Case No: 2300712/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Gould**

Respondent: **Daval International Limited**

Heard at: **Croydon** **On:** **19 and 20 February 2018**

Before: **Employment Judge K Bryant QC**

Representation:

Claimant: Mr J Susskind (Counsel)
Respondent: Ms L Bell (Counsel)

RESERVED JUDGMENT

1. The Claimant was employed by the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996 throughout the period of his work for the Respondent, from mid-2000 until 7 December 2016.

2. The Respondent's defence of illegality in respect of all of the Claimant's claims is made out and those claims are therefore dismissed.

REASONS

Claims and issues

1. The parties had prepared an agreed list of issues. The tribunal discussed the issues further with the parties at the start and at the end of the hearing. In broad terms the claims and issues as to liability in this case are as follows:

    1.1 Employment status:
        1.1.1 Was the Claimant an employee within the meaning of section 230(1) of the Employment Rights Act 1996 ('ERA') and, if so, for what period?
        1.1.2 If not, was the Claimant a worker within the meaning of section 230(3) of the ERA and, if so, for what period?

    The tribunal notes here that the Respondent accepts that the Claimant and the Respondent entered into a contract in 2000 and this remained the same contract throughout the period up to its termination in late 2016.

    1.2 Illegality: the parties accept that the parties entered into a contract lawfully, but the Respondent contends that the contract was knowingly performed illegally by the Claimant in that he evaded payment of tax on his earnings and that, as a result, the Claimant is barred from enforcing the contract, upon which all of his claims rely.

    1.3 Constructive unfair dismissal:
        1.3.1 Did the Respondent's withholding of pay or delay in payment amount to a repudiatory breach of the Claimant's contract?
        1.3.2 If so, did the Claimant resign in response to that breach?
        1.3.3 If so, was the Claimant's dismissal fair or unfair within the meaning of section 98 of the ERA?

    1.4 Wrongful dismissal; the tribunal notes that although this claim is not set out expressly in the list of issues agreed by the parties it is clearly raised on the face of the ET1 and was accepted by the Respondent during the hearing as being a live claim.

    1.5 Unauthorised deduction from wages: is the Claimant entitled to unpaid wages for November and December 2016?

    1.6 Holiday pay: is the Claimant entitled under the Working Time Regulations 1998 ('WTR') to pay in lieu of holiday that had accrued but not been taken at the time of termination of his contract with the Respondent?

2. The Respondent accepted during the course of the hearing that if the Claimant succeeds in establishing that he was an employee or worker at the material times and if his claims are not defeated by illegality, then he would succeed in his claims for unauthorised deductions and holiday pay, the only remaining question being the amount of payments to which he would be entitled.

3. The Respondent does not accept, however, that the Claimant was dismissed or, even if he was, that his dismissal was unfair. The employment status and illegality issues will not, therefore, fully resolve liability on the unfair or wrongful dismissal claims if those issues are both resolved in the Claimant's favour.

4. Following discussion with the parties, and in light of the likely volume of evidence and the two day listing of this case, the tribunal decided to deal with liability issues only at this stage and to 'park' remedy for another hearing if necessary.

5. As matters transpired, evidence was concluded during the two day listing and the parties were given the opportunity to make brief oral submissions. Directions were then made, with the agreement of the parties, for written submissions to be provided to the tribunal and for written replies on the law.

Evidence and findings of fact

6. At the start of the hearing the tribunal was provided with a bundle of documents in four volumes together with an agreed list of issues, agreed chronology and agreed cast list. The Claimant also produced a short written opening note.

7. The Claimant gave evidence on his own behalf by reference to a written witness statement.

8. The Claimant also relied on a short statement from a trainee at his solicitor's firm who had attended a previous hearing in this case. The purpose of the statement was to exhibit the trainee's note of evidence given at that hearing. The Respondent accepted the accuracy of the note of evidence and the witness was not called to give live evidence.

9. The Respondent called evidence from the following witnesses, each of whom gave evidence by reference to a written witness statement:

    9.1 Graham Ralph, Director of the Respondent, and more specifically Finance Director, from November 2001 until his resignation in July 2017.
    9.2 Paul Cater, who was the Respondent's Company Secretary from 2000 until his resignation on 30 June 2011.
    9.3 Brian Quick, Director of the Respondent from 2000 to date.
    9.4 Roger Beesley, Director of the Respondent from 2002 to date.
    9.5 Kevin Norville, Director and Chief Executive Officer of the Respondent from early 2016 to date.

10. In light of all the evidence heard and read by the tribunal, it has made the following findings of fact:

10.1 The Respondent was incorporated in the summer of the year 2000. It was founded by David Shotton who became its first CEO. The business of the Respondent concerns a single pharmaceutical product called AIMSPRO ('the Product'). This was originally used in the treatment of HIV/Aids but there has been, and continues to be, research into its possible use to treat other medical conditions including Alzheimer's disease and in wound healing.

10.2 The Product is produced from the blood of a specific herd of vaccinated goats in Tasmania. Serum extracted from their blood is frozen and transported from Australia to a company in Wales. It is then thawed, processed into vials and refrozen. It is then in a state that can, once thawed, be injected into patients.

10.3 The Product must be stored and transported in a frozen state at all times other than when being processed in Wales or immediately prior to use.

10.4 David Shotton had acquired the UK rights to the Product. The Respondent was founded to exploit those rights. There appears to be an issue as to whether the rights are owned by the Respondent or by another company controlled by Mr Shotton or conceivably by Mr Shotton himself. However, it is unnecessary for the purpose of this case to resolve that issue.

10.5 The Claimant is Mr Shotton's son-in-law, ie he is married to Mr Shotton's daughter.

10.6 During the early part of 2000 the Claimant and Mr Shotton discussed the possibility of the Claimant working for the Respondent once it had been established. As the Claimant accepted in evidence, he started work for Mr Shotton in about April 2000 on a self-employed basis. He then started working for the Respondent at around the time of its incorporation in June 2000; his status thereafter is one of the principal issues in this case.

10.7 At some time before 2000 the Claimant had been assisted by Graham Ralph, whose firm were Mr Shotton's accountants and subsequently became accountants to the Respondent, Mr Ralph himself becoming the Respondent's Finance Director. There was an issue between the Claimant and HMRC concerning back taxes. The sum owing had been agreed but Mr Ralph assisted the Claimant in negotiating payment terms.

10.8 As noted above, the parties accept that the Claimant and the Respondent entered into a contract which remained in force throughout the period from 2000 until its termination in late 2016. The parties also agree that the contract was never reduced into any sort of written form. Indeed, the Respondent's witnesses accepted in evidence that no one who worked or works for the Respondent, even those it accepts were or are employees, has ever been provided with a written contract of employment.

