EMPLOYMENT TRIBUNALS

Claimant **Respondents**
Mr. C. Pritchard v **Italia Conti Academy of Theatre Arts Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
OPEN PRELIMNARY HEARING
(RESERVED JUDGMENT)

HELD AT: London Central **ON:** 20 and 21 December 2018

BEFORE: Employment Judge Mason

Representation
For the Claimant: Mr. C. Payne, counsel.
For the Respondent: Ms. G. Crew, counsel**.**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was not an employee as defined in section 230(1) of the Employment Rights Act 1996 of the Respondent.

2. The Employment Tribunal therefore does not have has jurisdiction to hear his claim for automatic unfair dismissal under s103A Employment Rights Act 1996 is dismissed and the full merits hearing listed for 23 April to 1 May 2019 is vacated.

REASONS

Background and issues

1. Mr. Christopher Pritchard ("the Claimant") claims he was initially engaged by the Respondent as a consultant by a Consultancy Agreement dated 19 August 2016 and then from 1 September 2016 he became an employee and remained employed by the Respondent until 9 November 2017.

2. On 8 March 2018, the Clamant presented this claim. He failed to specify in his application the type of claim or claims he was making; subsequently (on 28 March 2018) he clarified that he was complaining of (i) "whistleblowing" under the Public Interest Disclosure Act 1998 and (ii) automatic unfair dismissal contrary to s130A Employment Rights Act 1996 ("ERA").

3. The Respondent lodged a response on 21 May 2018. All of the claims are denied and the Respondent's case is that at all times the Claimant was a self-employed consultant and that his engagement came to an end on 30 September 2017.

4. At a Closed Preliminary Hearing on 6 September 2018, Employment Judge Grewal considered the Claimant's application to amend his claim to include a claim that he was subjected to a detriment under s48 ERA on the ground that he had made a protected disclosure. EJ Grewal refused that application for the reasons set out in her Notes of the Discussion sent to the parties on 7 September 2018; the Claimant did not apply for reconsideration or appeal that decision. Mr. Payne confirmed to me that he was not pursuing further any application to amend. Therefore the Claimant's only outstanding claim was one of "automatic" unfair dismissal under s103A ERA 1996 and the issue of possible worker status is not relevant.

5. EJ Grewal directed that there should be an Open Preliminary Hearing, which was then listed before me, to determine as a preliminary issue whether the Claimant was an employee of the Respondent at the time when his relationship with the Respondent was terminated; she directed that if he was not an employee the final merits hearing listed (23 April to 1 May) is to be vacated.

Evidence and procedure at the Hearing

6. I was provided with a substantial bundle of agreed documents (pages 1-442) and witness statements. On the first day of the Hearing, having established that the only issue is whether or not the Claimant was an employee, I retired to read the bundle and witness statements.

7. I then heard from the Claimant and, on his behalf, Mr. Graham Sheward. On the second day, I heard from the Respondent's witnesses, Ms. Samantha Newton and Ms. Anne Sheward.

8. Both representatives provided helpful written submissions and also made additional verbal submissions. I am obliged to both representatives for their courtesy throughout. At the conclusion of the Hearing, I reserved judgment which I now give with reasons.

Findings of fact

9. Having considered all the evidence in the round and having reminded myself that the standard of proof is the balance or probabilities, I make the following findings of fact.

10. The Respondent is a Performing and Theatre Arts independent school for pupils aged from 10 to 19 years of age. It has two sites in London: Goswell

Road, Barbican and Landor Road, Clapham. Ms. Samantha Newton (nee Sheward) ("Ms. Newton") is currently Principal and the directors are Ms. Newton and her sisters Ms. Anne Sheward (former Principal) and Ms. Gaynor Sheward. Their brother Mr. Graham Sheward ("Mr. Sheward") was also briefly a director until his resignation on 1 December 1994. The Respondent is a wholly owned subsidiary of Italia Conti Holdings Limited [p166] and the directors of that holding company are the same as the Respondent. There is some dispute regarding the identity of the shareholders in Italia Conti Holdings Ltd but this is not relevant for the purposes of my determination of the sole issue of whether or not the Claimant was an employee.

11. The Claimant is a Fellow of the Chartered Institute of Management Accountants and a Chartered Global Management Accountant. His background is in finance and his CV dated April 2016 [p60-61] sets out his considerable experience and shows he has variously "*run an accountancy practice; co-owned a Thai fusion restaurant; sourced project finance ....*" ; his CV concludes "*Nowadays, I run a £5m pa business providing payroll services to construction industry companies*". He is also sole director and shareholder of Astec Finance & Commerce Ltd ("Astec Finance") incorporated on 19 December 2014 [p307-314].

12. In 2008, the Claimant first met Mr. Sheward in connection with an unrelated financial matter. In early **March 2016**, Mr. Sheward contacted the Claimant and asked for his help to find new bankers for the Respondent. Mr. Sheward had not been directly involved in the Respondent's business for many years but had been asked by his sisters to assist with selling the Respondent's London sites and find a new site to relocate to and had also agreed to help the Respondent find alternative finance. The Claimant arranged a meeting on 14 March 2016 with Mr. John Lester, business relationship manager at Lloyds who agreed in principle to take over the secured lending from HSBC and provide additional working capital, subject to submission of a suitable application by the Respondent to transfer banking facilities.

