Case No. 2301370/2016

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **Mr C Dobbie** **CLAIMANT**

AND

Paula Felton t/a Feltons Solicitors **RESPONDENTS**
Ms C Duncan

OPEN PREMIMNARY HEARING

ON: **18th -21st September 2017**

Appearances

For the Claimant: **Mr A Ohringer, counsel**
For the Respondent: **Ms S Chan, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant was not an employee of the Respondent within the meaning set out in section 230(1) of The Employment Rights Act 1996. Accordingly he has no right to claim unfair dismissal or breach of contract and those claims are dismissed.

(ii) The Claimant was a worker within the meaning set out in section 230(3) of The Employment Rights Act 1996. His claims for unpaid wages and for detriment for making a protected disclosure shall proceed to a full hearing before a full Tribunal listed for 10 days commencing on 5th November 2018.

(iii) There will be a case management discussion by telephone on 4th December 2017 at 10.00 a.m.to make further orders for the preparation of the case to the full hearing.

REASONS

1. The Claimant claims unfair dismissal (sections 98 and 103A of the Employment Rights Act 1996), detriment for making a protected disclosure, unpaid wages and breach of contract.

2. This was a preliminary hearing to determine the Claimant's employment status and the Tribunal's jurisdiction to hear his claims. This issue was not relevant to Ms Duncan and in this Judgment references to the Respondent refer only to Ms Felton trading as Feltons solicitors. There were three issues to determine:

    a. Was the Claimant an employee as defined in section 230(1) of the Employment Rights Act 1996 ("the ERA")?
    b. Was the Claimant a worker as defined in section 230(3) the ERA?
    c. Was the Claimant a worker within the extended definition of worker in section 43K of the ERA?

3. For reasons that are unnecessary to describe here I had 11 lever arch files of documents and a further lever arch file containing witness statements. One way or another I was taken to documents in all of the numerous bundles which became unruly and difficult to manage.

4. I heard from the Claimant and, on his behalf, from the following witnesses
    a. Mr M Bodini
    b. Mr F Derosa
    c. Mrs C Dobbie
    d. Ms E Herath
    e. Mr L Jurillo
    f. Ms R Robertson
    g. Mr S Muwanguzi.

    The Claimant also produced witness statements written on his behalf by Mr A Frassoni, Mr F Hamid and Mr S Dajani, the latter two being agreed by the Respondent. I also heard from Ms Felton, the Respondent in this case. A statement made on her behalf by Mr N Clear another individual working as a Consultant for the Respondent was not challenged.

Relevant facts

5. The Claimant has had a professional relationship with the Respondent since 2010. The Respondent, Ms Felton, set up her own solicitors practice in 2010, working as a sole trader. The Claimant at that time had been called to the bar but had not undertaken pupillage. He had been doing a number of different things including running a legal translation business, through which he had been introduced to the Respondent in 2009.

6. In 2010 the Claimant approached the Respondent suggesting he could do some work for her. Between 2010 and March 2014 the Claimant did ad hoc work of a paralegal variety for the Respondent. During this period he was generally paid £50 an hour, although if the work did not result in paid work from the client he was not paid. In March 2013 the Claimant asked the Respondent if she would support his application to become a solicitor by evidencing the experience that he had gained as a paralegal with the SRA (Q597). He also proposed a consultancy arrangement with the Respondent on the basis that the Claimant would take 75% of fees which he personally billed. Although the parties are now in dispute as to the extent of the work that the Claimant did for the Respondent during this period (2010-March 2014), in October 2013 the Respondent certified to the SRA that the Claimant had done work which equated to more than 6 months full-time equivalent. In her cover letter to the SRA the Respondent confirmed to them that the Claimant had been "employed by this firm as a consultant on a part time basis since October 2010." The SRA accepted that evidence and the Claimant was admitted to the roll as a solicitor on 3rd March 2014.