10.9 The Claimant says that before he started working for the Respondent he had a meeting with David Shotton and Mr Ralph. He says that he was told that he would be doing general driving duties and other ad hoc tasks as required. The tribunal accepts that there was a

discussion about duties and that Mr Ralph was party to that discussion.

10.10 The Claimant also says that he was told during the same discussion that Mr Ralph's firm would deal with the Claimant's pay on a PAYE basis. The tribunal does not accept that this was said. The only evidence seen by the tribunal that is in support of any mention of PAYE having been made at this meeting is a short passage in the Claimant's witness statement, which was produced more than 18 years after the event. There is, for example, no contemporaneous record of the meeting and no mention of PAYE at any time from 2000 onwards save for some payslips to which the tribunal will return below. Nor did the Claimant suggest in the email correspondence immediately prior to the termination of his contract with the Respondent, which is discussed further below but which raised the question of employment status, that Mr Ralph had told him that his firm would deal with his pay on a PAYE basis.

10.11 The tribunal also considers that a 'Confidential Memorandum' prepared by Mr Ralph in 2003 is relevant here. It was sent to Jim Shotton, who is David Shotton's brother and, even though based in the US, was the Respondent's CEO for a time in or around 2003. In the memorandum Mr Ralph sets out for Jim Shotton's benefit a short summary of the then current position with regard to payments to everyone working for the Respondent who was paid on a monthly basis. He also made a few recommendations where he felt that the current basis was open to challenge. One feature of this memorandum is that the Claimant is described as being *'paid as a self employed individual'* and another is that the general tenor of Mr Ralph's comments about various individuals suggests that it was his view that they should all be paid on a self-employed basis unless there was a good reason not to. Indeed, it seems clear from the memorandum that no one working for the Respondent at that time, ie in 2003, was paid on a PAYE basis although it was acknowledged that perhaps some of them should be. The tribunal finds that the contents of the memorandum reflected Mr Ralph's genuine views at the time and that they are inconsistent with Mr Ralph having told the Claimant at any stage that he would be paid on a PAYE basis.

10.12 This ties in with Mr Ralph's evidence at this hearing; at paragraph 17 of his statement, for example, he referred to the situation *'Where an individual had opted to be treated as self*-employed'; again, the default was that those working for the Respondent would be treated as self-employed unless there was a good reason not to.

10.13 It is also consistent with other of the Respondent's evidence, for example Mr Quick said in evidence that he considered himself to be an employee from the start of his work with the Respondent but *'they* [ie the Respondent] *insisted that I be paid through a limited company.'*

10.14 The Claimant relies on a number of payslips which were produced by Mr Ralph, or by someone in his firm, and which purport to show PAYE deductions. These are dated from May to August 2002

inclusive, from August to September 2003 inclusive and from April to June 2010 inclusive.

10.15 Before looking at the contents of the payslips the tribunal should deal with the question of what the Claimant was paid over the years of his work for the Respondent. These sums were decided, the tribunal accepts, unilaterally by David Shotton. Although there appears to have been some initial variation in amount, it is clear that the Claimant was paid on a monthly basis throughout the period of his work for the Respondent. In so far as a spreadsheet produced from Mr Ralph's firm's accounting software suggests that there were odd months when the Claimant was not paid, the tribunal finds, as Mr Ralph accepted in evidence, that this is an error in the spreadsheet rather than an accurate reflection of missing payments.

10.16 By the start of 2002 the Claimant was paid £3,300 monthly, by early 2003 this had risen to £3,800 per month and by the start of 2004 to £4,000 per month. The monthly payments increased to £5,000 in early 2010 and again to £6,000 in the latter part of 2015.

10.17 The Claimant also claimed, and was reimbursed for, expenses incurred while undertaking work for the Respondent.

10.18 He was paid monthly by direct transfer into his bank account. He never produced an invoice for any payment although he did fill in expenses claim forms. Nor was he given a payslip at the time of any payment. Payment was simply made every month in the sums indicated above. There are a number of invoices in the tribunal bundle but Mr Ralph accepts that he, rather than the Claimant, produced these and that he did so without reference to the Claimant because he thought that the Respondent's external auditors would want to see such documentation.

10.19 Turning back to the payslips, copies of which are in the tribunal bundle, it is the Respondent's case, as the tribunal understands it, that these were produced by Mr Ralph at various times to give the Claimant an illustration of what he would have been paid had he been paid on a PAYE basis. One difficulty with that explanation is that although the 2010 payslips are consistent with Mr Ralph's evidence, in that the gross sum indicated in the payslips is £5,000, the monthly sum being paid to the Claimant at that time, the two earlier sets of payslips do not include as the monthly gross payments the sums being paid to the Claimant. For example, in 2002 the Claimant was being paid £3,300 each month but the paylips give a gross figure of £4,825 and a net figure of £3,301.70 or thereabouts. The same discrepancy is seen in the 2003 payslips; the Claimant was being paid £3,800 each month but the gross sum in the paylips was £5,755 and the net sum around £3,801.60.

10.20 The tribunal finds that the Claimant's explanation for why these payslips were produced at various times is more plausible. He says, and the tribunal accepts, that he asked Mr Ralph for a few payslips whenever he needed proof of his earnings, for example for a mortgage or a loan, and Mr Ralph duly produced some payslips on each occasion. The figures included by Mr Ralph were not, however,

an indication that any payment to the Claimant had in fact been made on a PAYE basis and nor could the Claimant reasonably have concluded that they were. The net figures in the 2002 and 2003 payslips are close to, but not the same as, the sums being paid to the Claimant each month. The net figures in the 2010 payslips are nowhere near the sums being paid to him each month.

10.21 It is also of some note that the Claimant, apart from three occasions when he needed some sort of proof of earnings to satisfy lenders, did not query, over a period of over 16 years, the fact that he did not receive regular payslips or P60s or any other indication whatsoever that tax and NI were being deducted by the Respondent. That would be surprising, the tribunal finds, if he genuinely believed that that was happening.

10.22 In all the circumstances, the tribunal finds that not only did Mr Ralph not say in 2000 that the Claimant would be paid on a PAYE basis, but the Claimant must have known throughout the period of his working for the Respondent that he was not being paid net of tax and National Insurance. Not only were the payments made to the Claimant throughout the relevant period in round numbers, which of itself would be highly unusual if those payments were on a net basis, but if they had been net payments the Claimant's gross earnings would have been implausibly high. Towards the end of the relevant period, for example, the payments made to him were the equivalent of £72,000 per year. If those payments were on a net basis, the corresponding gross annual sum would have been well over £100,000. In the tribunal's judgment, the Claimant cannot have thought that, however generous his father-in-law was being in terms of pay for the work he did for the Respondent, he would have been generous to the tune of over £100,000 per annum.