13. The Claimant reached a "*gentlemen's agreement*" [w/s para. 23] with Mr. Sheward that he would prepare the application as a consultant on a success fee basis. I accept that the fact that he was paid a success fee of £45,000 [p306A] is a strong indication that that fee was agreed.

14. As part of preparing the Lloyds application, the Claimant carried out a review of the Respondent's financial position which disclosed some anomalies and irregularities which he shared with Mr. Sheward, Ms.Gaynor Sheward and Ms. Newton. By **June 2016**, the application to Lloyds bank had been approved conditional upon valuations and charges over the Respondent's London properties; however, the Respondent also required urgently a substantial bridging loan pending transfer of the banking facilities from HSBC to Lloyds.

15. The Claimant and Mr. Sheward says [w/s para. 13] say that in **June 2016** Mr. Sheward asked the Claimant to become Finance Director once the bridging loan was in place and the Claimant verbally accepted.

15.1 Mr. Sheward says his sisters approved this invitation. Ms. Anne Sheward accepts [w/s8] that in June 2016 she gave Mr. Gane of HSBC authority to

communicate with the Claimant (and Mr. Graham Sheward) [p67] in respect of the Respondent's finances; Mr. Gane then advised her that the Claimant had informed him that he [the Claimant] would "*assume the role of financial director ... at some point in the near future*" [p71]. In view of this I accept that Ms. Anne Sheward (and therefore the Respondent) was aware from June 2016 that the Claimant's appointment as financial director was at least "on the cards" and had no objection

15.2 The Claimant says (w/s para 20 and 21) that the terms he agreed were as follows:

(i) He could only guarantee to work for a minimum of 12 days per month;

(ii) He would be paid a daily rate of £500 with monthly payment capped at £6,000 for up to 15 days work per month and capped at £7,500 for 15 or more days;

(iii) Mr. Sheward asked him to take up this post starting on 1 September 2016 and to remain in post until at least September 2021.

15.3 Apart from the daily rate of £500, I do not accept that these terms were agreed as the Consultancy Agreement subsequently entered into on 19 August 2016 (and intended to reflect the terms agree retrospectively from 1 March 2016) does not mention these.

16. On **1 August 2016**, Ms. Newton and Ms. Gaynor Sheward entered jointly into a Deed purporting to give a general Power of Attorney to their brother, Mr. Sheward [p83-83]. Mr. Sheward was given authority, amongst other things, to "*carry out or complete any new contract of any kind*" (para. 2); however, underneath this paragraph is written in manuscript by Ms. Gaynor Sheward: "*Italia Conti only in the event I am out of the UK*". Mr. Sheward confirmed in evidence that he understood that the Power of Attorney only applied if Ms. Gaynor Sheward and Ms. Newton were out of the country. This Power of Attorney was revoked on 1 December 2016 [p120].

17. On **19 August 2016**, the Claimant (on behalf of Astec Finance) and Mr. Sheward (purporting to act on behalf of the Respondent) then signed a Consultancy Agreement between the Respondent (defined as "the Client") and Astec Finance (defined as "the Consultant").

17.1 This Consultancy Agreement was drafted by the Claimant (according to Mr. Sheward's verbal evidence) and provided [p84] that Astec Finance would provide the Respondent with "*ongoing management consultancy services from 1st March 2016*". It then specifies that Astec shall:

(i) arrange for the Respondent to transfer its banking facilities from HSBC to Lloyds;

(ii) arrange interim financing;

(iii) liaise with HSBC to ensure an increase in overdraft facilities; and

(iv) liaise with the Respondent's external auditors regarding submission of the 2015 statutory accounts.

The Consultancy Agreement concludes that the Consultant "*shall receive a Commission Payment of £45,000 for arranging an interim finance facility, and otherwise a Consultancy Fee at the rate of £500 per day"*.

17.2 I find that Mr. Sheward did not have authority to enter into this agreement with the Claimant for the following reasons:

(i) The Respondent says it had no knowledge of this agreement at the time and I accept this. Ms. Anne Sheward explains [w/s 10] that she was Principal at this

time and would have been heavily involved in the recruitment process for engaging or employing someone at this level of seniority; as the Respondent is regulated by OFTSED, the Respondent is required to carry out suitability checks beforehand. Furthermore, Mr. Sheward accepted in oral evidence that Ms. Newton, Ms. Anne Sheward and Ms. Gaynor Sheward had no knowledge of this Consultancy Agreement until January 2017.

(ii) Mr. Sheward was not an employee or director of the Respondent.

(iii) Mr. Sheward could not rely on the Power of Attorney as I accept Ms. Newton's evidence [w/s para. 8] that she was in the UK at that time and Mr. Sheward has failed to provide evidence to the contrary.

(iv) Mr. Sheward said in oral evidence that he was acting effectively as a quasi or shadow director but I do not accept that he had implied or ostensible authority to enter into this agreement. As an experienced Management Accountant with considerable knowledge and understanding of the Respondent's organisation, it is reasonable to assume that the Claimant knew full well that Mr. Sheward was not a director from the outset and indeed he acknowledged in oral evidence that he was aware of this a couple of days after the meeting with Lloyds bank on 14 March 2016.

17.3 I therefore place little evidential weight on this Consultancy Agreement. Nevertheless, it is clear that as a matter of fact that Astec Finance provided the Claimant's services to the Respondent on a consultancy basis on the terms set out in the Consultancy Agreement. Astec Finance then invoiced the Respondent against that Agreement [p306A and 230-239]; these invoices were duly paid with the exception of invoices in October & November 2017.