7. On 6th March 2014 the parties entered into a written agreement described as a Consultancy Agreement. I accept the Respondent's evidence that the Claimant wanted to be engaged on a flexible consultancy basis and was aware of the arrangement that the Respondent had with other individuals who worked for her on a consultancy basis. Her standard arrangement was that they would be paid 40% of fees billed. Ms Felton used a Law Society standard consultancy agreement which was adapted for the parties use. She had used this agreement as a pro-forma for the engagement of other individuals who worked for her practice. The following clauses are of particular note:

   a. Clause 2 provided that the agreement would be for a period of 6 months following which the Respondent (defined as the Practice) could renew the agreement for a further 6 months at 6 monthly periods thereafter. (In fact there was never any formal renewal of the agreement but the parties continued to work together amicably until the events that led to the termination of the agreement.)

   b. **Clause 3** of the agreement dealt with remuneration and provided that the Claimant would be paid *"a consultancy fee of 40% of the fees billed which have been paid and received by the Practice net of VAT and disbursements on receipt of an appropriate invoice which will be rendered by the end of each month by the Consultant. Where the Consultant has introduced the client to Feltons the consultancy fee shall be 50%.... For the sake of clarity the Consultant is self-employed and is not an employee of the Practice and it is the responsibility of the Consultant and the Practice to obtain money on account from clients."*

c. **Clause 5** dealt with the duties and provided as follows:

5.1 *The Consultant shall perform the Consultant's Duties in a good, efficient and proper manner consistent with the standards expected of a professional person.*

5.2 "*Subject to clause 5.4 the Consultant shall be expected to work for such period as the Practice reasonably considers necessary to devote to the Practice for the proper performance of the Consultants Duties.*

5.3 The Consultant shall:

5.3.1 be required to work as and when there is work available to do and he accepts the instruction for that work

5.3.2 not be required to work:

5.3.2.1 in the case of illness or accident in which case he shall notify the Practice immediately of his illness or accident as the Practice shall reasonably require so that suitable cover can be arranged where necessary."

There was no clause 5.4.

d. **Clause 6** provided that "*The Consultant is engaged as a self-employed contractor. He is not and shall not be deemed to be an employee of the Practice for any purpose whatsoever. The termination of this agreement by the Practice or the expiry of its term without renewal shall not in any circumstances constitute or be deemed to constitute a dismissal for any purposes."*

e. **Clause 7** dealt with outside interests and provided that "*The Consultant shall not during the continuance of the Agreement be directly or indirectly concerned in any business venture of a legal nature in any capacity or manner whatsoever without the written permission of the Practice which shall not be unreasonably withheld. The Practice is aware of the Consultant's current position at Echo Sourcing Limited."*

f. Clauses 10 and 11 provided for termination without notice for cause and for termination for any other reason by one month's written notice.

g. The Consultant's Duties were defined in the First Schedule as "*To conduct the affairs of those clients of the Practice as shall be referred to him by the Practice provided always that such matters be within the reasonable sphere of competence and experience of the Consultant.*

Such other duties as the Consultant may reasonable be expected to carry out taking into account his particular skills and areas of expertise."

h. Schedule 2 contained restrictive covenants providing certain restrictions on the Claimant's practice for 12 months after the

termination of the Agreement and from soliciting clients or employees of the Practice. (The Respondent says that she only intended to restrict the Claimant from working for Child and Child, where she had previously been a partner, but that is not what the agreement provides and had she intended that to be the position she could have amended the contract accordingly.)

8. In relation to clause 5.3.1 the natural meaning of the words is that there was no obligation on the Claimant to accept any particular instruction (and no obligation on the Respondent to provide work) but that once the Claimant had accepted the instruction for particular work he was required to do it.

9. In relation to Clause 5 3.2 the Respondent contended that Clause 5.3.2 was a stand-alone clause specifically providing that the Claimant was not required to work. The Claimant says that the structure of the clause indicates only that he was not required to work in the case of illness or accident. I agree with the Claimant. The structure of the clause indicates that clause 5.3.2 is linked, and confined, to the situation in the subsequent sub clause (clause 5.3.2.1). However it also follows that this can only refer to a situation where the Claimant had already accepted an instruction (see clause 5.3.1). (It also appears that the standard pro forma had other sub-clauses setting out occasions when the Consultant would not be required to work which had been deleted.)

