Appeal No. UKEAT/0134/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 December 2017

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR R BLAKELY — APPELLANT

(1) ON-SITE RECRUITMENT SOLUTIONS LIMITED
(2) HERITAGE SOLUTIONS CITY LTD (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW
For the First Respondent	MR THOMAS KIRK (of Counsel) Direct Public Access
For the Second Respondent	Second Respondent debarred from taking part in this appeal

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

The Tribunal erred in concluding that there was no intention to create legal relations in circumstances where there was clearly a contract of some description between the Claimant and First Respondent.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. This is an appeal against the Judgment of the Reading Employment Tribunal ("the Tribunal") that the Claimant was neither a worker nor an employee of the First Respondent (On-Site London Ltd) or the Second Respondent (Heritage Solutions City Ltd). The Tribunal rejected his claims for unlawful deductions in respect of sums that he was required to pay the Second Respondent by way of reimbursing it for employers' National Insurance contributions and also a sum of £18 per week described as a "*Management Company Margin*". There was also a claim in respect of holiday pay.

2. Heritage did not participate in the proceedings below having failed to lodge a Response to the claim. Heritage also failed to comply with an Unless Order in respect of this appeal and is therefore debarred from any further participation.

Factual Background

3. At the hearing below, the Claimant was represented by a solicitor and the First Respondent (On-Site) was represented by its Managing Director, Mr Burnett, who also gave evidence. There appears to have been a lack of proper or full disclosure of several key documents pertaining to the relationships between the parties and between On-Site and the client (Fascel Group Ltd) for which the work was undertaken. Given that those documents were not available, the Tribunal did face some difficulties in assessing all the facts of the case. However, the main facts can be summarised from the Tribunal's findings as follows.

4. The First Respondent provides recruitment services predominantly to the construction sector. Such services are provided pursuant to contracts entered into with client companies.

A The client in this case was Fascel Group Ltd which was undertaking building work at Broadmoor Hospital. As I said, there is no documentary evidence as to the terms of the contract between On-Site and Fascel.

B 5. On some contracts the First Respondent uses its own directly employed staff to provide services to clients. The evidence was that On-Site has more than 270 individuals employed under contracts of employment. However, it appears that on other contracts, the rates agreed C with clients do not enable On-Site to provide directly employed labour. In those circumstances, On-Site provides labour on a subcontracted basis; that is to say, they enter into a contract with another party, in this case Heritage, to provide the labour. Once again, the terms of this D contract between Heritage and On-Site were not available to the Tribunal.

6. The Claimant is a pipefitter. He applied to On-Site in response to an advertisement for work. On 19 January 2016, he received a text message saying that three pipefitters were E required for building work at Broadmoor Hospital. The text confirmed the name of the main contractor and the address. The Claimant also received a text telling him to contact Heritage for payment and was given a telephone number for that purpose. No one explained the precise F nature of the proposed working arrangement to the Claimant before he commenced.

7. On-Site purported to send a letter to the Claimant dated 20 January 2016. The Claimant G did not receive this letter. This letter provides:

> **"Dear Mr Blakely,**
>
> **We are pleased to confirm your temporary appointment for On-Site London Ltd and would like to confirm that you have chosen to sub-contract through Heritage Solutions City Ltd, an approved supplier of construction services to On-Site London Ltd."**

H

A The letter proceeds to set out the details of the assignment, including the agreed hourly rate of £17 per hour.

B 8. The Claimant was told that he would be sent timesheets on a weekly basis. The letter says: "*These will be sent to you on a weekly basis whilst this contract continues*". He was told he would have to ensure that the client's representative enters the hours worked each day and completes the timesheet. The timesheets were to be returned to the First Respondent's

C Accounts Department by 5.30pm each Monday.

9. The Claimant was also provided with health and safety rules which had to be read and

D understood, and confirmation of that had to be provided by signing and returning copies. He was also told that a copy of his passport would be required in order to ensure compliance with immigration requirements.

E

10. The letter concluded as follows, "*Please note that failure to return completed copies of all the above forms and documentation immediately will delay your payments. Thank you for your assistance in this matter and we wish you success in this and future appointments with The*

F *On-Site Group and its Associated Companies*".