18. On **16 September 2016**, Ms. Anne Sheward took early retirement as Principal but remained as a statutory director. Ms. Newton then became Principal but within a matter of a few days, she suffered a serious accident and her daughter, Ms. Hayley Newton-Jarvis, took over as Acting Principal.

19. On **28 September 2016**, Mr. Graham Sheward wrote to the Claimant [p85-86] on the Respondent's headed notepaper. This letter was also drafted by the Claimant.

19.1 This letter states:

"We are delighted to offer you the post of Italia Conti's Group Finance Director with effect from 1st September 2016.

Your financial management mandate shall relate to Italia Conti Holdings Limited and its wholly owned subsidiaries...

We have agreed with you that the objectives in your first year in-post are:

- *To undertake a comprehensive review of existing financial management processes and practices, and of the competences of the current financial management team.*
- *In the light of the review findings, to regularise and commercialize Italia Conti's modus operandi as it relates to financial management, in order to establish a sound financial basis and a talented finance and commercial team to underpin the optimisation of future profitability, the development of the business, and the relocation of the Italia Conti Academies to Egham (Project Egham).*
- *To streamline and update the corporate structure of Italia Conti in the context of Project Egham.*

- *To prepare a comprehensive business plan for Project Egham.*
- *To support the globalisation of the Italia Conti offering.*
- *To form the primary interface with Italia Conti's bakers, external accountants and auditors, and solicitors.*

The precise terms and conditions of your appointment are to be agreed and formalised once you physically take up your post at the Goswell Road Academy."

19.2 I find that Mr. Sheward did not have authority to enter into this agreement with the Claimant for the following reasons:

(i) Ms. Newton says [w/s para 12] that she had no knowledge of the letter of 28 September 2016 until 17 January 2017 and I accept this. Furthermore, Mr. Sheward accepted in oral evidence that Ms. Newton, Ms. Anne Sheward and Ms. Gaynor Sheward had no knowledge of this agreement until January 2017.

(ii) Mr. Sheward was not an employee or director of the Respondent.

(iii) Mr. Sheward could not rely on the Power of Attorney as I accept Ms. Newton's evidence [w/s para. 8] that she was in the UK at that time recovering from her accident. The fact that Ms. Newton was incapacitated is irrelevant.

(iv) I do not accept that Mr. Sheward had implied or ostensible authority to enter into this agreement. In any event, the Claimant acknowledged in oral evidence that he became aware that Mr. Sheward was not a director a couple of days after the meeting with Lloyds bank on 14 March 2016.

20. With regard to the Claimant's title of director, I find that by November 2016 there was a loose "agreement to agree" that at some unspecified point the Claimant would become a statutory Director but in the meantime he had the titular role of Finance Director. I have made this finding taking into account the following:

20.1 It is not in dispute that the Claimant was not at any time appointed as a statutory director and indeed he did not want to be a statutory director [w/s para. 22].

20.2 It is also not in dispute that the Claimant used the title Director of Finance (e.g. p289). On **7 November 2016**, Ms. Gaynor Sheward wrote to Mr. Jon Gane, Relationship Manager HSBC Bank [p97] and in that letter she refers to the Claimant as "*Italia Conti's Director of Finance & Commercial*"; around the same time she also wrote to all staff [p289-290] to advise that the Claimant "*has been brought in as Director of Finance*".

20.3 The Claimant was not given any business cards and his name did not appear on the Respondent's notepaper. He did not attend any formal board meetings and points out that the Respondent is a family owned business which operates on an informal basis. However, despite the absence of any minutes of board meetings in the bundle, I accept Ms. Newton's evidence that board meetings took (and continue to take) place once every term in accordance with regulatory requirements.

21. In **October 2016**, Ms. Newton-Jarvis, Acting Principal, left the Respondent to go on maternity leave. Ms. Newton was still in hospital in November and then in December 2016 she remained at home recovering from her accident. In **January 2017**, Ms. Newton returned as Principal and Ms. Newton-Jarvis became Vice-Principal.

22. With regard to the type and extent of the services provided by the Claimant, I find as follows:

22.1 I accept that he carried out a number of projects and a variety of financial services for the benefit of the Respondent, as set out in his witness statement. I also accept his evidence [w/s para. 35] that he was given the authority and responsibility to deal with "*extremely high level of confidential and sensitive work, relating to the financial and commercial affairs of the Respondent*". He was (the only non-family member) signatory on the Respondent's bank and had a company credit card.

22.2 The matters he was closely involved with included the following:

(i) In October 2016 he commissioned a report from Riddingtons reviewing the accounting processes and procedures [report p127-135] and liaised with the police regarding a subsequent fraud investigation;

(ii) In November 2016, he was closely involved in the dismissal of staff in the accounts department in November 2016 [p88-100] and in October 2016 with the appointment of a bursar [p123-126]);

(iii) In November 2016 he appointed Riddingtons as interim accountants [p100]) and commissioned a property survey/report by Alchemy Global (November 2016 [p107-119]);

(iv) In June 2017, he negotiated a lease for rental/maintenance of copiers and printers [p178-182].