10. The Claimant had no set hours and no place of work. Until March 2015 the Respondent used an office in Knightsbridge as her personal office which the Claimant never attended. From March 2015 the Respondent had an arrangement with Regus whereby she could use Basil Street in Knightsbridge as her postal address, with post-forwarding and messaging services, and use of their offices for 5 hours a month for client meetings etc. Any additional hours were charged at £150 an hour. The Respondent and her consultants all therefore largely worked from home. The Claimant did attend Basil Street (which was described as a virtual office) from time to time but I accept that these occasions were infrequent.

11. At the time the Respondent had 2 other individuals working for her on similar terms. She continues to use other consultants on similar terms.

12. The Claimant was not provided with any equipment. He used his own laptop and mobile phone – although for a brief two-week period in 2014 was lent a blackberry. He paid for his own business cards which stated that he was a consultant for Feltons.

13. The Claimant began doing ad hoc pieces of work for the Respondent under the consultancy agreement in 2014. He had various other business interests. At the time that the consultancy agreement was signed he was working for Echo Solutions Ltd, drafting terms and

conditions for them – though there was no evidence that the Claimant did further work of this nature. The Claimant ran and continues to run a maths tutoring business called Richmond Maths. During the course of the agreement he also sought to set up a professional development course for managers on how to instruct lawyers and prepare for legal disputes. He advertised this on the Internet but the Claimant says that he had insufficient take up and did not run the course. He undertook a mediation for an undertaking (which subsequently became a client of the Respondent) in his own capacity for which he was paid £800. He had preliminary discussions over the purchase of a tower in Florence to turn into luxury serviced apartments but this did not materialise. He looked into the possibility about setting up a guesthouse in Thailand and in an eco-hotel in Bali. There were various other projects, including the possibility that he might be engaged on a retainer with the Malaysian Entrepreneurship Institute but this did not materialise. In other words the Claimant was actively engaged in looking for commercial opportunities to generate additional income and regarded himself as free to do so. He asked an individual S to do work for him to assist on various personal projects in 2014 (R360/R355).

14. I do not accept, as suggested by the Respondent that after March 2014 the Claimant undertook any legal work on his own account, beyond the work for Echo Solutions. All the legal work which he undertook was done through Feltons. As a solicitor with less than 3 years post qualification experience he was not entitled to practice on his own account and he did not have any arrangement with any other law firm to practice through them. Issues have arisen as to whether the Respondent had authorised the Claimant to do certain work through the Respondent (for example on his parents matter and for client TFO) but whatever the truth of the matter the Claimant was, at the least, purporting at all times to act through Feltons and invoices were eventually issued by Feltons.

15. For three months, from early June 2014 to late September 2014 the Claimant remained in Bali, where his son was born. He sought no permission from the Respondent to do this although I accept that during this period he continued to some, albeit minor, bits of work for the Respondent. He frequently travelled abroad without advising Ms Felton of his whereabouts.

16. The Respondent also says that the Claimant frequently turned down work, setting out in her witness statement (para 19) a number of instances when the Claimant was unavailable to work on matters for her clients. She has not produced documentary evidence of these occasions which the Claimant denies or does not recall. On balance I think it is probable that the Claimant did turn down some work – though perhaps not as many matters as the Respondent now suggests. In any event it is clear that he was plainly entitled, under the terms of the agreement, to turn down work if he chose to do so.