11. The Tribunal concluded that the word "*chosen*" in the beginning of that letter is only

G true in the sense that the Claimant had chosen to accept the appointment. The Claimant had no choice but to accept the appointment on anything other than the subcontracted basis.

H 12. The Claimant commenced working at the Broadmoor site as a pipefitter on 20 January 2016. He received payslips. Each payslip is headed "*Heritage PAYE*". The payslip describes

A the Claimant as an "*Employee*" and identified deductions made under the heading "*Costs*". These deductions included "*HMRC Payment NIERS*", "*Expenses*", "*Management Company Margin*" and "*Retained Holiday Pay*".

B

13. The Claimant started to correspond with his Trade Union a short time into his engagement because he had been sent a draft contract by the Second Respondent (Heritage) and he was unhappy with the proposed terms. He queried the deductions being made for C employer's National Insurance contributions and the Management Company Margin. The draft contract was never signed by the Claimant. In correspondence with his Union, the Claimant described himself as being unhappy at having to pay two lots of National Insurance and states D that Heritage threatened to withhold his wages if he did not sign the contract.

14. The Tribunal found that the arrangement under which the Claimant was working was not clear to him. However, notwithstanding that lack of clarity, the Tribunal found that he had: E

> **"37. … accepted the arrangement whereby he was paid £17 per hour … by Heritage, which the parties describe as an umbrella company, and consented to pay Heritage a management fee and also to refund to them national insurance contributions which they presumably pay to HM Revenue & Customs under some scheme approved by HMRC for the management of the tax affairs of temporary staff. He consented to continue with this arrangement because he thought it financially worthwhile because of the ability to offset expenses against tax."**

F

There was no evidence before the Tribunal about any such HMRC scheme.

15. The Claimant continued to work at Broadmoor, effectively under protest, until 20 May G 2016 when he went on holiday. The Respondents claim that the Claimant simply did not turn up for work, but neither of them sought to contact the Claimant to find out what had happened or to discipline him for non-attendance. The Claimant contacted the First Respondent on 3 June H whilst on holiday and was told upon his return that the client did not need any further

operatives. It is in these circumstances that the Claimant brought his claim for unlawful deduction of wages and failure to pay for accrued holiday.

The Tribunal's Conclusions

16. The Tribunal found that there was no contract at all between the Claimant and On-Site. It accepted On-Site's case that, for financial reasons to do with the commercial realities of the contract with the client, On-Site was only looking for subcontracted labour for this job. The Tribunal found that On-Site had no intention to enter into legal relations with the Claimant. It also concluded that the arrangement does not seem to have been a sham, although no reasons are given as to why that conclusion was reached.

17. On the basis that there was no contract, the Tribunal went on to conclude that the Claimant was not therefore a worker with On-Site within the meaning of section 230 of the **Employment Rights Act 1996** or regulation 2 of the **Working Time Regulations**.

18. The Tribunal did, however, conclude that there was a contract between the Claimant and Heritage. However, the Tribunal also found that the Claimant was not a worker in that case because he was "*not providing work for Heritage in any meaningful sense since they appear to have had no obligation to Fascel*" (paragraph 46).

19. The Tribunal's main conclusions are set out in paragraphs 43, 44, 45, 50 and 51:

> **"43. I have come to the conclusion on the balance of probabilities that the claimant did not enter into a contract with On-Site. I do not forget that the letter which the claimant did not receive (but which evidences On-Site's intentions) describes a "temporary appointment for On-Site London Ltd". However it was not received by the claimant. He was directed to work at Broadmoor for Fascel and told he would be paid by Heritage. Most of his communications about work related matters were through Heritage (the exception being his assertion that he was covered by the Agency Workers Regulations which does not appear to have been pursued). It is clear that, for financial reasons to do with the commercial realities of the contract between On-Site and Fascel that On-Site looked for sub-contracted labour for this job. They had no intention to enter into legal relations with the claimant. I accept their**

evidence on this, the arrangement does not seem to me to have been a sham (in the sense that the true arrangement was something different).

44. This deals with the claim by the claimant against On-Site. It is a necessary pre-condition of a finding that the claimant was a worker that there was a contract between the parties. The claimant was therefore not a worker of On-Site as defined in s.230(3) ERA or reg.2 WTR.