10.23 The tribunal now turns to the work that was done by the Claimant for the Respondent during the relevant period.

10.24 The Respondent's business has always been run, at least when David Shotton was in post, on the basis that everyone involved would 'muck in' as and when required, including the Directors. However, for the most part the Claimant's role involved transporting the Product from the processing company's premises in Wales to the Respondent's cold storage facility and then from that facility to the Respondent's customers. He was also involved to a significant extent in organising clinical trials as and when they were in preparation.

10.25 The Claimant was given the job title 'Logistics Manager' in about 2003 and then 'General Manager: Product Distribution' in 2006. The Respondent produced a job description for the Claimant's role in 2006. This was produced by Mr Ralph. This gives his job title as 'General Manager: Product Distribution', says that he is responsible for 'All Aimspro deliveries and vehicle maintenance' and that he reported directly to the Managing Director with a 'dotted' reporting line to the Chairman.

10.26 The Claimant had a degree of autonomy in his work for the Respondent but for the most part he acted under the direction of David Shotton and/or Mr Cater. Until he left the Respondent in late 2015 it seems that Mr Shotton ran more or less every aspect of the Respondent's business as he saw fit, sometimes against the wishes of the other Directors. Mr Beesley's evidence was rather telling in this regard. When discussing whether certain actions of the Claimant had been authorised and directed by the Board, Mr Beesley denied that they had but accepted that the Claimant was effectively following the orders of his *'stupid father-in-law'* (who was CEO at the time) and that Board decisions *'didn't mean much'* as the Respondent was run as a *'one man band'*.

10.27 The Claimant also worked in accordance with standard operating procedures drafted by Mr Cater. He also recorded information, such as freezer temperatures when using the Respondent's vehicles and delivery information on despatch documents, on pro formas drafted by others within the Respondent's business. When dealing with anything out of the ordinary, such as an instruction to the processing company for a new batch of the Product, the Claimant would consult with, and seek approval from, Mr Cater before proceeding. Mr Cater repeatedly refuted in evidence that he gave 'instructions' to the Claimant (although he did accept it at one point), preferring to say that they had lines of communication, but it is clear, in the tribunal's judgment, that the Claimant regularly consulted with Mr Cater and deferred to him on matters concerning the operation of the Respondent's business.

10.28 Both parties have relied on various documents which described the Claimant in various ways. Some support the Claimant's case and others do not. There was no real consistency in the way the Claimant was described within the Respondent's organisation. For example:

10.28.1 In memoranda to shareholders dating from around 2004 and 2007 the Claimant was not included in the list of employees although he was included in the list of 'workers' (which is itself inconsistent with the Respondent's case) and it was said that his remuneration was 'variable' (which, as outlined above, it was not).

10.28.2 Internal management accounting records referred to the Claimant's remuneration as 'wages' as did various internal correspondence. The references given in the Respondent's banking records for payments to the Claimant referred to them as 'salary'.

10.28.3 Internal correspondence referred to the Claimant on at least one occasion as an 'employee' although the context was whether or not he was covered by Directors' insurance rather than whether he was an employee as opposed to self-employed.

10.28.4 Management accounts occasionally referred to the Claimant as a member of 'staff'.

10.29 However, it is clear that the Claimant was consistently held out to the outside world as an integral part of the Respondent's business. Although he did use his own private vehicle for some deliveries, the tribunal finds that for the most part he drove a company vehicle when undertaking work duties. Before the storage premises moved in late 2015 the Claimant was based in those premises and had an office there. The office was equipped by the Respondent, for example with a desk, chair, computer, filing cabinets, cold storage and so on. The freezers at the premises were alarmed and if there was a fault there was a list of the Respondent's people who could be contacted; the Claimant was one of those on the list.

10.30 The Claimant was also provided with a company credit card in his own name. He was given, and used, a company email address. He was given company business cards; the only difference between his cards and those of others was the name and job title. He was authorised to complete and sign commercial invoices on behalf of the Respondent.

10.31 Mr Ralph accepted in evidence that the Claimant was *'quite essential'* to the Respondent's business. Mr Cater accepted in evidence that the Claimant was *'part of the fabric'* of the Respondent, although he added that so were a number of others.

10.32 When work was particularly busy, the Claimant was either helped by one of the Directors or, on occasion, others were brought in to assist under the Claimant's direction. Those others were paid by the Respondent rather than by the Claimant. Similarly, on occasion the Claimant needed an extra pair of hands when working at weekends. At such times the Claimant would pay the individual in cash but would then claim this as part of his expenses and would be reimbursed by the Respondent.

10.33 Around 2006 the Respondent was granted a Wholesale Dealers Licence by the Medicines and Healthcare products Regulatory Agency ('MHRA') in relation to the Product. Before then the Respondent had only been able to supply the Product to patients under the supervision of doctors. The new licence enabled the Respondent to distribute the product on a wholesale basis. This led to a significant increase in the amount of Product being delivered.

10.34 One requirement of the MHRA before an organisation such as the Respondent will be authorised to distribute regulated products is the appointment of a 'Responsible Person'. Up until 2009 the Responsible Person was one of the Directors, Harish Dhutia, who also worked as a pharmacist.

10.35 In 2009 the Claimant completed an application form to become a Responsible Person. He was then appointed as joint Responsible Person with Mr Dhutia. Part of the form has tick boxes to indicate whether the applicant is a permanent employee or a consultant. The Claimant ticked the consultant box. He also added in a narrative box below that *'I act as a self-employed consultant on the basis that I am always available* [to the Respondent] *whenever required. …'*. The Claimant says that he completed the form in the way that he did

because he was told by Mr Cater to do so. Mr Cater denies this. The tribunal cannot see any logical reason why it would have been preferable from the Respondent's (or the MHRA's) perspective for the Claimant to portray himself as self-employed rather than as an employee in the application form. Although the tribunal accepts that there was no requirement for a Responsible Person to be employed, and indeed Mr Dhutia was not an employee, if anything it would be preferable to have an employed Responsible Person who would be available if needed to deal with MHRA inspections and the like rather than a self-employed consultant who may not be. The tribunal finds that the Claimant completed the application form in the way that he did because that was how he saw himself at that time, ie as self-employed but working exclusively for the Respondent.