17. It was the Respondent's case that the Claimant had the right to substitute other workers for himself and that therefore he was not contracted personally to do the work. The Respondent gave evidence that as long as the work was done she did not mind who did it as long as they were competent. The Claimant could have engaged a locum. It was her evidence that the Claimant was entitled to, and did, use others as a substitute. It was not in dispute that in August 2015 the Claimant instructed another firm of solicitors to amend and serve a claim form for a client of the Respondent (client A). The Respondent also says that the Claimant used Ms Robertson and Ms Herath to cover his work but I do not accept this. I accept Ms Herath's evidence that she was engaged by the Respondent and paid by the Respondent. Her work was usually billed to and recovered from the clients but her contractual arrangement was with the Respondent and not with the Claimant. Ms Robertson did a few pieces of administrative work for the Claimant but was not a substitute for the Claimant. Plainly she could not be; she was not a solicitor.

18. The Consultancy Agreement is silent as to the right of substitution but clause 5.1 provided that "the Consultant shall perform the Consultants Duties in a good, efficient and proper manner consistent with the standards expected of a professional person". The Consultants Duties are defined in the Schedule and require him "*To conduct the affairs of the Practice as shall be referred to him by the Practice PROVIDED always that such matters shall be within the reasonable sphere of competence and experience of the Consultant."* The natural meaning of those words is that the Claimant would be required to do the work himself. There is no reference to a right of substitution or delegating matters to others. While the Claimant did delegate some administrative tasks to others (Ms Robertson or Ms Herath for example), he was expected to do the legal elements of the work himself. Using another firm to serve a claim in an isolated instance does not show that there was no requirement that the Claimant do the work personally. In practice the Claimant did do the work himself and the client care letters identified that he would be the individual who was doing the work and his charge out rate.

19. As is required by the SRA when a new client was taken on or a new matter opened the Respondent and the client would sign a client care letter setting out the terms upon which Feltons would undertake work for the client and its charges. Those letters set out who would be doing the work and explained that Ms Felton had supervisory control of all the work. The Claimant would copy letters to her. Ms Felton now says that in practice she did not really supervise the Claimant and that she trusted him as a barrister to carry out the work competently and well. This only changed in September 2015, when following a mistake made by the Claimant she was required by her professional indemnity insurers to exercise greater supervision of his work.

20. Ms Felton may have exercised a light touch in the way she supervised the Claimant. Nonetheless she held herself out to the world, and no doubt to the SRA, as having oversight of the Claimant's work. While I do not know to what extent she did supervise matters it is clear that she was copied in on significant number of communications and that she had access to the Claimant's email account. The work which the Claimant did was on behalf of Feltons and the client contracts were between the client and Feltons. The clients were invoiced by and payments were made to Feltons.

21. The Claimant was fully integrated into the Respondent's business. He was described as a member of the team on the Respondent's website and was held out as a consultant. The work that he did was mainstream to the Respondent's business.

22. The Claimant was not paid any fixed salary but was paid a percentage of the fees billed against invoices which he submitted to the Respondent. Those fees were paid gross and there was no deduction for tax. He was entitled to set his own hourly rate as long as it was not unreasonable or, if he chose, to act for a fixed fee. Although the agreement was not wholly clear on the point, where others had worked on a matter the accepted practice was that the Claimant was paid a percentage of that portion of the bill which related only to the element of the work that he personally had undertaken. If the client did not pay the bill the Claimant would not be paid. It was up to the Claimant to set his own hourly rate on any given matter or to agree a fixed fee. In one instance he agreed a Damages Based Agreement – resulting in no fee although that was against the policy of Ms Feltons practice (and resulted in some acrimony). He had no billing targets, was not required to keep time sheets and generated his own bills to the clients

23. The Claimant paid for his own annual legal practice certificate, his own business cards, and his own continuing professional development. At all times he described himself as a consultant.

24. The Claimant never asked for and was not given any paid holiday. Issues of sick pay never arose.

25. The Claimant worked on a number of matters in 2014 including some intermittent work for client A. The work for client A, however, picked up considerably in or about April 2015 when the Claimant and the Respondent agreed with the client that he would be billed for 50 hours per month. It is in dispute between the parties as to whether the Claimant actually worked the 50 hours per month billed or whether the billing arrangement was for money to be paid on account to be costed, balanced out and properly attributed at a later date. It is not necessary for the purpose of this preliminary hearing to determine this, it being the subject of a different dispute, but I do accept that the work for client A picked up substantially from April 2015 onwards and that it was the Claimant who was primarily involved with his matter.