45. I have come to the conclusion on the balance of probabilities that there was a contract between the claimant and Heritage. Heritage may have intended the standard terms at page C66 to govern that relationship but they did not because Heritage sought to introduce them after the relationship had begun and the claimant did not agree to the changes they made.

…

50. I have reached the conclusion that the contract between the claimant and Heritage was not one by which he undertook to perform personally any work or services for another party to the contract who was not a client of a business operated by the claimant. The claimant could not be said, by attending and working at Broadmoor Hospital, to be working for Heritage in any meaningful way. More to the point, although this working arrangement was new to the claimant, he very quickly understood that he was able to set the expenses of travelling to work against tax and he knew that Heritage were the payroll company through which this was arranged. It was when that trade off, accepting the management company margin and refunding NIERS for the ability to offset expense, was no longer available that he concluded that the bargain he had made was not sufficiently advantageous to him. I draw that conclusion from the letter on page C39 where he said that the expenses offset was "the attraction for putting up with having to pay employers Nat Ins (£67.54) and also a weekly charge". I conclude that since he put up with that arrangement he agreed to it (while not fully understanding it and not liking it) but when the tax provisions changed it was no longer an arrangement which suited him.

51. Heritage's draft standard terms and conditions did not apply to this contract and therefore I do not have to consider whether the provisions in them concerning the provision of a substitute actually reflected the arrangement between the parties. This working arrangement did not last very long and was set up entirely informally because neither On-Site nor Heritage ensured that the administration which ought to have been a precursor to the claimant starting was done up front. I have concluded that the contract between Heritage and the claimant was for Heritage to provide to the claimant payroll, tax accounting and insurance services to the claimant in exchange for a fixed fee. The claimant was not a worker of Heritage within the definitions found in s.230(3) ERA or reg.2 WTR."

The Grounds of Appeal

20. Mr Brittenden, who appears for the Appellant today, clarified the grounds of appeal and stated that there were four. The first was that the Tribunal erred in relation to its conclusion that there had been no intention to enter into legal relations with the Claimant. The second was in respect of the finding that there was no undertaking to provide work or services personally to either On-Site or Heritage. The third ground was that the Tribunal erred in its approach in failing to identify any business undertaking of the Claimant in respect of which either On-Site or Heritage were a customer or client. Ground 4 was that the Tribunal failed to apply the

correct approach having regard to **Autoclenz Ltd v Belcher & Others** [2011] UKSC 41 in assessing the reality of the situation as compared to the written terms.

The Law

21. Section 230 of the **Employment Rights Act 1996** provides:

> **"(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" … 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 on by the individual."**

These provisions are mirrored in regulation 2 of the **Working Time Regulations** and I do not repeat those here. It is not in dispute that this was a limb (b) case; that is to say a "worker" case under section 230(3)(b).

22. The questions for determination for the Tribunal therefore were:

(1) Whether there was a contract at all;

(2) Whether, if there was a contract, there was an agreement to provide work or services personally to the other party; and

(3) Does the exception applicable to services being provided to a client or customer where the individual is operating the business undertaking apply?

23. I was taken to several authorities. The first of these was **Byrne Bros (Formwork) Ltd v Baird & Others** [2002] ICR 667, a decision by Mr Recorder Underhill QC (as he then was), where it was held as follows:

"11. In our view it is plain that the contracts do require the applicants personally to perform work or services for the contractors [Byrne Brothers]. As a matter of common sense and common experience, when an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. In our view that consideration is admissible as part of the factual matrix. But even if that were not so, the same understanding can be clearly inferred from the documents. Declaration (c) carries a clear implication to that effect; and we agree with Mr Hogarth that clause 13, which concerns the use of additional or substitute labour, only makes sense against the background of an understanding that, subject to its provisions, the services are to be provided by the subcontractor personally.

…

16. It may be convenient here to set out again the essential terms of the definition in regulation 2(1):

> **" 'worker' means an individual who has entered into or works under … (b) any other contract … 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."**

The structure of limb (b) is that the definition prima facie extends to all contracts to perform personally any work or services but is then made subject to the clumsily-worded exception beginning with the words "whose status is not". The question is whether the contract between the applicants and [Byrne Brothers] falls within the scope of that exception.