22.3 The Claimant asserts that he was in sole charge of the Respondent's business from when Ms. Newton-Jarvis went on maternity leave in October 2016 until Ms. Newton's return in January 2017. Ms. Newton accepted in verbal evidence that the Claimant was "*pretty busy*" during this period and was of "*great value*" to the business but does not accept that he was in sole charge. I agree with the Respondent for the following reasons:

(i) Ms. Newton acknowledges [w/s 10 & 17] that during her absence the Claimant had "*taken it upon himself to assume responsibilities way beyond those for which he had been engaged"* because of the "*power vacuum*" created by Ms. Anne Sheward's retirement, Ms. Newton's own accident and Ms. Hayley Newton-Jarvis' maternity leave. However, I accept Ms. Newton's evidence [w/s 19] that the Claimant "*does not know how to run a school*" and "*did not understand or attend any validations, courses, Board meetings, senior management meetings, quality management meetings, or safeguarding training*" and he "*never met with the School Governors or trustees*".

(ii) Ms. Newton's evidence is consistent with a letter dated **19 October 2016** from Mr. Gregory Apostolidis, Vice-Principal & Course Director [p87] in which he advises all staff of the sequence of events and concludes: "*In the meantime, I will be responsible for managing the Academy until such time as Sam [Ms. Newton] or Hayley [Ms. Newton-Jarvis] return";* significantly, there is no mention of the Claimant in this letter. The Claimant says Mr. Apostolidis was only managing the academic side of the business but this is not borne out by a common-sense ordinary interpretation of that letter.

23. More significant than the nature of the services provided by the Claimant is the manner in which he Claimant provided these services and I make the following findings of fact with regard to this.

23.1 He was free to work either from home or at the Respondent's premises and the Respondent did not dictate or control his working hours and it was the Claimant who determined when he worked as evidenced by the following:

(i) His total monthly hours varied as reflected in the invoices submitted by Astec Finance for his services [p230-239] which show he worked as follows:
January 2017: 15 days
February 2017: 12 days
March 2017: 15 days
May 2017: 15 days
June 2017: 15 days
July 2017: 15 days
August 2017: 15 days
September 2017: 12 days
October 2017: 12 days.
There is no evidence to suggest that it was other than the Claimant who determined whether he worked 12 or 15 days per month.

(ii) In his witness statement [w/s para. 60(a)] he says he regarded the "post" offered to him in the letter of 28 September 2016 as "*a permanent employed position*" and the role that he "*accepted and undertook was full-time*". I do not accept this as he also says (w/s 20) that he agreed that he could only guarantee a minimum of 12 days per month and this is not reflected in the invoices submitted by Astec Finance for his services [p230-239] (see above) which show he usually provided 15 days per month, occasionally 12 days.

23.2 I accept Ms. Newton's evidence [w/s 30] that employees are generally required to attend between the hours of 09:00 and 18:00 but the Claimant did not adhere to this and there was "*never any certainty as to when the Claimant could be expected to arrive at the School, if at all, on any given day*". In verbal evidence she said he generally came in at about 11:00 and left at 16:00 and would take 2 hour lunches.

23.3 The Respondent did not control when he took holidays or other absences. On Saturday 28 January 2017, he emailed Ms. Newton to inform her that he would be on holiday the following week [p140]; the purpose of his email was to notify Ms. Newton of his absence, not to seek permission. I accept that this is contrary to the Respondent's holiday policy which requires employees to seek and obtain the Principal's prior approval. In oral evidence, the Claimant said he was not required to seek prior approval as he was a director.

23.4 The Claimant was free to work for other clients without the permission of the Respondent. I accept that Astec Finance did not in fact raise invoices other than against the Respondent (letter from accountants [p288 & 349A] and accounts for year ended 31 December 2016 [p325]).

23.5 The Claimant was provided with an Italia-Conti email address but almost invariably used his own personal email address which is the same email address he uses for Astec Finance.

23.6 By his own account, the Claimant did not regard himself as answerable to the statutory Directors of the Respondent and/or the Principal of the Respondent:

(i) Ms. Newton says [w/s para. 10] that at a meeting in or about January 2017 the Claimant told her *"I do not report to you".* In his witness statement [w/s para. 60 b)] the Claimant agrees that he asserted that he *"did not work for Samantha Newton but rather with her...".* Also in verbal evidence, he was adamant that he worked with the directors, not for them.

(i) He refused to attend a meeting with solicitors in August 2017 [p182A-184] and in an email to Ms. Anne Sheward dated 13 August 2017 [p183-184] he stated : *"I have been formally contracted to act as Director of Finance of the subsidiaries of Italia Conti Holdings Ltd and IC Arts Centre Ltd. Accordingly, I do not report to you or anyone else in the Sheward family. In broad terms, I work with all the four principals of the family to further IC's best financial and commercial interests*".

24. With regard to the Claimant's remuneration, I find as follows:

24.1 Astec Finance raised the following invoices against the Respondent:

(i) 12 September 2016 in the sum of £45,000 [p306A] for "*Commission for arrangement of an interim finance facility and other consultancy under the Consultancy Services Agreement of 19 August 2016*".

(ii) January to October 2017 at the rate of £500 per day [p230-239] for *"the provision of services under the Consultancy Services Agreement of 19th August 2016*".