26. In August 2015 the Claimant lodged an invalid claim form on behalf of client A and this resulted in the loss of the issue fee. A new claim form had to be issued and a 2nd issue fee of £10,000 was paid. The Claimant agreed that the £10,000 lost to the client because of the service of the invalid claim should be deducted from his wages, unless the client agreed to pay (which in the end it did). He also agreed to pay part of the lost costs.

Relevant law

Employment status

27. Section 230 (1) defines an employee as "an individual who has entered into all works under (or, where the employment has ceased, worked under) a contract of employment". Subsection 2 defined a contract of employment as "a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing." It is well established law that whether an individual works under a contract of service is a question of fact (or, more accurately, a mixed question of fact and law) for the Tribunal to decide.

28. It is also the case that the label which the parties use to describe their relationship (employed, self-employed or freelance) cannot alter the true position, although in deciding what that relationship is, the way that they have chosen to describe that relationship is relevant but not conclusive (Young & Woods -v- West [1980] IRLR 201 CA). In Ready Mixed Concrete (South East) Ltd -v- Minister of Pensions and National Insurance [1968] 2 QB 497, McKenna J stated that in order to establish a contract of employment three conditions had to be fulfilled, namely –

(i) The individual agrees that, in consideration for a wage or remuneration, he or she will provide their own work or skill in the performance of some service for his master, i.e. mutuality of obligation;

(ii) The individual agrees to be subject to the other's control in a sufficient degree to make that other master; and

(iii) The other provisions of the contract are consistent with it being a contract of service.

29. In Hall (Inspector of Taxes) -v- Lorimer [1994] IRLR 171, the Court of Appeal stated that, in determining whether an individual was an employee or a self-employed sub-contractor carrying on business on his own account, the correct approach was to have regard to all the relevant aspects of a person's work activity, none being decisive, giving such weight to each factor as was appropriate. Some factors may point to the existence of a contract of employment and others may suggest a different conclusion. Some (neutral factors) may be consistent with more than one conclusion. In considering these factors, it is not the function of the Tribunal to embark upon a

mechanical exercise of running through items on a check list to see whether certain factors are present or absent. Rather, the Tribunal should bear all the relevant factors in mind and then make an informed, considered, qualitative appreciation of the whole. In essence, the question for the Tribunal is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' The answer to this question depends on a wide range of factors.

Worker status

30. Section 230(3) of the ERA provides that "in this Act worker means (a) an individual who has entered into works under 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 on by the individual…"

31. Byrne Bros (Formworks) Ltd -v- Baird [2002] IRLR 96 was a case dealing with the status of a labour only subcontractor. In that case the Employment Appeal Tribunal gave consideration to the definition of "worker" under Regulation 2 of the Working Time Regulations 1998. (This definition is the same as the definition in section 230(3) of the ERA). In that case the EAT stated that the intention behind the Regulations was

> "to create an intermediate class of protected worker who on the one hand is not an employee, but on the other hand cannot be regarded as carrying on a business. The distinction is between individuals whose degree of dependence is essentially the same as that of employees but who do not have a sufficiently arm's length and independent position to be treated as genuinely in business on their own account. Drawing that distinction requires all or most of the considerations as arise in drawing the distinction between an employee and a self-employed sub-contractor "but with the boundary pushed further in the putative workers favour……The basic effect of limb (b) is to lower the pass mark so that cases which failed to pass the mark necessary to qualify for protection as employees might do so as workers."

31. Further guidance on the concept of a "worker can be gained from Cotswold Developments Construction Limited v Williams 2006 IRLR 181 where Langstaff J suggested that the focus is upon "whether the purported worker actively markets his services as an independent person to the world in general or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations."