17. We were referred to no authority giving guidance on that question; and we accordingly spell out our approach to it in a little detail, as follows.

(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the applicants do not carry on a "profession" in the ordinary sense of the word; nor are [Byrne Brothers] their "clients".

(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" tout court; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the 1998 Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.

(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in sense intended by the Regulations - given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship - see below - but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.

(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services - but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see *Carmichael v National Power plc* [1999] ICR 1226, especially per Lord Hoffmann at pp 1234-1235.

(7) We should add for completeness that, although the 1998 Regulations are of course based on the Working Time Directive, we were referred to no provision of the Directive nor any case law of the European Court of Justice which sheds any light on the present issue. The Directive does not contain any definition of the term "worker".

18. Self-employed labour-only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the "intermediate category" created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk. They have long been regarded as being near the border between employment and self-employment: it is for this reason that their status has for many years been a matter of controversy with the Inland Revenue and has also given rise to a string of reported cases: see, eg, *Lee Ting Sang v Chung Chi-Keung* [1990] ICR 409 and *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493. Cases which "could have gone either way" under the old test ought now generally to be caught under the new test in "limb (b)". The fact that such a subcontractor may be regarded by the Inland Revenue as self-employed, and hold certificates to prove it, is relevant but not decisive. (We note that in *RG Carter Harleston Ltd v Jarvis* (unreported) 28 February 1996, this tribunal accepted, though the contrary was not argued, that a group of self-employed carpenters, paying tax under Schedule D, were "workers" for the purpose of the Wages Act 1986 (where, as noted above, the identical definition is employed).)"

24. I was also taken to the decision of the Supreme Court in **Clyde & Co LLP & Another v Bates van Winkelhof** [2014] ICR 730 where Baroness Hale said as follows:

"34. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, para 53 Langstaff J suggested:

> **"a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."**

…

39. I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in [*James v Redcats (Brands) Ltd* [2007] ICR 1006], a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making

goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in [*Hospital Medical Group Ltd v Westwood* [2013] ICR 415], 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 party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". 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."

25. The next case referred to was **Pimlico Plumbers Ltd v Smith** [2017] ICR 657:

"94. In deciding whether a worker is a limb (b) worker or falls within the second category in para 66 above, the tribunal carries out an evaluative exercise, with an intense focus on all the relevant facts: *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004, para 34. There is no single touchstone, such as whether there is a relationship of subordination of one party to another, for resolving the issue: *Bates van Winkelhof* case [2014] ICR 730, para 39. Subordination might, nevertheless, be relevant, as might be such factors as whether there are a number of discrete separate engagements, whether obligations continue during the breaks in work engagements (sometimes called an "umbrella contract"), and also the extent to which the claimant has been integrated into the respondent's business: *Windle v Secretary of State for Justice* [2016] ICR 721; *Halawi v WDFG UK Ltd (trading as World Duty Free)* [2015] 3 All ER 543 and *James v Redcats (Brands) Ltd* [2007] ICR 1006.

…

116. Having considered all those factors, the tribunal rightly stood back and asked and answered (in paras 52 and 53 of the decision) the over-arching question whether the better conclusion was that the company was a client or customer of Mr Smith's business or rather the company should be "regarded as a principal and Mr Smith was an integral part of the company's operations and subordinate to the company". In carrying out its evaluation and reaching its conclusion that it was the latter, the tribunal made no error of law or principle and did not reach a decision outside the ambit of what was judicially permissible. In that latter context, it is entitled to the respect due to a specialist tribunal carrying out that kind of evaluation: compare *Banco Santander Totta SA v Cia Carris de Ferro de Lisboa SA* [2017] 1 WLR 1323, para 67."

26. I was then taken to the case of **Autoclenz Ltd v Belcher & Others** [2011] ICR 1157:

"29. However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in [*Consistent Group Ltd v Kalwak* [2007] IRLR 560] and of the Court of Appeal in [*Firthglow Ltd (trading as Protectacoat) v Szilagyi* [2009] ICR 835] and in this case to that of the Court of Appeal in *Kalwak*. The question in every case is, as Aikens LJ put it [2010] IRLR 70, para 88, quoted above, what was the true agreement between the parties. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak*, of Smith and Sedley LJJ in *Szilagyi* and this case and of Aikens LJ in this case.