24.2 In December 2017, Astec Finance sought to serve a statutory demand [p240-240B] for payment of the October and November 2017 invoices; the invoices are described in the "pleading" as having been *"... raised by the Creditor [Astec Finance] in respect of its charges for professional services provided to the Company [the Respondent] pursuant to the terms of a Consultancy Agreement entered into between the Creditor [Astec Finance] and the Company [the Respondent] on 19 August 2016"* [p240A].

24.3 Despite his assertion that he was an employee, the Claimant freely acknowledges he was not at any time paid by the Respondent via the payroll [w/s para. 31]. As a consequence of not being paid via the payroll, no deductions at source were made from his remuneration in respect of PAYE income tax or National Insurance contributions. The Claimant says [w/s para. 33] he was not paid via the payroll because the payroll having been previously "*used to filch money*" he "*decided that those involved in running the payroll when it was brought back in-house were not themselves to be paid through the payroll*". However, I do not accept this explanation as from November 2016, at his instigation the payroll was outsourced to external accountants, Riddingtons, and there is no logical reason why from this point, if the Claimant genuinely regarded himself to be an employee, he was not then paid through the payroll. He confirmed in oral evidence that he was aware of the difference in employee/self-employed taxation obligations and of IR35.

24.4 The accounts for Astec Finance for the year ended 31 December 2017 [p337A-J] (dated 27 September 2018 and which the Claimant approved as truthful [p337D]) show that for the year ended 31 December 2017, turnover (which he confirmed was made up entirely of monies received from the Respondent) was £58,500. The accounts also show that expenses of £23,928 were set off against that turnover thereby reducing taxable net profit to £34,429. The expenses shown include: rent £6,000; wages £6,000; motor expenses £5,000; and entertainment £2,907 [p337I]. The Claimant explained that the £6,000 wages was for his wife who provided administrative/secretarial support. With regard to rent of £6,000, he was unable to offer a satisfactory explanation; he said he does not have a tenancy agreement but said this is "*a standard thing covered by these sort of accounts*". He was unable to explain the motor expenses of £5,000. He accepted that expenses of this kind cannot usually be

offset against employed income and that if he had been paid subject to PAYE income tax, he would have paid more tax but said that the taxation benefit was "*coincidental*". I do not accept this; in view of the Claimant's considerable experience as a Management Accountant who has run an accountancy practice and a business providing payroll services to construction industry companies, I find that he was fully aware of the taxation advantages.
The Claimant points out that the bursar was offered an employed role [p124] but invoiced the Respondent [p231, 284] for 18 months in a similar manner but I place no weight on this as it is the Claimant's circumstances which are relevant.

24.5 He was not paid when off sick; the only period he was absent for sickness was for surgery which took place during the half-term holiday.

24.6 He was not paid when on holiday; he acknowledged this in oral evidence and the invoice from Astec Finance for work carried out in February 2017 [p231A] (when he was on holiday) shows he invoiced for 12 days rather than the more usual 15 days.

24.7 He was not enrolled in the Respondent's pension scheme.

25. The Respondent followed the following procedure when his services were terminated:

25.1 On **18 August 2017**, the Claimant was given a warning by the Respondent's solicitors (Vincent, French and Browne) [p187-188] as to his "*conduct and future conduct*" and advised that his "*contrac*t" was under review and may be terminated if the situation did not improve.

25.2 On **31 August 2017**, the Claimant was suspended on full pay pending an investigation into his conduct [p194-195] and given a right of appeal against that decision and the right to be accompanied at any appeal meeting. He says [w/s para. 60 d)] that he regarded this letter as the termination of his employment. Further correspondence ensued regarding termination of his services in which the Respondent's solicitors make reference to his contract of employment having been terminated but there is also reference to him having been self-employed [p228].

25.3 On **26 October 2017** he was sent a letter formally terminating his services [p208] which he said in oral evidence that he received on either the 27 or 28 October 2017.

Submissions

Respondent's submission:

26. Ms. Crew provided Written Submissions (10 pages) and made oral submissions. A summary of the key points is as follows.

27. It is not in dispute that in 2016, on a consultancy basis, the Claimant assisted the Respondent to obtain finance and change banks. The core dispute between the parties focuses on the Claimant's status from 1 September 2016.

28. Relevant law:

28.1 In addition to s230 ERA Ms. Crew refers to the following cases: **Express and Echo Publication v Tanton [1999] IRLR 67; [1968] 2 QB Ready Mix Concrete (South East) Ltd v Minister of Pensions and NI 497; Cotswold**

Developments Construction Limited v Williams [2006] IRLR 181; **Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374; Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173; Hall (Inspector of Taxes) v Lorimer [1994] 1 WLR 209; Apex Masonry Contractors Limited v Everitt [2005] UKEAT/0482/04/TM; Catamaran Cruisers Ltd v Williams [1994] IRLR 386; Autoclenz ltd v Belcher [2011] ICR 1157; Pimlico Plumbers Ltd v Smith [2018] ICR 1511.**

28.2 However, she submits that the law is not controversial and "*can be summarised as a multi-factorial approach based on the three main factors set out in the **Ready Mix** case with the tribunal then standing back to see if there is anything inconsistent with a relationship of an employee*". In accordance with **Autoclenz**, "*the Tribunal will look at what the relationship actually was rather than what is said on paper*" and in order to do that the Tribunal must "*first determine whether there was a valid agreement between the Claimant and the Respondent as alleged by the Claimant."*