32. Despite the formulation in Byrne Bros (above) which refers to individuals who cannot be regarded as carrying on a business on their own account, the Court of Appeal in Hospital Medical Group v Westwood 2013 ICR 415 made it clear that the term worker did not exclude all those who are in business on their own account (para 19).

It adopted the following test of worker status set out by Aikens LJ in the Court of Appeal in Autoclenz Ltd v Belcher 2010 IRLR 70

a. *"There are 3 requirements. Two are positive and one is negative. First, the worker has to be an individual who has entered into or works under a contract with another party for work or services*
b. *The second requirement of the statutory definition in paragraph (b) of section 230(3) is that the individual undertakes to do or perform personally the work or services for the other party.*
c. *The third requirement relates to the status of the other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services. In most cases at least, it is easy enough to recognise someone who has this status. It includes, for example, the solicitor's or accountant's clients or a customer who seeks and obtains services of a business undertaking such as from an insurance broker or pensions adviser."*

33. As to personal service in Wright v Redrow Homes (Yorkshire) Ltd 2004 IRLR 720 the Court of Appeal stated that the relevant test for personal service was not whether the parties understanding or expectation was that their work would be performed personally, but whether it was their intention that there should be an obligation to perform it personally. This is more to do with the form of their original agreement than with what actually happened in practice. In Pimlico Plumbers Ltd v Smith 2017 ICR 657 the Court of Appeal stated that *"An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may not be inconsistent with personal performance, depending upon the conditionality. It will depend on the precise contractual arrangement and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be inconsistent with personal performance."*

34. In Bates van Winkelhof v Clyde &Co LLP (2014 ICR 730) the Supreme Court distinguishes workers from truly independent contractors as follows: *"One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them.… The other kind of self-employed people who provide their services as part of a profession or business undertaking carried on by someone else."*

35. In that case Lady Hale expressed her agreement with Maurice Kay LJ in the Westwood case that there is no single key with which to unlock the words of the statute in every case. There is no magic test other than other than the words of the statute themselves. She also expressed that the concept of subordination may well be largely irrelevant. "*A small business may be genuinely an independent business but completely dependent on and subordinate to the demands of a key customer.… Equally, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other parties operation as to fall within the definition. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."*

36. Section 443K of the ERA provides an extended meaning to the term "worker" for part IV of the Act (which deals with protection for protected disclosure). The definition includes a "worker" within the meaning of section 230 (3) but also includes any individual who would fall within the ordinary definition of "worker" were it not for the requirement that he or she personally perform the work or services for the employer.

Submissions and conclusions

37. Was the Claimant an employee? The first issue was whether there was mutuality of obligation. Ms Chan for the Respondent submits that there was no mutuality of obligation. The Claimant was under no obligation to accept any work. Even on the Claimant's interpretation of clause 5.3 it was not the case that the Claimant was required to work at all times, unless he was ill. The contract provided that the Claimant only had to work if he had accepted the instruction for that work. Ms Felton had given clear evidence that, in practice, a consultant could stop working at any time even if they had accepted the instruction. In such a case she would simply give the work to another consultant. There was no obligation to offer any set amount of work or to pay any set amount in the absence of work. If the consultant was not given work he did not earn.

38. Mr Ohringer for the Claimant submits that there was mutuality of obligation. The Claimant was obliged to undertake work for the Respondent if given it and to complete that work. He further submits that if I am against him as to status in the earlier part of the

relationship, matters changed in or about April 2015 as from then on the Claimant was working a reasonable percentage of each month (50 hours) on Client A such that it might be said that there was a continuous stream of work for him to do and which he had a legal obligation to undertake. Mr Ohringer suggested that if nothing else an employment contract arose from at least that date.

39. As I have said the written agreement provided that there was no obligation to provide work and no obligation to take work if offered. Once a job was offered and accepted then an obligation arose. It matters not that Ms Felton said that she would not have enforced her rights in this respect. The fact was the agreement gave her those rights. During those periods when there was work there was mutuality of obligation. The work was intermittent at least until April 2015 with gaps in time where the Claimant was not carrying out any work for the Respondent so that in that sense the work was casual or irregular, with periods where there was no mutuality.