30. In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of looking at the reality of the obligations and in para 58 to the reality of the situation. In this case [2010] IRLR 70 Smith LJ quoted (at para 51) para 50 of her judgment in *Szilagyi*:

> **"The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by."**

…

> **32. Aikens LJ stressed at paras 90-92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in the *Szilagyi* case and in paras 47-53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties.**
>
> **…**
>
> **34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:**
>
> > **"I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so."**
>
> **35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."**

27. I was also taken to extracts from *Harvey* and *IDS Briefs* which confirmed that the first issue is whether or not there is a contract of sorts between the worker and employee. Paragraph 1.12 states that:

> **"In order for a contract to exist, several conditions must be satisfied. There must be an agreement (usually consisting of an offer that is then accepted) made between two or more people; the agreement must be made with the intention of creating legal relations; and it must be supported by consideration - i.e. something of benefit must pass from each of the parties to the other. …**
>
> **A contract will only exist if the parties had the necessary intention to create legal relations. …"**

Submissions

28. Mr Brittenden submits that in relation to the question of whether or not there was a contract, the Tribunal's analysis was inadequate and deficient. He says that it was wrong to focus on the intention of the parties and even then, to focus on only one of the parties, in order to determine the question and it ought to have considered the matter objectively. He said the Tribunal failed to apply the intense focus to the facts required by the authorities. He submits

A that the Tribunal failed to consider or apply essential guidance given to Tribunals as to the question of employment or worker status.

B 29. He also submits that in many cases the intention, or the lack thereof, to create legal relations cannot be determinative in a case where a party may be seeking to avoid incurring liability in connection with basic employment rights.

C 30. In relation to ground 2, Mr Brittenden says there is no suggestion from On-Site that there was no personal service in this case; that was not the basis on which the matter was defended below.

D 31. In relation to ground 3, Mr Brittenden contends that having found there was a contract between Heritage and the Claimant, the Tribunal failed to make key findings as to that contract. In particular, it failed to answer three important questions: namely, whether the Claimant was E carrying on a business or undertaking, if so who was his client or customer, and why it was found that that person was his client or customer?

F 32. Finally, in relation to ground 4, he says that there was a clear failure to take the approach required by the decision in **Autoclenz** particularly in light of the spurious references in the unsent letter to the Claimant having "chosen" to subcontract. The Tribunal should have G been on notice that this was, in reality, an arrangement that was not reflected by the written terms and that it was incumbent upon the Tribunal to undertake an analysis of all of the circumstances to determine the true nature of the relationship.

H

33. The First Respondent (On-Site) was represented today by Mr Thomas Kirk of counsel. He did not appear below. I have been assisted by his input and the clarity of his submissions. His principal contention was that the Tribunal made a clear finding of fact, that the Claimant did not enter into a contract with the First Respondent and that that finding has not been challenged in the Notice of Appeal, and that, in those circumstances, unless it can be said that the Tribunal's conclusion is perverse, it is not open to this Court to intervene. Given that unchallenged finding, he submits it was not necessary for the Tribunal to go on to consider the matters forming the subject of the remaining grounds of appeal because these are predicated on the existence of a contract between the Claimant and the First Respondent.

34. He submitted that the Claimant's arguments ignore the critical finding that there was no contract at all and it is emphasised that there was no suggestion below that there was some sort of implied contract between the Claimant and On-Site. I shall refer to other submissions made by Mr Kirk in dealing with the grounds below.

Discussion

Ground 1

35. I deal first with Mr Kirk's contention this is not properly the subject of the grounds of appeal. He submitted that none of the grounds, or any of the skeleton argument, seeks to challenge the finding that there was no contract at all. However, paragraph 11 of the Notice of Appeal says that:

> **"11. The ET erred in law and/or misdirected itself when it concluded at paras 23 and 43 that '*[R1] had no intention to enter into legal relations with the [appellant]*' as somehow being determinative of the jurisdictional issue. This is irrelevant …"**

36. Whilst that paragraph does not expressly challenge the finding of fact that there was no contract at all, it does directly challenge one of the factors, indeed the only factor, that the

Tribunal identified for coming to that conclusion, namely the absence of any intention to create legal relations. Given that without such intention there could not be any contract, I consider that the challenge to the Tribunal's finding as to the contract is encompassed by the challenge set out at paragraph 11 of the Notice. At any rate, if the Respondent is correct that there was a misdirection of law on the question of intention, then the finding that there was no contract could not stand on its own.

