report on weekly to his Line Manager. He was able to provide details of how the region in general was performing and it was apparent from the terms of the various e-mails that he was putting considerable pressure on individuals such as the claimant and Ms Docherty to achieve their MPI targets.

129. The claimant's position in relation to Mr Paterson was that he was controlling these individuals, including the claimant at least in so far as pushing them to achieve the targets. In relation, however, to their earning capacity this was entirely dependent in terms of the Recruiter Agreement of their meeting the required MPI. If they did not do so, then they did not earn commission.

130. In relation to issues such as holidays, the Tribunal preferred Mr Paterson's evidence that he was never asked about holidays by the claimant and that, in relation to a Nominated Substitute, it does not appear that this ever occurred to the claimant as being something that he could have applied to

do or that he would have been able to do so, subject to obtaining the requisite consent.

131. There was a conflict of evidence with the witnesses in relation to the specifics of whether the claimant was, as he believed, an employee, and the respondent's position as spoken to by their witnesses and Mr Paterson, supported by the Recruiter Agreement that the claimant was self-employed. A similar point arose in relation to Ms Docherty and her evidence.

132. The Tribunal has set out the evidence of the various individuals separately since it seemed necessary to do so given Mr Carr and Mr Brennan were principally called by the respondent to appear in order to reinforce their insertion that the arrangement was one of an independent self-employed sub-contractor rather than one of employment in terms of Section 230 of the 1996 Act and/or alternatively Section 83 of the 2010 Act.

133. It is appropriate to record that the intention had been that both parties would have the opportunity address the Tribunal on their submissions at the close of the Preliminary Hearing. It had been agreed that Mr Hardman would provide a copy of his skeleton argument to the claimant on 12 July in advance of Mr Hardman addressing the Tribunal which he did on 13 July in relation to that skeleton argument. It had also been the intention that the claimant would then provide his submission to the Tribunal and it was made clear that he did not require to provide a written submission but this was a matter for him to decide how best to proceed. It therefore came as something of a surprise to the Tribunal and indeed to the respondent when the claimant made it clear on 13 July that he was not in a position to address the Tribunal either orally, having heard Mr Hardman's submission, or alternatively, by providing a short written submission. After discussion, it was confirmed that the claimant should be allowed time to provide a written submission although the respondent objected to the further delay which this would involve and also made an application for expenses, (see below).

134. In relation to the issues set out in the skeleton argument, as indicated there were some supplementary points made by Mr Hardman orally on 13 July.

135. In short, Mr Hardman indicated that in order for there to be a contract of their service or employment there required to be personal work carried out by an individual in exchange for remuneration whereby an employee agrees to provide his work and skill in the performance of a service for his employer. Mr Hardman's position here was that there was no agreement between the parties for the respondent to provide work. Therefore, there was no mutuality of obligation.

136. The next issue was whether there was sufficient control in that an individual is subject to the other' s control in sufficient degree to make that other his employer. So far as Mr Hardman was concerned, there was no control over who, when, where and how the claimant was to achieve the contractual purpose of recruiting new members to the FSB.

137. Against that, it was very clear to the Tribunal that the claimant felt he was within the control of Mr Paterson. As indicated above, it may be that Mr Paterson's default position would always be to e-mail individuals working with him whether on a self-employed or employed basis, in order to remind them of their need to achieve targets, both on a weekly or even a daily basis.

138. It was clear to the Tribunal that it was understandable why the claimant may have thought that he was within the control of the respondent in that Mr Paterson did keep very detailed track of the results both of the claimant and others in his team. Indeed, the reference to "team" which seems to be one used by him frequently in his emails and on the face of it, this does tend to suggest an employment situation. Against that, however, there was no control as to when, where or how the claimant achieved the contractual obligation to recruit 20 new members each month to the FSB. It was, however, apparent that in order to achieve the MPI targets individuals such as the claimant would have to work on a fairly full time basis every week, Mondays to Fridays as Mr Paterson's evidence was very clear that in order to achieve this target of five new members per week then at least 15 appointments were required to be set each week as the rate of accrual seemed to be about 1 new member per every three appointments.

139. The Tribunal accepted Mr Hardman's submission that there was no place of work, no uniform, no tools supplied with the exception of the MOJO tablet which was used in order to move towards a paperless system albeit it was still feasible to sign up new members using the old method of payment by credit or debit card or cheque.