40. The question therefore is whether mutuality of obligation subsisted during those periods when the Claimant was not doing work for the Respondent. (This issue is sometimes described as whether the individual could be said to be working under an "umbrella contract".) Could it be inferred that the Claimant was under a legally binding obligation to make himself available for work if it was offered. Boston Deep Sea Fisheries Ltd v Wilson 1987 ICR 526.

41. I concluded that it could not be said that the Claimant was ever under such an obligation. He was not required to accept whatever work was given. The contract was clear about that and these were professional individuals who understood the arrangement. I do accept that from April 2015 the Claimant worked continuously at least part of each month on client A work, as work for that client increased. Nonetheless I did not consider that this changed the contractual position. Employment status cannot be determined solely by the amount of time that a person spends working for the putative employer. Such a formulation would be unworkable meaning that an employment contract could spring into existence at some unspecified point when work became more regular and then fall away. The issue was whether the regularity of work had changed the contractual position and in this case I was satisfied that it had not.

42. In any event, even if I am wrong about that and it could be said that there was mutuality of obligation (either from April 2015 or earlier) I would still find that the Claimant was not an employee.

43. Applying the test in Ready Mixed Concrete, once mutuality is established the next issue is whether there was degree of control consistent with an employment contract. I am satisfied that there was. It is not necessary to satisfy this limb of the definition for there to be daily supervision, particularly where the individual is a professional. (In

those cases all the degree of supervision serves to show is the degree to which the principal trusts the individual or regards him or her as competent.) The question is who is in charge and who has the ultimate right to direct how the work is carried out. White v Troutbeck SA 2013 IRLR 949. In this case Ms Felton was the owner of the practice and had duties of supervision. The Claimant was obliged to work for the Respondent "for such period as the Practice reasonably considers necessary to devote to the Practice for the proper performance of the Consultant's Duties". Clause 5.

44. However it is when one considers the third limb of the test in Ready Mixed Concrete that it apparent that the Claimant fails at this hurdle. There were a significant number of factors which were inconsistent with employment status.

a. The Claimant was free to, and did, carry out work for others at the same time as working for the Respondent.
b. The Claimant was not paid a fixed wage but was paid a percentage of the monies received by the Practice. He took the financial risk of unpaid bills by clients.
c. The Claimant was free, within reason, to set his own charges with the clients.
d. The Claimant submitted invoices to the Respondent and was paid gross.
e. The agreement entered into specifically stated that Claimant was not to be deemed to be an employee of the Respondent. These are professional people and understood the arrangement. (For the avoidance of doubt I did not regard the fact that in Ms Felton's letter to the SRA she referred to the Claimant having been "employed" by her firm as having any significance as it was clearly used in the colloquial rather than the legal sense and referred also to his being a consultant.)
f. The Claimant was not required to take on work and was not guaranteed work. Much of the work which he did undertake was self-generated.
g. The Claimant was paid gross and was aware that no deductions had been made for tax or national insurance.
h. The Claimant was permitted to work at a place of his own choosing, including abroad. He at no point had to account for his whereabouts.
i. The Claimant was permitted to work at times of his own choosing. He had no set hours or targets for billing or Chargeable time.
j. Neither side expected either holiday pay or sick pay.
k. The Claimant was provided with no equipment and paid for his own practicing certificate.

45. Some factors I regarded as neutral. These were the place of work (given that the reality was that the Respondent did not offer any individuals any place of work) and the degree of supervison. Some

factors were consistent with employment such as the fact that the work he did was integral to the business, the fact that the Claimant acted for the Respondent's clients (i.e. there was no contractual relationship between the Claimant and the clients) and the fact that he was covered by the Respondent's indemnity insurance. However,taking an evaluative approach to the whole relationship, those factors are outweighed by the many other factors which pointed in the opposite direction.