37. Turning to the substance of the appeal, in my judgment, the Tribunal did err in concluding that there was no intention to create legal relations. There are several reasons for this. In the first place, the context was clearly a commercial one of an individual seeking work for which he would expect to be paid. This is not a family or domestic arrangement where there might be some presumption against there being any intention to create legal relations. The Claimant would expect that if he was not paid for work done, there would be some legal recourse.

38. Although the Tribunal found that the letter dated 20 January 2016 was not received by the Claimant, it did not consider properly or at all whether the limited communications that did arrive before he commenced work were sufficient to indicate the existence of a contract. Thus, there was an advertisement for work setting out hours and rates of pay and location. There was an expression of interest by the Claimant. There was a text confirming the location of work and the name of the client. There was also information as to whom he should contact for payment purposes. It seems to me that that is more than ample to indicate that there was an agreement of some sort. Clearly, the Claimant was agreeing to provide services or work in return for pay. The only other party with whom there had been any communication at that stage was On-Site.

A The suggestion that there was no intention for this arrangement to give rise to some enforceable obligation cannot be accepted.

B 39. Whilst the letter of 20 January was not received by the Claimant, the Tribunal did conclude that it was evidence of the intention of On-Site in relation to the Claimant at the relevant time; see paragraph 21 of the Reasons. That was undoubtedly correct. However, the Tribunal then seems to have disregarded several features of the letter which clearly point to there being obligations going both ways as between the Claimant and On-Site. Thus, the letter talks about confirming the "*temporary appointment*". That certainly appears to be confirmation of an arrangement to provide work. There are details as to work and rates of pay. There were obligations on the Claimant personally not to breach confidentiality, which obligations were clearly owed to On-Site. Under the heading of "*Other documents*", there was a reference to "*this contract*". In the circumstances, it is difficult to see that that could be reference to anything other than a contract between the Claimant and On-Site. There are obligations to provide documents to On-Site including the penalty of delayed or non-payment if these are not provided. Once again, these obligations are provided to On-Site. There are health and safety obligations owed to On-Site. On any reasonable reading of that letter, On-Site was seeking to enter into a contract with the Claimant pursuant to which he was required to conduct himself in a manner which complied with On-Site's policies.

G 40. The Tribunal seems to have reached its conclusion about intention without any regard to the Claimant's intentions. Any conclusions about the absence of intention to create legal relations could only have validity if it could be said that both parties shared that intention, or did not share that intention. As to the Claimant's position at the outset of the arrangement, that was the subject of a finding at paragraph 24 of the Reasons where the Tribunal said as follows:

> **"24. On the claimant's account the arrangements which marked the start of the work he did at Broadmoor Hospital were nothing if not casual. Following the two texts I refer to in paragraph 18 above he began working as a pipe fitter on 20 January 2016. As he put it "I'm unemployed. I accept the job." He does not seem to have questioned particularly deeply or at all the nature of the relationship he was being invited to enter into or with whom. On his account everything he did for the job had been through On-Site so he believed that he had been working for them. …"**

The finding that there was no intention to create legal relations is, in my judgment, inconsistent with that finding.

41. In my judgment, the conclusion that there was no intention to create legal relations is fundamentally flawed. Instead of focusing on the intentions of the employer, who might perceive an advantage in the finding that there is no contract at all, the Tribunal ought to have considered the question of contract objectively, based on an analysis of all the relevant circumstances including, but not necessarily limited to, those identified above. The result was that there was not then a full and proper analysis of the relationship between the Claimant and On-Site in order to determine whether that contract was one under which he was required to perform services personally, or whether the exception in relation to customers of an undertaking applied.

42. Mr Kirk submitted that the Judge's analysis of the commercial realities of the situation - on the one hand the commercial pressures under which On-Site operated on this engagement, and on the other the Claimant's acceptance of an arrangement which was financially beneficial to him because it enabled him to offset expenses against tax - meant that the intentions of both sides were taken into account. However, those matters do not address the fundamental issue that there was plainly some sort of contract between the Claimant and On-Site. Those commercial realities, as Mr Kirk described them, might well be relevant to the analysis of the

A nature of the contract or its precise terms, but they do not, in my judgment, undermine the view that there was a contract of some sort. Ground 1 therefore succeeds.