10.36 Although the Claimant's workload varied to some extent depending on how many collections or deliveries were required, where deliveries were being made and whether there were clinical trials in preparation, up until early 2016 the tribunal finds that he effectively worked full time. Mr Beesley accepted in evidence that up to 2007 at least the Claimant was working about 40 hours per week. He also accepted that in 2016 the Claimant was working about 20 hours per week although for a few weeks in May 2016 that increased to about 35 hours per week. The Claimant did not work for anyone else during the period from 2000 to late 2016. The tribunal finds that the Claimant worked such hours as were required to complete the work that the Respondent needed to be done.

10.37 When the Claimant went on holiday his monthly payments continued as normal. Similarly, monthly payments continued without interruption or any change in the amount when he was off sick.

10.38 Towards the end of 2015 David Shotton resigned as CEO. There is a dispute between the parties as to whether this was because his wife was very unwell or because he had fallen out with the other Directors who would not support his plans for the Respondent. It seems that Mr Shotton wanted to pursue two clinical trials, one into the effectiveness of the Product for treating wounds that were hard to heal and the other into Alzheimer's disease, in an attempt to progress the Product to market as soon as possible, whereas the other Directors were less keen because of the expense of such trials. It is unnecessary for the tribunal to resolve that dispute. In any event, for whatever reason, Mr Shotton left the Respondent in late 2015.

10.39 In late February 2016 or thereabouts Mr Norville was appointed as a Director of the Respondent and subsequently, in June 2016, he became its CEO.

10.40 The Respondent's financial position was not good at the time of Mr Norville's appointment. He was appointed largely because of his experience in 'turnarounds', ie saving ailing businesses from insolvency and turning them around into profit.

10.41 When Mr Norville started to look into the Respondent's business he was concerned that the amount being paid to the Claimant was 'outrageous' and 'ridiculous' and that he was paid more than anyone

else apart from Mr Norville. He was also not entirely sure what the Claimant did for the Respondent. However, he had more pressing matters to deal with and so left the issue of what he felt was the Claimant's excessive remuneration for the time being.

10.42 Mr Norville met with the Claimant in April 2016. The Claimant expressed his concern that he felt sidelined and 'out of the loop' since the departure of Mr Shotton. Mr Norville said words to the effect that he did not want to lose the Claimant. Shortly thereafter Mr Cater confirmed in an email to those working for the Respondent that the Claimant should still be copied in on, and consulted in relation to, all matters within his area of responsibility.

10.43 However, Mr Norville's concerns about the Claimant's role and his remuneration remained. Although the tribunal accepts Mr Norville's evidence that he did not want to lose the Claimant, it is clear that he felt that the Claimant was being paid far too much even if he had been working full time. He felt, and described him as such in evidence, that the Claimant's role was as 'the van driver', ie to drive the van, make deliveries and keep a record of those deliveries, and that being paid £72,000 a year for that role could not be justified. He said in evidence that he was not trying to belittle the Claimant or to say that what he did was unimportant, but ultimately it largely involved moving things in the Respondent's van.

10.44 In fact, the amount of work for the Claimant to do had decreased significantly following the departure of Mr Shotton and the arrival of Mr Norville. This was not any sort of deliberate removal of work from the Claimant that was then given to someone else to do. Rather, because of the decision of the Board of Directors not to undertake the two clinical trials and because of other decisions about the way the business should be run going forward, there were hardly any deliveries of the Product that needed to be undertaken in 2016. Mr Beesley confirmed in evidence that it was not the Claimant's fault and that he had generally done a good job, it was just that there was little work for him to do.

10.45 On the morning of Friday 25 November 2016 Mr Ralph rang the Claimant and said words to the effect that the Respondent could not afford to pay him that month but that Mr Norville thought it would be sorted out the following week.

10.46 The Claimant wrote to Mr Ralph by email that same day saying that this was unacceptable and asking what the position was. Having received no reply, he wrote again by email the following Monday asking for a response.

10.47 By Friday 2 December 2016 the Claimant had still heard nothing so emailed Mr Norville that afternoon asking for payment of his 'salary' that day.

10.48 Mr Norville replied the same afternoon saying that the Claimant was a consultant not an employee and so did not get paid a salary. He said that he thought the Claimant would agree that there had been little for him to do over recent months but Mr Norville had taken the view that that was not the Claimant's fault and so had left things as

they were. Mr Norville said that in light of the Claimant's memo (which presumably meant his email) and the situation in general he would need to talk to the Claimant about his future as he was the second highest paid person in the Respondent and he struggled to justify that position even if the Claimant had been busy.

10.49 The Claimant replied the same afternoon saying that he had always worked for the Respondent as an employee. Mr Norville replied that evening, ie still on 2 December 2016, reiterating his position that the Claimant's status had not changed but he had understood that the Claimant had never been an employee.

10.50 Mr Norville's next email to the Claimant was on the afternoon of 7 December 2016 in which he said that he had been given information by Mr Ralph from which it was clear that *'the company has never followed the formalities that would be consistent with you being an employee'*, that he had never been paid on a PAYE basis, that he had never been given a contract of employment (which the tribunal notes could be said of everyone who has ever worked for the Respondent, even those it accepts were employees) and that he had even periodically rendered invoices for his services (which the Respondent now accepts is not true). Mr Norville then said that having said all that he regarded *'these matters as a technicality'* and that he very much wanted the Claimant to stay with the Respondent.

10.51 The Claimant replied the same afternoon saying that he expected to be paid his salary and asking that this be processed immediately. Mr Norville replied within 10 minutes or so saying that *'You will be treated in the same way as others and you will be paid when funds allow.'* He said that he expected the 'cash issue' to be resolved within days.

10.52 The Claimant replied a few hours later, on the evening of 7 December 2016, saying that it was his fundamental right to be paid his salary, that he had received no guarantee from the Respondent that he would be paid that week or in the near future, and that he therefore had no alternative but to treat himself as constructively dismissed.

10.53 Mr Norville replied shortly after saying that he treated the Claimant's email as termination of his contract and that he accepted that termination with immediate effect.

10.54 There is some evidence that when the Respondent had previously had cash flow problems payment to a number of individuals had been delayed. The Claimant also accepted in evidence that he had on occasion 'in the early days' been paid later than he expected and had had no warning of this. However, the Claimant's payments had not been delayed in that way for many years before 2016; he was paid by the end of each month or, occasionally, within the first day or two of the following month.

10.55 The tribunal also notes here that both parties accept that no tax or National Insurance ('NI') contributions have been paid in respect of remuneration received by the Claimant from the Respondent from 2000 to 2016. The Claimant says that this was the Respondent's responsibility and the Respondent says that it was the Claimant's

responsibility. The Claimant accepts that he did not submit any tax returns for the relevant period. He also accepts that he sold some shares during the relevant period but that share sale was not declared on any tax return.