140. The Tribunal was satisfied that there were no holiday arrangements, no working hours and no training apart from the initial training in Blackpool which appears to be centred on what services the FSB can offer its members.

141. On balance, and the Tribunal has to emphasise that it found this to be very finely balanced, it concluded that, based on the evidence there was no support to the contention put forward by the claimant that there was a contract of service of employment. Accordingly, Mr Hardman's submission that the claim under the 1996 Act must fail is well founded.

142. Looking at the issue in terms of the 2010 Equality Act, as Mr Hardman indicated, this has a looser definition than that which appears in the 1996 Act. However, the Tribunal has again reached the conclusion that the facts as found above do not support a contention that the claimant was an employee of the respondent.

143. In reaching these conclusions, the Tribunal gave careful consideration to the various authorities to which it was referred and, in particular, in relation to ***Pimlico Plumbers***, (see above). It noted the specific reference set out at paragraph 84 set out that the nature and degree of any right to substitute another person to perform the services is relevant as to whether the contract is one for personal service or not.

144. The Tribunal concluded that Mr Hardman was correct in his submission that there was no material restriction on the claimant's right to substitute another to recruit new members. That the claimant appeared to be unaware of this substitution right is not altered by the fact that this is clearly specified in the contract which the claimant entered in terms of the Recruiter Agreement between the parties which the claimant signed.

145. The Tribunal further noted Mr Hardman's submission in relation to ***Clarkson,*** (see above) where it was held that the circumstances there were close to the dividing line, however, in that case the claimant was not found to have been a worker.

146. The Tribunal concluded that Mr Hardman was also correct in his submission that the facts in this case are further from that dividing line although it has to say again that as indicated above it was apparent to the Tribunal that the claimant might well have thought he was within the control of the respondent given that the terms and frequency of the e-mails which he received from Mr Paterson.

147. The Tribunal concluded that Mr Hardman was correct in his submission that there was no agreement between the parties that the respondent would provide any work to the claimant and there was no obligation on the respondent to do so. The Tribunal was satisfied that there was no requirement that the claimant would work at any particular time either each week or each month. The sole requirement placed on his was to obtain the 60 new members every quarter. Further, there was no requirement that the claimant should do any work personally but rather all he had to achieve was to recruit 60 new members each quarter. He could have done so by using staff employed by him as others have done, for example, Mr Brennan to create leads to be followed up and visited in the hope some of them would agree to become members of the FSB.

148. There was no restriction on where or when a Nominated Substitute could be used, all that would be required would be to nominate such a substitute and provide minimal training, as was evidenced by Mr Carr and Mr Hall.

149. There was no restriction on the claimant working in other fields or areas, provided this was not in competition for new members being recruited for the FSB.

150. The Tribunal further noted that the claimant had accepted that he was self-employed when he signed the Agreement and that he used his own car and was not reimbursed for travel expenses and other costs.

151. The only tools he received was the MOJO computer tablet for which he required to pay either upfront or over a 24 month period. He also received free of charge 250 business cards after which he required to purchase further cards from the respondent.

152. While the claimant did not operate as a limited company or employ staff there was nothing to have prevented his having done so, as was spoken to by Mr Hall, Mr Carr and Mr Brennan the latter two in relation to their own business arrangements.

153. On the issue of attendance at training events, the Tribunal was not persuaded that this was quite as Mr Hardman would suggest given there is the reference to:-

> "shall attend all **Training** and follow all reasonable instructions or directions provided during such Training and the Recruiter shall not provide any Recruitment Services until he has attended the Initial Training"

as set out in the Recruiter Agreement at Section 5.4, (page 64). The wording there does appear to be mandatory. The Tribunal also noted that it appears that in this case the claimant started on recruitment in advance of attending the initial training in Blackpool.

154. However, in relation to work being carried out personally the Tribunal was satisfied that the respondent was not concerned and had no power to check how the claimant or other Recruiters achieved their target of 60 new members every 3 months. It was a matter for them as to how they went about recruiting new members. The claimant chose not to use the services offered by the respondent for which he would have been charged. Instead, he used an independent company called MJL (see page 136).

155. That an individual could use a Nominated Substitute was evidenced by the way in which Mr Brennan did so when he went abroad. There was no objection to his doing so from the respondent.