B 43. It could be said that is sufficient to dispose of the appeal. It is not in dispute that the first question to be answered in a limb (b) worker case is whether there is a contract. If that question has been approached incorrectly, as it has in my view, then the rest of the judgment cannot stand. Notwithstanding that, I deal very briefly with grounds 2 to 4 in case they provide C assistance in due course.

Ground 2 - Personal Service

D 44. This ground was not developed to any extent orally. In any case, the Tribunal did not go on to consider this question because of the error at the first stage of the analysis; that is to say whether there was a contract.

E

Ground 3 - Failure to Identify a Business Undertaking

45. This ground applies more to Heritage than to On-Site.

F

46. In respect of On-Site, for the reasons already explained, the Tribunal did not go on to consider that issue because of the finding that there was no contract. Had it done so, it would have needed to consider both whether the contract meant that there was an agreement to G provide services personally to On-Site and, if so, whether the Claimant was operating a business or undertaking of some sort of which On-Site was a customer. Those are questions of fact that remain to be considered.

H

47. As regards Heritage, the Tribunal clearly found that there was a contract between the Claimant and Heritage. However, it is less clear what the terms of that contract were. The Tribunal did not accept that the letter from Heritage sent out in March 2016, some time into his engagement at Broadmoor, could evidence the terms at the outset of the engagement as the terms were not accepted by the Claimant.

48. The Tribunal did say the following as to the contract with Heritage:

> **"46. The payslips describe the claimant as an employee. On the other hand, he was not providing work for Heritage in any meaningful sense since they appear to have had no obligation to Fascel. The claimant paid Heritage a sum of £18 per week to provide him with payroll services, to administer his tax and national insurance and to provide him with public liability insurance. His understanding of the basis of his engagement was, understandably, unsophisticated. I can fully understand why, given that he had generally been directly employed in the course of his career and given that he was anxious not to be unemployed, he embarked on this arrangement without considering the niceties of the arrangement he was being offered.**
>
> **…**
>
> **50. I have reached the conclusion that the contract between the claimant and Heritage was not one by which he undertook to perform personally any work or services for another party to the contract who was not a client of a business operated by the claimant. The claimant could not be said, by attending and working at Broadmoor Hospital, to be working for Heritage in any meaningful way. More to the point, although this working arrangement was new to the claimant, he very quickly understood that he was able to set the expenses of travelling to work against tax and he knew that Heritage were the payroll company through which this was arranged. It was when that trade off, accepting the management company margin and refunding NIERS for the ability to offset expense, was no longer available that he concluded that the bargain he had made was not sufficiently advantageous to him. I draw that conclusion from the letter on page C39 where he said that the expenses offset was "the attraction for putting up with having to pay employers Nat Ins (£67.54) and also a weekly charge". I conclude that since he put up with that arrangement he agreed to it (while not fully understanding it and not liking it) but when the tax provisions changed it was no longer an arrangement which suited him.**
>
> **51. Heritage's draft standard terms and conditions did not apply to this contract and therefore I do not have to consider whether the provisions in them concerning the provision of a substitute actually reflected the arrangement between the parties. This working arrangement did not last very long and was set up entirely informally because neither On-Site nor Heritage ensured that the administration which ought to have been a precursor to the claimant starting was done up front. I have concluded that the contract between Heritage and the claimant was for Heritage to provide to the claimant payroll, tax accounting and insurance services to the claimant in exchange for a fixed fee. The claimant was not a worker of Heritage within the definitions found in s.230(3) ERA or reg.2 WTR."**

49. The Tribunal's conclusion that the contract between the Claimant and Heritage was not one by which he undertook to perform personally any work or services for another party to the contract, appears to take an unduly narrow view of section 230 of the **1996 Act**. Under that

section, a person can be a limb (b) worker if pursuant to a contract they undertake to do or perform personally any work or services for another party to the contract. One can agree to provide services for one party by undertaking work for a third. The Tribunal's analysis, focusing as it did only on the question of which party the work was done for, seems to have excluded that possibility. Another possibility, again not considered by the Tribunal, is whether Heritage was acting as On-Site's agent in circumstances where On-Site had the agreement with the end client.