10.56 There is also no evidence to suggest that the Claimant completed a tax return or accounted to HMRC for tax or NI in respect of earnings from the few months in 2000 during which he accepts he worked on a self-employed basis for Mr Shotton.

The parties' submissions and the law

11. The parties have both provided detailed written submissions and the Claimant has provided a written reply to the Respondent's submissions. In so far as necessary the tribunal will address the various arguments raised below, but will not repeat the parties' submissions here.

12. Both parties referred to a number of authorities in their submissions which the tribunal has taken into account; a combined list (in more or less chronological order) is as follows:

Stevenson Jordan and Harrison Ltd v Macdonald and Evans	[1952] 1 TLR 101
Ready Mixed Concrete v Minister of Pensions and National Insurance	[1968] 1 All ER 433, [1968] 2 QB 497
Western Excavating (ECC) Ltd v Sharp	[1978] IRLR 27
FC Gardner v Beresford	[1978] IRLR 63
Allders International Ltd v Parkins	[1981] IRLR 68
Hill v Mooney	[1981] IRLR 258
Cascade Aluminium Windows Ltd v Powlson	EAT/321/82
O'Kelly v Trusthouse Forte	[1984] QB 90
Stephenson & Co (Oxford) Ltd v Austin	[1990] ICR 609
Hall v Lorimer	[1994] ICR 218
Clark v Oxfordshire Health Authority	[1998] IRLR 125
Cantor Fitzgerald v Callaghan	[1999] ICR 639
Morrow v Safeway Stores	[2002] IRLR 9
Byrne Brothers (Formwork) Ltd v Baird	[2002] IRLR 96
Transco v O'Brien	[2002] ICR 721
Stringfellow Restaurants Ltd v Quashie	[2013] IRLR 99
Khan v Checkers Cars Ltd	EAT/0208/05
Omilaju v Waltham Forest London Borough Council	[2005] EWCA Civ 1493
Enfield Technical Service Ltd v Payne	[2008] ICR 1423
Clarkson v Pensher Security Doors Ltd	UKEAT/0107/09
Community Dental Services Ltd v Sultan-Darmon	[2010] IRLR 1024
Autoclenz v Belcher	[2011] ICR 1157
Dakin v Brighton Marina Residential Management Co Ltd	EAT/0380/12
Catholic Child Welfare Society v Various Claimants	[2013] IRLR 219
Atkinson v Community Gateway Association	[2015] ICR 1
Dewhurst v Citysprint UK Ltd	ET/2202512/2016

Gascoigne v Addison Lee Ltd	ET/2200436/2016
Pimlico Plumbers v Smith	[2017] ICR 657
Patel v Mirza	[2017] 3 WLR 399, [2017] 1 All ER 191
Uber BV v Aslam	[2018] IRLR 97

13. The tribunal has also reminded itself of the relevant provisions of the ERA, in particular those of sections 95, 98 and 230. It will be useful to set out here the key parts of section 230:

> ***'230 — Employees, workers etc.***
> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
> *(a) a contract of employment, or*
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
> *and any reference to a worker's contract shall be construed accordingly.*
> *…'*

Discussion and conclusions

14. The tribunal will first address the question of the Claimant's employment status. If his contract with the Respondent was not such as to give him employee or worker status then his claims will fail and the remaining issues, including the illegality defence, fall away.

Employment status

15. The first statutory question for the tribunal to answer is whether the Claimant was *'an individual who worked under a contract of employment'*, ie *'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.'*

16. The tribunal reminds itself that the exercise of determining whether a contract is a contract of service is not a mechanistic process of ticking boxes

on a checklist. Rather, the aim is to look at all the relevant circumstances before reaching a decision.

17. Having said that, there are certain features common to contracts of service and without which a finding of employment status (in the section 230(1) sense) cannot be made.

18. There have been various formulations of the legal test for identifying a contract of service in the authorities over the years. One relatively recent example is found in *Autoclenz*:

> *'18 As Smith LJ explained in the Court of Appeal [2010] IRLR 70, para 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgment of MacKenna J in* Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance *[1968] 2 QB 497, 515C:*
>
> > *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"*
>
> *19 Three further propositions are not I think contentious: (i) As Stephenson LJ put it in* Nethermere (St Neots) Ltd v Gardiner *[1984] ICR 612, 623, "There must . . . be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status:* Express & Echo Publications Ltd v Tanton *[1999] ICR 693, 699G, per Peter Gibson LJ. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see e g the Tanton case, at p 697G.'*

19. The essential requirements may be summarised as follows:

    19.1 The individual must undertake personally to perform work in return for remuneration. This is often referred to as the need for personal service. A right to substitute, ie to send someone else to undertake the work, will be inconsistent with an undertaking of personal service. Where there is a genuine right to substitute that will be inconsistent with a contract of service even if the right is not in fact exercised.

    19.2 There must be a sufficient degree of control.

19.3 There must be mutuality of obligation. The individual must be obliged to do work offered by the putative employer and the employer must then be obliged to pay the individual. There may also be an obligation to provide work to the individual.

19.4 The other terms of the agreement between the parties must also be consistent with it being a contract of service.

20. The parties accept, as noted above, that there was a contract between the Claimant and the Respondent and that the same contract persisted throughout the period from 2000 to its termination in December 2016. The starting point when answering the statutory question is one of the proper construction of that contract.

21. Whilst it is accepted that there was a contract in existence throughout the relevant period it is also clear, as found above, that none of its terms was ever reduced into writing. The tribunal must therefore seek to construe the contract from thing said by the parties and from the way in which the parties have conducted themselves. The aim remains to determine, objectively, the intentions of the contracting parties at the time the contract was entered (see, for example, *Autoclenz* at paragraph 20) but in the absence of any written terms the tribunal is entitled, indeed obliged in this case, to look at what the parties did and said to determine, again objectively, the agreement between them.

22. As noted above, the tribunal has found that both parties believed that the Claimant was self-employed. However, that subjective belief does not answer the question. It is necessary to look for objective evidence of the true agreement between them.

23. The tribunal has already made relevant findings of fact above as to how the parties conducted themselves over the years. These will now be considered in the context of the four essential requirements for a contract of service as summarised above.

24. The first requirement is for personal service. From the start the Claimant undertook to provide his own services to the Respondent. That was the essence of his conversations with Mr Shotton back in 2000 before he started working for the Respondent. He was agreeing that he himself would work for the Respondent. On occasions over the years he was given assistance to undertake certain duties but he had no right to substitute someone else to undertake those duties.