29. The Agreement/contractual relationship

29.1 The Claimant relies upon two agreements: (i) the Consultancy Agreement dated 19 August 2016 [p84] and (ii) the letter dated 28 September 2016 [p85-86]). However, Ms. Crew says neither of these is a contract of employment. Furthermore, they were both signed by Mr. Sheward who did not have actual or ostensible authority to bind the Respondent as:

(i) Mr. Sheward was not a director or employee;

(ii) Mr. Sheward could not rely on the Power of Attorney as this did not give him the right to enter into contracts of employment and could only be exercised if his sisters Ms. Gaynor Sheward and Ms. Newton were out of the country. Ms. Newton was certainly in the country on 28 September 2016 as she was recovering from her accident; and

(iii) the directors did not otherwise give him authority to enter into these agreements; as Mr. Sheward acknowledged in evidence, they were not aware of these agreements at the time.

29.2 The Claimant accepts that the agreement on 19 August 2016 was just a Consultancy Agreement.

29.3 The letter of 28 September 2016 is not a contract of employment:

(i) it does not include the usual terms to be found in a contract of employment (such as holiday, sick pay, hours, notice, salary etc);

(ii) it make no reference to the term the Claimant alleges was agreed that he entered into a 3 year contract at the daily rate of £500 per day;

(iii) it states "*the precise terms and conditions of your appointment are to be agreed and formalised once you physically take up your post*" but this contradicts what the Claimant and Mr. Sheward say, namely that it had all been agreed;

(iv) it was carefully drafted to avoid any reference to a contract of employment; and

(v) the Claimant continued to invoice against the Consultancy Agreement despite his assertion that his status changed to that of an employee.

29.4 Even if the Tribunal finds that the letter of 28 September 2016 was a contract of employment, Ms. Submits that this is not inconsistent with the Claimant in fact having carried out work on a self-employed basis.

30. The **Ready Mix** Test

30.1 Personal service:
The Respondent broadly accepts the duties as set out by the Claimant but does not accept that from October 2016 he was in sole charge. However, the Respondent accepts there was a requirement for personal service.

30.2 Mutuality of obligations:
The Respondent accepts that the "minimum irreducible" mutuality of obligation was present. Clearly the Claimant could have worked for others but the Respondent accepts that it was his only client.

30.3 Control:
The Respondent did not have the required degree of control over the Claimant:

(i) it did not control his place of work, hours, how he did his work or when he took holidays;
(ii) the Claimant was in control of his team;
(iii) the Claimant was not paid holiday or sick pay;
(iv) he was not disciplined for taking holiday without due notice or when he refused to attend the meeting with solicitors in August 2017; and
(v) on the Claimant's own evidence, he did not view himself as an employee and subject to the Directors' control.

31. Inconsistent features

31.1 Ms. Crew submits that the Claimant's tax affairs are wholly inconsistent with the Claimant being an employee. Throughout, he invoiced the Respondent through Astec Finance. His explanation for not being paid through the payroll is not convincing as the payroll was outsourced to Riddingtons in November 2016.

31.2 The Claimant "*has taken full advantage*" of being able to reduce his tax liabilities as a self-employed person by claiming expenses (some of which he was unable to explain to the Tribunal).

31.3 The Respondent accepts that the tax position is not conclusive (**Apex**) but it is "*highly compelling*" on the facts of this case. The Claimant is a Chartered Management Accountant and has had his own accountancy and payroll business; it is therefore not credible that he was not fully aware of his tax obligations and he cannot "*have his cake and eat it*".

32. In conclusion, Ms. Crew submits that the Claimant does not meet the test of an employee as set out in s230(1)ERA and the case law. The "control" element of the **Ready Mix** test is not made out and there are factors which are inconsistent with an employment relationship, in particular the Claimant's management of his tax affairs.

Claimant's submissions

33. Mr. Payne provided Written Submissions (8 pages) and made oral submissions. A summary of the key points is as follows.

34. Relevant law:

34.1 The principles set out by Ms. Crew are broadly accepted but in addition to personal service, control and mutuality of obligation, he submits consideration must also be given to other factors such as:
a) the economic reality;
b) integration of the individual into the business;

c) nature and length of engagement; and
d) the presence of benefits.

34.2 The question in every case is "*what was the true agreement between the parties*?" (**Autoclenz)** and "*the object of the exercise is to paint a picture from the accumulation of detail"* (**Hall v Lorimer)**.

35. The Agreement/contractual relationship

35.1 Mr. Payne accepts that there is limited documentation setting out the precise terms of the Claimant's relationship but submits that the contents of the Consultancy Agreement and letter of 28 September 2016 accord with the Claimant's account. In any event, "*the actions of the parties lend great weight"* to the Claimant's version of events and his claim to have been employed as Director of Finance & Commercial from September 2016.

35.2 The Respondent's case that the Claimant was appointed as Director without consent and carried out numerous acts beyond his authority, is undermined by the fact the Respondent did not terminate his "services agreement" and there are no documents expressing any concern until some 10 months after he started. His appointment was not challenged because it was fully agreed to.

35.3 Prior to his commencement as Finance Director, the Claimant only invoiced for £45,000 but once his employment started his remuneration changed.

35.4 Ms. Newton was well aware of the Claimant's appointment by at least November 2016 as evidenced by (draft) letters sent to her by the Claimant for approval which he signed as "*Chris Pritchard Director of Finance & Commercial*" [p188-96 & 98-100].