46. I am satisfied that the Claimant was not an employee for the purposes of section 230(1) of the ERA. His claims for unfair dismissal and breach of contract therefore cannot proceed.

47. Was the Claimant a worker? As set out above this question involves a different test to the test of employment status. The focus is not on mutuality of obligation but on personal service. The cases referred to above set out detailed discussions of the nature of a worker but none of the cases purport to set out a clear test which can be applied in every case and most cases are fact specific.

48. The statute involves asking 3 questions. It is accepted that the first question - did the Claimant work under a contract with another party for work or services – can be answered in the affirmative.The parties are however at issue over the second 2 questions. These are the requirement for personal service and the requirement that other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services.

49. Ms Chan for the Respondent submits that there was no personal service because there was a right of substitution and this was inconsistent with an obligation for personal service. In her submissions she says that it was open to the Claimant to ask and pay others to assist him. As an example she refers to the Claimant instructing another firm of solicitors to serve and amend a claim form for client A. This does not, however, demonstrate a right of substitution. The Claimant gave detailed instructions and the essential legal work was his. An element of permitted delegation does not detract from that essential requirement and I refer again to clause 5 and schedule 1 of that agreement. As I have set out at paragraphs 17 and 18 above, I am satisfied that the terms of the written agreement required personal service. Although Ms Felton now says "I didn't mind who did the work as long as it got done", that was not the arrangement.

50. The third issue to be determined in considering worker status relates to the status of the other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work. I accept Mr Ohringer's submission plainly supported by Bates van Winkelhof and Westwood (above), that the

issue in considering worker status is not whether the Claimant was in business on his own account (which would prevent his being an employee), but whether the Respondent could be said to be his client or customer-though plainly there will be some linkage between those 2 questions.

51. I accept that the answer to that question is no. The work that the Claimant did was for clients of Feltons and integral to the Respondent's business. Clients understood that he was part of Feltons team. He had no contract with the clients. There was no evidence that the Claimant actively marketed his services as a solicitor to others. Although he sought other sources of income, none of these were for services to other firms of solicitors and Clause 7 of the written agreement prevented him from doing so without the written permission of the Respondent, not to be unreasonably withheld. He had also undertaken to abide by restrictive covenants surviving after he left, a factor also inconsistent with (but not necessarily fatal to) the concept that Ms Felton was his client. It matters not that Ms Felton did not intend to enforce them.

52. While he was entirely free to undertake other non-legal work his other interests were more in the nature of exploiting those opportunities that he came across. I accept, as Mr Ohringer says, that this case is not dissimilar on its facts to the facts in the Westwood case - although one distinguishing feature is that Dr Westwood had agreed to provide his services as a hair restoration service exclusively to HMG, whereas the Claimant was able to provide services to other law firms with permission.

53. Nonetheless standing back and taking an evaluative approach to the relationship, I am satisfied both that Ms Felton could not be described as a client or customer of the Claimant. Accordingly he meets the three limbs of the test of a worker.

54. I find that the Claimant was a worker within the definition in section 230(3) of the ERA. He therefore has the right not to be subjected to a detriment for making protected disclosures (and does not need to rely on the extended definition in section 43K of the ERA). He also has the right to bring a claim for unpaid wages.

55. The remaining aspects of this case are currently set down for a hearing to be heard over 10 days before a full tribunal commencing on 5th November 2018. In the meantime it has been agreed with the parties that there will be a case management discussion by telephone to discuss directions for the management of the case to a hearing. This will take place on 4th December 2017 at 10 00a.m. The parties should ensure that they have co-operated in the production of an agreed list of issues, primary responsibility for its production being with the Claimant, and the Claimant should also have prepared and sent to both the Respondent a schedule setting out the amounts claimed in

these proceedings under each head of claim and with clear calculations as to how he has arrived at those amounts, giving credit for earnings since the relationship with the Respondent came to an end. Both documents should be sent to the Tribunal to arrive not later than 10 a.m. on 1st December 2017.

_____

Employment Judge F Spencer
5th October 2017