156. The Tribunal noted that it is clear both from the statutory provision and the authorities that, in order to establish that a tribunal has jurisdiction, the claimant must be able to demonstrate that there was a requirement for him personally to do work for the respondent and that there was a mutuality of obligation on the respondent to provide work. The Tribunal was satisfied there was no such evidence before it to support this assertion that the claimant required to do work personally nor was there an obligation on the respondent to provide him with work.

157. The only obligation placed on the claimant, as indicated by Mr Hardman, was that the claimant had to sign up 60 new members to the FSB each quarter.

158. Whether he did this or used staff employed by him to assist in this was not of concern to the respondent. There was the opportunity to nominate a substitute and to train that substitute, albeit the claimant did not appear to have realised that this was open to him to do.

159. In relation to whether there was sufficient control over the claimant, as indicated the Tribunal had some concern in relation to this given the evidence of Mr Paterson and the clear evidence of his e-mail correspondence with the claimant and others in his team.

160. Against that, the Tribunal noted that so far as Mr Paterson was concerned he had no right to discipline or deal with the claimant in any other way except to meet with him and explain that he was not meeting the targets.

161. In relation to the trappings of employment, the Tribunal concluded that the claimant was self-employed. He paid tax as such, he claimed expenses for his business, it was open him to employ staff, he had no requirement to work anywhere specific nor at particular times, albeit in order to achieve the targets, it was apparent that he required to work on an almost full time basis Monday to Friday. There were no restrictions on his taking holidays but there was no provision for sick pay and no uniform or way of identifying himself as an employee.

162. The Tribunal further concluded that there was no wage/work bargain since all that the claimant had to do was to sign up new members to the FSB in order to receive commission which was only payable as and when he recruited new members.

163. The Tribunal therefore concluded that the respondent's submission is correct in that applying the law to the above findings of fact, the claimant was self-employed rather than an employee of the respondent.

164. It is appropriate to mention that the Tribunal in reaching this conclusion took into account the very detailed written submission provided by Mr Campbell. It is also appropriate to note that it was explained by Mr McArdle in an e-mail to the Tribunal of 3 August 2017 that there were a number of points where the claimant refers to what are specified to be "a number of alleged facts which were not raised in evidence" which Mr McArdle submitted could not form part of the claimant's case.

165. The Tribunal accepted that this was correct. The example given of training sessions from third party providers was not covered in evidence to the Tribunal.

166. The Tribunal noted that the claimant had taken care to consider the detailed submissions from Mr Hardman very fully. While this was helpful the Tribunal not satisfied that the points he set out alter the conclusion which the Tribunal has reached in this case which is that the claimant was not an employee of the respondent but was self employed.

167. The Tribunal noted that the claimant referred to the Court of Appeal's judgment in *Brook Street Bureau (UK) Ltd v Patrick Dacas [2004] EWCA Civ 217*. At paragraph 69 Lord Justice Mummery noted:-

> "In dealing with cases of this kind in the future Employment Tribunals should not determine the status of the applicant without also considering the possibility of an implied contract of service and making findings of fact relevant to that issue."

In this case the Tribunal was not persuaded that there was an implied contract of service. As is indicated above, the Tribunal has noted carefully the issue of whether there was sufficient control over the claimant by his RSM Mr Paterson but even if there was a degree of control as the claimant obviously believed there was that alone is not enough to imply a contract of service rather than the claimant being a self employed contractor who had agreed to undertake the role of a recruiter in terms of the Recruiter Agreement which he signed with the respondent.

On the issue of mutuality of obligations, the Tribunal noted in Brook Street Bureau that reference was made by Mr Justice Munby at paragraph 82 as follows:

"The approach of the industry is founded on assumptions that, reduced to their simplest form, can be summarised as follows:

i) There can be no contract of employment – no contract of service- unless there is (a) mutuality of obligation as between the employer and employee and (b) "control" of the employee by the employer.

ii) There can be no mutuality of obligation in the absence of an obligation on the part of the employer to pay a wage or other remuneration.

iii) Therefore there can be no contract of service unless there is (a) an obligation on the part of the employer to remunerate the employee and (b) "control" of the employee by the employer.

iv) It follows that if the obligation to remunerate the worker is imposed on one person whilst control of the worker is vested in another, there cannot be a contract of employment with either."