35.5 The Power of Attorney was in force in August 2016 and neither Ms. Anne Sheward nor Ms. Newton dispute or insist that they were in the country at that time; the inference therefore must be that they were out of the country when the Consultancy Agreement was entered into.

35.6 The Power of Attorney (para. 2) gave Mr. Sheward the authority to enter into "*any contract*" including a contract of employment.

35.7 In any event, Mr. Sheward was a shadow director with full authority to bind the Respondent. He was "*doing things*" on behalf of the Respondent, before, during and after the Power of Attorney.

35.8 The way in which the Respondent went about ending the relationship is "*most telling*" and shows that the Respondent regarded the Claimant as an employee. On 18 August 2017 he was given a warning [p188] then on 31 August 2017 he was suspended on full pay [p194-195] and given a right of appeal and to be accompanied at any appeal hearing. Furthermore, Ms. Newton accused him of breaching the mutual duty of trust and confidence – a term only present between employer and employee [p196-197] - and refers to the possibility of "*formal disciplinary proceedings*".

36. The Ready Mix Test

36.1 Personal service:
The Respondent accepts there was a requirement for personal service and Mr. Payne says the test is readily met.

36.2 Control:

(i) The question of control must be considered in the context of the Claimant being a director and the fact he is a qualified Chartered Management Accountant.

(ii) The Claimant sought consent/approval from the Respondent before taking various steps including changing solicitors, terminating the services of Mr. Murdoch, dismissing Mr. and Mrs. Jolley and appointing the bursar.
(iii) Throughout the relationship, the Claimant "*subjected himself to the control of the Respondent, to a level commensurate with that of an employed director*".

36.3 Mutuality of obligations:
As the Respondent accepts that the "minimum irreducible" mutuality of obligation was present, I will not rehearse Mr. Payne's submissions on this point.

37. Other factors

37.1 Mr. Payne submit that the Claimant was substantially integrated into the Respondent's business as an employed director with significant responsibilities:
(i) after 2 October 2017, he started attending the offices of the Respondent;
(ii) he had an Italia Conti email account which he used to send mundane documents relating to the Respondent;
(iii) he was the first non-family member to be placed on the bank mandate; and
(iv) the "dearth" of official documentation is because this is a family run business.

37.2 The Claimant billed against the Consultancy Agreement as this was the only documents which refers to his payment of £500 per day. The bursar was offered an employed role [p124] but invoiced the Respondent [p231, 284] for 18 months in a similar manner to the Claimant.

37.3 There was an imbalance in bargaining power; the Respondent would nto pay his "usual" daily rate and so he accepted £500.

37.4 The Claimant was still paid for February despite substantial periods of time off [201A] [239].

37.5 The Claimant did not have professional indemnity insurance.

37.6 The Claimant was candid when asked about his accounts.

38. In conclusion, Mr. Payne submits that if the Claimant was not an employee at the outset, he became an employee over a period of time particularly after Ms. Newton's accident when he was required to "*keep the wolf from the door".*

The Law

39. Section 230 ERA.

> *"(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" … 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.*

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment" –

(a) in relation to an employee means ... employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly."

40. There is a large volume of case law which seeks to define and clarify the essence of a contract of employment and distinguish it from other forms of working relationship:

40.1 In ***Ready Mixed Concrete*** McKenna J summarised the essential elements of a contract of employment as follows:

"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." [para. 11]

40.2 In ***Autoclenz Limited*** the Supreme Court established the following principles to be considered by the Tribunal in determining the true nature of the relationship:

"... in the context of employment, where taking into account the relative bargaining power of the parties, the written documentation might not reflect the reality of their relationship, it was necessary to determine the parties' actual agreement by examining all the circumstances, of which the written agreement was only a part, and identifying the parties' actual legal obligations; and that, on the basis of the findings of the employment tribunal, it had been entitled to disregard the terms of the written documents in so far as they were inconsistent with those findings and to hold that the claimants were "workers" ..."

40.3 In **Catamaran Cruises**, the EAT held that the importation of a limited company does not prevent the continuation of a contract of employment if the true relationship is that of employer and employee.

40.4 In **Pimlico Plumbers [2017]** (upheld by the Supreme Court [2018] UKSC 29 (13 June 2018) the Court of Appeal gave guidance and observed:

"If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential." [para. 145].

40.5 I have also considered the case law the representatives have taken me to in their submissions.

Conclusions

41. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.

42. In order to determine the Claimant's status, I am required to first consider what the terms of the agreement are (or were); secondly consider whether any of those terms are inherently inconsistent with the existence of a contract of employment; and, thirdly, if there are terms inherently inconsistent, go on to decide whether the contract is a contract of service or a contract for services

43. In determining the terms of the agreement between the Claimant and the Respondent my starting point is to consider the express terms the Claimant says were agreed. The Claimant relies on (i) a verbal agreement with Mr. Sheward in March and June 2016, (ii) the Consultancy Agreement and (iii) the letter of the letter of 28 September 2016. Considering these in turn I have concluded as follows:

43.1 With regard to any verbal "gentlemen's' agreement" with Mr. Sheward, it is not in dispute that, on a consultancy basis, the Claimant assisted the Respondent to obtain finance and change banks:

(i) The fact that he was paid a success fee of £45,000 [p306A] is a strong indication that that fee was agreed.