25. Indeed, it is difficult to see how there could realistically have been a right to substitute given the nature of the Claimant's principal duties. Although the Respondent, in particular Mr Norville, has described the Claimant as effectively just a van driver, the nature of the collections and deliveries he was making required a level of knowledge of the Product, of the Respondent's standard operating procedures and of the equipment used to transport it; it would not have been feasible to send someone else to do that

aspect of his role. Similarly, other aspects of his role, such as helping with the preparation for clinical trials and being on the contact list for the freezer alarm at the Respondent's cold storage facility, were not something that he could just ask someone else to do for him; they required a certain level of knowledge and experience of the Respondent's business. The tribunal finds that there was in fact no substitution during the period the Claimant worked for the Respondent and nor was there any unexercised right to substitute.

26. The next of the essential features outlined above is a sufficient degree of control. As the tribunal has already found above, the Claimant had a certain degree of autonomy in his daily work but for the most part he worked under the direction of the Respondent's Directors, principally Mr Shotton and Mr Cater. On occasions it seems that what the Claimant was doing at work was not something of which various of the Directors approved. However, it is clear that on such occasions the Claimant was acting under the direction of Mr Shotton and it does not indicate that the Claimant was not at all material times acting under the effective control of the Respondent.

27. The third essential feature is mutuality of obligation. It is the Respondent's case, as the tribunal understands it, that the Claimant could choose to work as and when he saw fit. However, the tribunal finds that in practice whenever there was work for the Claimant to do for the Respondent he did it and that he was obliged to do so. As the Respondent's witnesses accepted in evidence, the Claimant had done a good job for the Respondent but in the latter part of 2016 there was simply not much work available for him to do. The tribunal also finds that although the Respondent was not obliged to provide the Claimant with any particular amount of work it was obliged to, and did, pay him regularly and consistently throughout his period of work from 2000 to 2016.

28. The final feature is that there is no term of the contract that is inconsistent with it being a contract of service. There is no definitive checklist of the type of terms to consider in this context, although a number have been discussed in the authorities over the years. Looking at the facts of this case as found above, it seems to the tribunal that the following are relevant:

    28.1 The Claimant was paid every month throughout his period working for the Respondent. The amount was set by the Respondent without any input from the Claimant. He did not invoice for his services.
    28.2 The amount the Claimant was paid was a set amount (apart from expenses) each month. There was no element of profit-sharing.
    28.3 The Claimant took on no element of financial risk. He was paid business expenses on top of his regular monthly pay.
    28.4 Although on occasions he used his own vehicle (for which he was paid expenses), for the most part he used the Respondent's equipment such as office furniture, computer, mobile phone, van and so on.
    28.5 The Claimant worked exclusively for the Respondent.

28.6 The Claimant continued to be paid when on holiday and on sick absence. Although not referred to expressly as such, that amounted to holiday and sick pay and there was never any question of the Claimant's pay being stopped when he was absent from work for any reason.

28.7 The Claimant was an integral part of the Respondent's business. He was considered as such by the Respondent itself; the tribunal recalls here Mr Cater's comment in evidence that the Claimant was *'part of the fabric'*. He was also held out to others as an integral part of the Respondent's business, for example in the form of business cards and the company credit card.

29. The tribunal has considered the fact that on various occasions the Claimant was referred to in documentation as an employee and on other occasions as a worker or something similar that was inconsistent with employed status. However, the tribunal considered this aspect of the evidence to be broadly neutral. There was no consistency in the way that the Claimant was referred to by others in the Respondent's organisation. The tribunal has concluded that the terms used at various times are an indication of a lack of care with words and/or a lack of understanding of their meaning in a legal sense.

30. The tribunal has also considered the way in which the parties saw themselves in terms of employment status. The tribunal has already found that both parties believed that the Claimant was self-employed, at least until near the end of the contract between them. However, that cannot, in the tribunal's judgment, outweigh the other objective evidence in this case, as summarised above, as to the terms of the contract between the parties.

31. In all the circumstances, the tribunal finds that the Claimant was employed under a contract of service throughout the period of his work for the Respondent from mid-2000 to December 2016. He was therefore an employee within the meaning of section 230(1) of the ERA.

32. In light of the above finding it is unnecessary to consider the alternative arguments concerning worker status under section 230(3) of the ERA.

Illegality

33. The Claimant's claims are all predicated on his contract with the Respondent. If, therefore, that contract was illegal from the start or was performed in an illegal manner then the illegality defence may be made out and, if it is, his claims would have to be dismissed.

34. The Supreme Court, in the *Patel* case, has recently considered the illegality defence and, by a majority, has given updated guidance as to the correct approach for courts and tribunals. Essentially the two schools of thought being discussed in *Patel* (see, for example, paragraph 226, per Lord Sumption) were on the one hand that the law of illegality may require the

application of clear rules and on the other that the equity of each case should be addressed as it arose. Putting it another way (as Lord Sumption did later in his judgment) the distinction is between a rule-based approach and a 'range of factors' approach.

35. The majority of the Supreme Court (which did not in fact include Lord Sumption) favoured the 'range of factors' approach, as set out by Lord Toulson, JSC, at paragraph 120 in the following terms:

*'**[120]** The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.'*

36. Earlier in his judgment Lord Toulson had discussed the sort of factors that may be relevant:

*'**[107]** In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows's list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.*
***[108]** The integrity and harmony of the law permit—and I would say require—such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should*

they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. ParkingEye *is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract. Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate.*

[109] *The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.'*

37. In the above extract Lord Toulson referred to a list of factors suggested by Professor Burrows (in his *Restatement of the English Law of Contract* (2016) at pages 221–222) which had already been discussed earlier in his judgment:

*'**[93]** If a 'range of factors' approach were preferred, Professor Burrows suggested, at pp 229–230, that a possible formulation would read as follows: 'If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant—*

(a) how seriously illegal or contrary to public policy the conduct was;
(b) whether the party seeking enforcement knew of, or intended, the conduct;
(c) how central to the contract or its performance the conduct was;
(d) how serious a sanction the denial of enforcement is for the party seeking enforcement;
(e) whether denying enforcement will further the purpose of the rule which the conduct has infringed;
(f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
(g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;
(h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.'

Professor Burrows noted that the final factor is capable of a wider or narrower approach, depending on what one understands by inconsistency.'

38. As noted at the start of this discussion, an illegality defence can succeed either because the relevant contract was illegal from the start of because it was performed illegally. In the employment context, for example, a contract may be illegal from the day it was made if the employee in question did not have the right to work in the UK, or it may be performed in an illegal manner because an employer avoids payment of NI contributions to HMRC. In either type of case the tribunal dealing with the matter once an illegality defence is raised must now (in line with the *Patel* guidance) consider all relevant factors before deciding whether the defence is made out.