Next, there is reference to the various authorities to which the Court was referred and at paragraph 86 it is put as follows:-

"86. The principle which emerges from that line of authority is most simply formulated in the statement by Longmore LJ at para [4] that

> "Whatever other developments this branch of law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment.
>
> As Elias J pointed out in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 at para [11]
>
> "The significance of mutuality is that it determines whether there is a contract in existence at all. The significant of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract
>
> I respectfully agree."

168. The Tribunal was satisfied that in this case it was not possible to conclude that there was an implied contract of service. All that the respondent provided to the claimant were post codes in which he could operate. It was for the claimant to find leads i.e. potential new members who might be interested in becoming members of the FSB. The provision of the MOJO was to ensure that new members could then be signed up electronically but alternatively the existing methods of payment of the membership fee could still be taken telephoning Head Office and their administrative staff would then be given the potential new member's credit or debit card so that payment could be made. Another option still appeared to be payment by cheque. The only other business tool provided was the initial run of 250 business cards given free of charge with subsequent cards being billable to the claimant. The provision of an email address was necessary as a means of communicating with the Membership Advisors. As indicated above, whilst the Tribunal could well understand why the claimant may have felt he was under the control of Mr Paterson as his RSM and Mr Paterson's language in many of his emails tended to support this view, there was no disciplinary procedure in place. It was for the claimant to meet his monthly and quarterly MPI targets and so on the other hand this perhaps explained some of the emails from Mr Paterson who was looking to ensure that all his team,

including the claimant, were reaching their targets. The use of terminology such as "earning wages", "the team" and that Mr Paterson is designated as a Regional Sales Manager may tend to suggest an element of control. However, even if the Tribunal reached this view that there was such control, the Tribunal was not satisfied that the requisite mutuality of obligation existed in this case given the respondent had no requirement to provide the claimant with work that he was to undertake personally. The fact that the claimant seemed not to appreciate that he could have used a Nominated Substitute does not alter the contractual position that it was open to him to have done so in terms of the Recruiter Agreement.

169. In all these circumstances, the Tribunal was not satisfied that the necessary mutuality and element of sufficient control were present.

170. It is also appropriate that the Tribunal reiterates that, in reaching its conclusion that the claimant was self-employed in this case rather than being under a contract of service and employed by the respondent, that it has done so based on the evidence given to it and, it is on the basis of applying the law to the findings of fact above, that the Tribunal has reached the conclusion that this claim cannot succeed and it is therefore dismissed.

171. The Tribunal required also to consider the respondent's detailed application for expenses and the forceful opposition from the claimant. Again, the Tribunal was grateful to the parties for their detailed submissions.

172. While the Tribunal noted all that was said by the respondent in support of their application the Tribunal was not satisfied that the claimant's unwillingness to address the Tribunal on 13 July amounted to his acting unreasonably which is the test set out at rule 76 of the 2013 Regulations.

173. The Tribunal has no hesitation in reaching the conclusion that complex issues arise in this case for determination. The Tribunal can well understand why the claimant required to have time to consider the respondent's Skeleton Argument on which Mr Hardman then addressed the Tribunal. It is also relevant to note that Mr Paterson's evidence was or considerable

assistance given he was able to comment on the contents of many of his emails.

174. The Tribunal has taken into consideration the amount of detail set out by the claimant in his closing written submission. He must have taken a great deal of time to do so given the level of scrutiny he has made to the respondent's submission. This is not something that the Tribunal considers would have been feasible to have achieved overnight on 12/13 July 2017.

175. In all the circumstances, since the Tribunal was not persuaded that the claimant acted unreasonably in failing to have a written reply available for consideration on the morning of 13 July and that the Tribunal did indicate that it would be prepared to accept written submissions, it follows that the respondent's application for expenses should not succeed and it is therefore refused. Since the application has been refused the Tribunal did not require to consider the issue of the claimant's ability to pay in terms of rule 84 of the said Regulations.

176. As already indicated above, it therefore follows, applying the law to the above findings of fact, that this claim cannot succeed and it is therefore dismissed and the application for expenses is refused.

Employment Judge: F Jane Garvie
Date of Judgment: 31 August 2017
Entered in register: 04 September 2017
and copied to parties