(ii) I have accepted that by June 2016 the Claimant's appointment as financial director was "on the cards" and I have also accepted that the daily rate of £500 was agreed.

43.2 I am not satisfied that either the Consultancy Agreement of the letter of 28 September 2016 can be relied upon as evidence of clear express contractual terms as I have found that Mr. Sheward did not have the authority of the Respondent to enter into these agreements for the reasons given above (paras. 17.2 and 19.2). I agree with Mr. Payne that the Power of Attorney gave Mr. Sheward the authority to enter into "*any contract*" including a contract of employment with the Claimant. However, I disagree with Mr. Payne that in the absence of evidence I must draw the inference that that Ms. Gaynor Sheward and Ms. Newton were out of the country on 19 August 2016 and have drawn the opposite inference.

43.3 In any event, the Claimant does not seek to argue that the agreement on 19 August 2016 was other than a Consultancy Agreement and I do not accept that the letter of 28 September 2018 is a contract of employment (or evidence of a contract of employment) for the following reasons:

(i) it does not mention that the Claimant is to be an employee, only that he should have the titular role of Director; the Claimant said in evidence that it was only his "assumption" that this post would be an employed position and accepted that this was not specifically discussed;

(ii) it does not set out the terms and conditions usually associated with a contract of employment, such as hours, salary, holidays, notice and so on;

(iii) the Claimant invoiced against the Consultancy Agreement.

44. As there are there are no clear express (verbal or written) contractual terms it is therefore necessary for me to analyse the real relationship between the parties (**Autoclenz**) and consider all aspects including mutuality of obligations;

personal service; degree of control; method of payment and any benefits; degree of integration; degree of financial risk born by the Claimant; and provision of equipment.

45. Ms. Crew sensibly and helpfully concedes that the "minimum irreducible" mutuality of obligations was present and that, whilst the Claimant could have worked for others, it is accepted that he only worked for the Respondent. Ms. Crew also concedes that there was a requirement for personal service and I am not required to consider these aspects further.

46. With regard to the degree of control exercised by the Respondent over the Claimant I have concluded that the level of control is not consistent with the level of control one would usually expect in an employment relationship for the following reasons:

46.1 I agree with Mr. Payne that the level of control must be seen in the context of the Claimant's seniority, experience, and qualifications. However, whilst I have found that he carried out a number of projects and a variety of financial services for the benefit of the Respondent, I have not accepted that he was in sole charge of the Respondent's business from when Ms. Newton-Jarvis went on maternity leave in October 2016 until Ms. Newton's return in January 2017. I do not accept that it is "*inconceivable"* that he was a self-employed independent contractor; none of the services he provided are conclusively indicative of his status and could have been carried out in his capacity as an employee, self-employed consultant, worker and/or director (statutory or otherwise, executive or non-executive).

46.2 I have found that the Claimant was free to determine his place of work and hours; the Respondent did not control when he took holidays or other absences; and he was free to work for others without the permission of the Respondent.

46.3 Most significantly, on his own account, the Claimant did not regard himself as answerable to the statutory Directors of the Respondent and/or the Principal of the Respondent. This is inconsistent with the position of an executive director and I disagree with Mr. Payne that throughout the relationship, the Claimant "*subjected himself to the control of the Respondent, to a level commensurate with that of an employed director*".

46.4 When terminating his services, the Respondent followed a procedure typical of that which one would expect in an employment relationship and inconsistent terminology was used in correspondence from the Respondent's solicitors regarding the nature of his contract. However, this does not outweigh the other factors above.

47. The rate and method of payment (which was entirely in the Claimant's hands) is not indicative of an employment relationship:

47.1 The Claimant elected not to be paid via the payroll and instead submitted monthly invoices in the name of Astec Finance. Accordingly, no deductions at source were made from his remuneration in respect of PAYE income tax or National Insurance contributions. I have not accepted his explanation for this and I have found that he was fully aware of the taxation advantages. However, whilst the Respondent has placed considerable weight on this, I have reminded

myself that this is far from conclusive and must be seen only in the context of the entire picture.

47.2 He was not paid when off sick or on holiday.

47.3 He was not enrolled in the Respondent's pension scheme and there is no evidence of any other benefits.

48. With regard to integration, I accept that the Claimant was integrated into the Respondent's business to an extent but do not agree with Mr. Payne that the Claimant was substantially integrated:

48.1 Whilst he was on the bank mandate and given the title of (variously) Finance Director/Director of Finance/Director of Finance & Commercial, he was not a statutory director and did not attend any formal board meetings.

48.2 He rarely used an Italia-Conti email address, he was not issued with a business card and his name did not appear on the Respondent's notepaper as a director.

48.3 From October 2017, he attended the Respondent's premises but was free to work from home

49. There is no evidence that the Claimant assumed any degree of financial risk or that he provided any equipment; neither side made any submissions on these points and they are neutral.

50. Standing back and weighing up all the above factors, and painting "*a picture from the accumulation of detail"* (**Hall v Lorimer)** my overall conclusion is that the terms of the relationship between the Claimant and the Respondent were not consistent with the existence of a contract of employment and he was not an employee. He may have been a worker but I have not considered this as it is outside my remit. The Claimant's claim for automatic unfair dismissal must therefore be dismissed.

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Employment Judge Mason

8 January 2019

Judgment sent to Parties on

9 January 2019