39. In this case, both parties accept that the contract between the Claimant and the Respondent was legal when first made in 2000 and there is no suggestion that that contract was terminated and replaced with a different contract at any time thereafter.

40. The Respondent's case on illegality therefore rests on a contention that the contract was performed illegally. The Respondent says that the Claimant knew throughout that he was self-employed but failed to account to HMRC for tax or NI on that or any other basis. The Claimant says that the illegality defence could only arise if he was in fact working under a contract of employment (which the tribunal has found he was) but if he was working under such a contract then the Respondent was responsible for deducting tax and NI on a PAYE basis and accounting for it to HMRC; in other words, the Claimant did nothing wrong.

41. The tribunal is unaware of any authority on this specific type of case. Generally the authorities on illegality concerning tax involve either the employer (with or without the knowledge and/or agreement of the employee) failing to deduct and/or pay PAYE tax or NI on a proper basis or the employer paying gross payments and the employee declaring income to HMRC on a self-employed basis (whether innocently or with knowledge or suspicion that this was not the correct approach) when he or she was in fact an employee. However, although the facts of no previous reported case of which the tribunal is aware are on all fours with this case, it will be of some assistance to consider previous cases in which similar tax issues have arisen.

42. This case is in some respects similar to the *Enfield Technical Service* case. In that case both claimants and their employers proceeded on the basis that the claimants were self-employed. When dismissed they each claimed unfair dismissal, contending that they had in fact been employees. Although they were correct in their assertion that they had been employees rather than self-employed, the Court of Appeal held that an error in categorisation of the relationship was not enough, without more, for an illegality defence to succeed. What was required was some sort of false representation as to the work being done or the basis on which payment is being made.

43. There is, of course, an added feature in this case in that although both parties believed that the Claimant was self-employed and he was paid on

that basis, he did not then declare his income on that (or, indeed, any other) basis to HMRC.

44. The tribunal is aware of two cases which may also be said to have raised issues similar to this case. The facts were clearly different and both cases were decided before (and in one case long before) the guidance of the Supreme Court in *Patel* but they are nevertheless of some assistance.

45. The first is *McConnell v Bolik* ([1979] IRLR 422), a decision of the Scottish EAT sitting in Glasgow. The claimant was an employed farm worker. In addition to his basic wage he was given two calves by his employer each year which he then reared and sold. He had failed to include income from the calves (which amounted to a small percentage of his total earnings) in his tax returns. The employer had been wholly unaware. When the employer discovered this, after the industrial tribunal (as it then was) had decided the claimant's unfair dismissal claim in his favour, an illegality defence was raised on appeal. The EAT dismissed the appeal, finding that the employer was not privy to the claimant's failure to declare part of his income and that it was a separate matter between the claimant and the Inland Revenue (as it then was).

46. The second case is *Quashie* in the English EAT ([2012] IRLR 536). It involved issues of both employment status and illegality. The judgment of HHJ McMullen QC was subsequently overturned on appeal on the employment status point (the Court of Appeal judgment is cited in the list of authorities above) and it was therefore unnecessary for the Court of Appeal to consider the illegality part of the EAT judgment. The material facts of the case were that the claimant had believed that she was self-employed when she first started working for the respondent and had paid tax on that basis. However, during the latter part of her work for the respondent she believed that she was in fact employed but continued to declare her income on a self-employed basis and to pay tax accordingly. The respondent was not involved in this in any way.

47. As part of her case to the EAT, the claimant contended that her relationship with HMRC was entirely separate from her contract with the respondent. This argument was rejected in the following terms:

> *'71 … Mr Hendy at one stage contended that the relationship between the Claimant and HMRC was entirely outside the contract, a matter solely between the Claimant and a third party and nothing to do with the performance of the contract. I reject that as a matter of common sense. The contract was performed by the Respondent providing the Claimant with earnings. She had to account to the Revenue for those earnings. …'*

48. HHJ McMullen QC then discussed the applicable legal principles in the following terms, before deciding that the ET in the particular case had failed

to deal with the illegality arguments sufficiently and that the matter should therefore be remitted:

'72 If there is falsehood in the representations made by the Claimant to the Revenue, it seems to me that that is a falsehood in the performance of the contract which makes it unlawful. I accept Mr Glynn's submission that illegal performance "may arise because one or both of the parties may intend to perform the contract in an illegal manner" [citing Chitty on Contracts at paragraph 16/009]. It follows that when the illegality is unknown to the innocent party the innocent party is not defeated by that illegality: Davidson v Pillay *[1979] IRLR 275 para. 4. By implication the person committing the illegality may not enforce the contract.*

73 It also seems to me that the enforcement of the right to claim unfair dismissal is integrally linked to the contract of employment: Tinsley v Milligan *[1994] 1 AC 340 HL and* Hall v Woolston Hall Leisure *[2000] IRLR 579 CA. As is clear from the foregoing part of this Judgment, in order to obtain a right to claim unfair dismissal a claimant has to succeed in her contention that she has a contract of employment. Only then may she assert the right to unfair dismissal. Thus the contract of employment, and it follows the legality of its performance, are both pre-conditions to the enforcement of the statutory right. This puts in context the statement in* Newland v Simons & Willer *[1981] IRLR 359 CA by May LJ.*

> *"We have no doubt that Parliament never intended to give the statutory rights provided for by the relevant employment legislation to those who were knowingly breaking the law by committing or participating in a fraud on the Revenue."*

74 Only one exception has been provided in the authorities to me which is McConnell v Bolik *[1979] IRLR 422 where the EAT held:*

> *"Nothing has been said to us to suggest that the appellants were in any way privy to such an arrangement and in our opinion it could never be said that where an employee without the knowledge of his employer fails to disclose to the Inland Revenue authorities in his income tax return the details of a benefit he has received this automatically makes his whole contract of service an illegal one: we therefore feel that there are no circumstances which would justify in any way a remit back for any further evidence to be heard in this case."*

75 Clearly in that case the value of the benefit was small and there would be no automatic disqualification of the Claimant's right to claim unfair dismissal by such a small indiscretion.