50. The Tribunal did not go on to consider whether the arrangement fell within the customer exception in section 230(3)(b) because the Claimant, on its view, fell at the earlier hurdle of establishing that he had undertaken to perform work or provide services personally. However, the Tribunal has, in my judgment, erred on that issue and as a result did not go on to consider whether the exception applied. Whilst it might appear unlikely that the Claimant was carrying on a business undertaking given the finding that he had "*generally been directly employed in the course of his career*" (paragraph 46), it does not appear to me that a final conclusion on that issue can be reached at this stage without a full analysis of the facts. Ground 3 therefore succeeds.

*Ground 4 and the **Autoclenz** point*

51. Mr Brittenden submits that having made certain findings of fact, the Tribunal failed to stand back and consider whether there was, in reality, something different at play from the written terms. I am not sure that this ground takes Mr Brittenden much further on the facts found in this case.

52. In **Autoclenz**, there were extensive written terms purporting to apply as between the parties which could be compared against the reality of what was agreed between the parties. In this case, the Tribunal did not consider that the written terms (as set out in the letter and/or draft contract) applied in either On-Site's case or indeed that of Heritage. Such written communications as did exist prior to the engagement commencing were very limited. Whether or not those terms or those communications amounted to terms of the contract, the question will be what was truly agreed between the parties, and the scope for conflict between those agreed terms and extensive written terms seems very limited indeed. Accordingly, ground 4 does not succeed insofar as it is a separate ground relied upon.

Conclusion

53. This appeal therefore succeeds. It does so primarily on the basis of ground 1, namely that the Tribunal erred in concluding that there was no intention to create legal relations. Grounds 2 and 3 also succeed, although it is right to say that the deficiencies highlighted by those grounds really arise because of the error under ground 1, certainly insofar as On-Site is concerned.

Disposal

54. That leaves the question of disposal. Mr Brittenden submits that I should proceed to decide the issue and to determine, at the very least, that the Claimant was a worker engaged by On-Site or, in the alternative, Heritage. It is the possibility of that alternative finding that renders it inappropriate, in my judgment, for this Court to decide the issue. As Mr Kirk rightly submitted by reference to **Jafri v Lincoln College** [2014] EWCA Civ 449, this Court should only take the course of deciding the issue if there is, in reality, only one possible outcome on

A the facts. That is not the case here as even Mr Brittenden accepts the Claimant could be found to be a worker of On-Site or Heritage or conceivably of both.

B 55. Whilst it can be said that there is a contract of some sort between the Claimant and On-Site, what sort exactly remains to be determined. Was it one whereby the Claimant undertook to provide work or services personally for On-Site and if so, did the exception applicable in respect of customers apply? Those are questions that will have to be determined by the C Tribunal having regard to all the circumstances: the same applies in respect of any contract with Heritage. In my judgment, this case must be remitted.

D 56. The next question is whether it should be remitted to the same Tribunal or to a freshly constituted one. The Claimant contends for a fresh start given the fundamental flaws in the Tribunal's reasoning. Mr Kirk reminds me of the guidance in **Sinclair Roche & Temperley v Heard & Another** [2004] IRLR 763. Dealing with each of the featured principles identified in E that case very briefly, my views are as follows.

57. The first is proportionality. It is right that the sums at stake are not high. However the F hearing was a short one and there is no reason why, if I were to remit the matter to a fresh Tribunal, it would take any longer to conclude than it did at the original hearing. It is unlikely that there would be a significant saving of time if the matter went back to the same Tribunal. G Passage of time? There is no real risk that the passage of time in this case is so great to say the Tribunal could not deal with it again. There is certainly no question of bias or impartiality, or indeed, any doubt as to professionalism of the Tribunal.

H

58. In my view, the deciding factor is that the Tribunal's approach to the initial question under section 230(3)(b) was fundamentally flawed. That had a knock-on consequence for the remainder of the Judgment such that even if I were to remit the matter to the same Tribunal, it would effectively have to start afresh. Accordingly, it seems to me that the better course is to remit to a freshly constituted Tribunal and that is what I order in this case.