76 The matter was taken further in Enfield Technical Services Ltd v Payne *[2008] ICR 1431 by Pill LJ at paragraph 18 who said the following:*

> *"A contract of employment may, as the cases show, be unlawfully performed if there are misrepresentations, express or implied, as to the facts. An obvious example occurs when what is in fact taxable salary is claimed to be non-taxable*

> *expenses. That is, however, distinguishable from an error of categorisation (as in the present cases) unaccompanied by such false representations, even if the employee had claimed the advantages of self-employment before the dispute arose. I accept that there are limits to that principle and that the circumstances in which a miscategorisation is made may amount to misrepresentation and bad faith which would deprive the employee of the right subsequently to claim the benefits of employment."*

77 *This approach also follows that of Lord Mansfield CJ in* Holman v Johnson *[1775] 1 COWP 341 at 343 to the effect that the court should not lend its aid to a claimant when the cause of the claim arises from an immoral or illegal act. As Langstaff J said recently in* Zarkasi v Anindita *UKEAT/0400/11 which I drew to the attention of the parties, Lord Mansfield's observation deserves repetition.*

> *"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs' own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendants."*

78 *I prefer to base my judgment on the second of Mr Glyn's propositions, but I would observe that the circumstances in this case do fit the primary policy objection set out by Lord Mansfield. The Claimant who seeks the protection of the Employment Tribunal in the enforcement of her rights against the Respondent should pay the taxes properly due upon her earnings which themselves support the administration of the tribunal system. If she is not paying her way, why should she be entitled to free access to the administration of justice? Obviously the approach is different in a criminal jurisdiction where a defendant is summoned to a court. The Employment Judge's summary of the propositions in para 8 of her judgment above largely follows Peter Gibson LJ's in* Hall v Woolston Hall *at paras 30-32. In my view, it cannot be said the contract "from the outset" was illegal. I agree that by statute the Claimant was required to account for tax on her earnings, and not paying proper tax is prohibited by statute, but no*

wrong even on Mr Glyn's case was committed until she made representations, during the contract, to the Revenue. His policy based submission can easily be fitted into the authorities dealing with tax returns during the currency of the contract eg Newland*. I would therefore dismiss Mr Glyn's first illegality argument.*

79 Applying the above principles to his second point, a contract is performed illegally if the claimant knowingly makes false returns to HMRC on a scale above what might be described as the minor faults in McConnell*. Avoidance of tax is not in issue. Evasion of tax on the small scale in McConnell does not "automatically" bar the claimant from the courts. Miscategorisation of an item declared to HMRC would not be illegal.*

80 All of that however appears to me to be settled by the decision of the Judge to approach the issue of illegality on the second basis put forward by the Respondent. This was that there were misrepresentations to HMRC, unilaterally by the Claimant and not known to the Respondent, which made the performance of the contract illegal. A weak challenge was made to that decision by Mr Hendy QC on the basis that there was nothing during the performance of the contract which was illegal. With respect, that argument cannot survive the finding that the Claimant signed tax returns during its currency, and if it were intended to cover the signature in January 2009, I would reject it because such signature should plainly relate to matters occurring during the subsistence of the contract and as I have said above in respect of expenses were incurred during the performance of the contract.'

49. In so far as the Claimant seeks to argue that his relationship with HMRC is separate from that with the Respondent and that therefore failure to declare his earnings to HMRC does not amount to illegal performance of his contract of employment, the tribunal rejects that argument. As HHJ McMullen QC found in *Quashie*, the contract here was performed by the Respondent paying the Claimant for the work he was doing for it, and it is fundamental to the employment relationship that appropriate account be made to HMRC in respect of that payment.

50. Turning to the facts of this case (and bearing in mind the 'range of factors' approach), the tribunal makes the following observations:

50.1 The tribunal has already found that the Claimant believed from the start of his work for the Respondent until at least shortly before his contract was terminated that he was self-employed and knew that he was being paid on a gross basis.

50.2 Although this may be said to be a miscategorisation case in that both parties thought that the Claimant was self-employed when in fact he was, as the tribunal has found, employed, it also has the significant added feature that he failed to complete a tax return over the course of over 16 years and failed to account for any tax or NI on his earnings over that period. The sums involved are very significant

given the Claimant's level of earnings and the period of time involved. Given the Claimant's previous dealing with HMRC his failure to make any attempt to raise or discuss his tax status with HMRC over the course of many years can only have been deliberate.

50.3 It is true that the Claimant (unlike Ms Quashie) did not make express representation (or misrepresentation) to HMRC as to his employment status or taxable earnings, but that distinction cannot, in the tribunal's judgment, assist the Claimant here. The fact is that he made no representation to HMRC at all, effectively hiding his earnings from the tax authorities for many years, which makes his conduct significantly more serious than that of Ms Quashie.

50.4 On any view there was a clear and serious breach of the Claimant's obligations to account to HMRC for his taxable earnings. The Claimant cannot argue, in the tribunal's judgment, that he should be in a better position than someone who deliberately misrepresented their status to HMRC. Nor can he argue that he should be treated the same as someone who inadvertently accounted to HMRC on the wrong basis, ie a true miscategorisation case; the fact is that the Claimant deliberately failed to account to HMRC on any basis whatsoever.

50.5 It is also clear from the tribunal's findings as set out above that the Respondent was wholly unaware of, and not involved in, the Claimant's failure to declare his income to HMRC. In other words, the culpability is entirely on the Claimant's side.

50.6 Turning to the underlying purpose of the tax system, and the statutory requirements of that system with which the Claimant has failed to comply, it is clearly of the utmost importance to the integrity of the legal system, and to society as a whole, that individuals pay appropriate taxes on their earnings. Indeed, as HHJ McMullen QC rightly identified in the extract from his judgment quoted above, the system of courts and tribunals upon which the Claimant seeks to rely is itself funded from those taxes.

51. The tribunal accepts that, under the range of factors approach, illegal performance does not result in the illegality defence automatically succeeding. Proportionality must always be considered; to adopt Lord Toulson's words, the tribunal reminds itself that respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate.

52. The tribunal has considered all the facts of this case, including the wholesale and long term failure by the Respondent to comply with the requirements of employment law in respect of its employees, the most obvious being its failure ever to provide any of its employees with a written statement of terms and conditions of employment.

53. However, in this case (unlike the *McConnell* case, the outcome of which can be explained in terms of proportionality, even if not expressed in such terms at the time) the Claimant's failure to declare income did not concern a small

portion of his earnings; it concerned his entire earnings, and in absolute terms the sums are very considerable. In this case, given the nature and extent of the wrongdoing, the tribunal has concluded that it would seriously harm the integrity of the legal system to allow the Claimant's claims to succeed.

54. The tribunal has concluded that in all the circumstances the illegality defence has been made out.

55. Where that leaves the parties in terms of tax and NI liability in respect of the Claimant's earnings over the relevant period is unclear, but that is not a matter that this tribunal has to decide.

56. Where that leaves the parties in the context of this case is that the Respondent's illegality defence succeeds and all the claims are therefore dismissed.

Employment Judge K Bryant QC
8 March 2018