



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Orford

**Respondent:** Newport County Council

**Heard at:** Cardiff **On:** 15<sup>th</sup> & 16<sup>th</sup> April 2019

**Before:** Employment Judge Howden-Evans (sitting alone)

## Representation

**Claimant:** Mr Churchill, Counsel

**Respondent:** Mr Lewis, Counsel

# RESERVED JUDGMENT

The employment judge's decision is that Mr Orford was an employee of Newport County Council and has worked under an implied contract of service.

# REASONS

1. On 16<sup>th</sup> October 2018, Mr Orford submitted an ET1 claim form asserting he had been unfairly dismissed from his employment as a maintenance / repair person with Newport County Council ("the Council"). This claim was submitted after an ACAS conciliation period (3<sup>rd</sup> August 2018 to 3<sup>rd</sup> September 2018).
2. In their ET3 response of 9<sup>th</sup> November 2018, the Council denied Mr Orford was an employee and asserted Mr Orford was an independent contractor.
3. This two-day hearing was listed to determine the issue of Mr Orford's employment status. Both parties were represented by counsel at this hearing and have been legally represented throughout these proceedings.
4. Parties had exchanged witness statements (and supplemental statements) addressing this issue. The employment judge read all of the witness statements prior to hearing evidence. With each witness the procedure adopted was the same: we had supplemental questions, cross examination, tribunal questions

and finally the advocate that had called the witness was able to ask any questions they wished by way of re-examination.

5. On day one, we heard evidence on oath from:
  - a. Mr Orford;
  - b. Mr Hale, who had, until September 2016, been the Council's Homelessness Prevention Officer and frontline manager of the Temporary Accommodation ("TA") team;
  - c. Ms Edwards, who had, until March 2018, been the Council's principal Homelessness Manager and TA Manager;
  - d. Ms Higgs, the Council's Creditors Team Leader; and
  - e. Mr Mason, the Council's Senior HR and OD Business Partner.
  
6. On day two, we heard evidence on oath from:
  - a. Mr Orford, who had been recalled, to identify an exhibit, namely a key safe;
  - b. Ms Mills Butcher, who has 'acted up' as TA Manager for the Council, since 2017; and
  - c. Mr Rose, the Council's Housing Needs Manager.
  
7. In addition to reading and hearing witnesses' evidence, the employment judge had the benefit of a bundle of documents of 742 pages and a bundle of 10 legal authorities. Mr Orford also brought an exhibit, a key safe, to the hearing. Both Counsel had prepared written skeleton arguments which they supplemented by closing oral submissions. Before turning to make findings of fact, the employment judge would like to thank both legal teams for the work they have put into preparing this case; this has made her task easier.

### **Findings of Fact**

8. The Council, a local authority, has a legal obligation to provide accommodation for households who are homeless, under the Housing Act 1996 and Housing (Wales) Act 2014.
  
9. Between 2003 and 2018, Ms Edwards was the Council's principal Homelessness Manager. In this role she managed the Council's homelessness team and arranged temporary accommodation for homeless households.
  
10. Since 2006, as the Council's Housing Needs Manager, Mr Rose was Ms Edwards's line manager and had responsibility for the Council's strategic and operational management of housing needs.
  
11. One of the Council's key performance indicators is the amount of time that homeless people have to live in bed and breakfast accommodation. Living in bed and breakfast accommodation is both more difficult for homeless families and more costly for the Council.
  
12. In 2009, the Council changed the manner in which it provided accommodation. Council properties were transferred to a separate department, Newport City Homes and the Council found it had an insufficient stock of properties to accommodate homeless people.

13. In order to meet its statutory obligations, the Council launched a Private Sector Leasing Scheme ("PSL scheme"), whereby the Council entered into contracts with private landlords to lease / manage their property for up to 5 years. These properties were then used to house homeless families.
14. The Council's PSL scheme has successfully substantially reduced the amount of time homeless people have to live in bed and breakfast accommodation. In 2009 there were only 4 or 5 properties in the PSL scheme, but by 2016 there were 150 properties in the PSL scheme.
15. The PSL scheme was / is administered by the Temporary Accommodation Team (TA team). In 2009, Mr Hale was the respondent's Homelessness Prevention Officer and frontline manager of the Temporary Accommodation ("TA") team.
16. The PSL scheme had to be financially self-sufficient; the tenants paid rent, via their housing benefit, which had to cover the costs the Council incurred in leasing properties from private landlords and any essential maintenance work.
17. The landlord was responsible for the overall fabric of the building, such as the roof or windows, but the Council were responsible for repairing damage caused by tenants / former tenants. Having rented a property from the private landlord, the Council had to make that property habitable as quickly as possible, so it could be used to home a homeless person or family.
18. Both Ms Edwards and Mr Hale explained that in 2009 the TA team were finding it difficult getting PSL properties repaired swiftly whilst remaining under budget. When a tenant left a property, or when they took on a new property, they had to get it ready for a new homeless family / person as quickly as possible – this could include repairing damage to the property, cleaning, decorating, carpeting, replacing broken beds / fridges, clearing debts on the electricity and gas meters, replacing locks. They were able to use the Council's internal maintenance department but found them to be too expensive. For instance, Mr Hale explained they had been charged £100 for a replacement toilet seat.
19. Mr Hale and Ms Edwards needed a cheaper alternative that would be totally reliable. In 2009 Ms Edwards met Newport Norse to see if they were able to undertake the PSL property maintenance / repair work. Newport Norse is a joint venture company established between the Council and Norse Commercial Services Limited (which is wholly owned by Norfolk County Council). Ms Edwards's evidence was that Newport Norse were not interested in the PSL work in 2009 as the scheme and budget were too small.
20. In 2009, one of the landlords introduced Mr Hale to Mr Orford and Mr White. Mr Orford and Mr White had been trading as a business partnership, as "Platinum Plasterers", since 2006. Mr Hale realised that Platinum Plasterers would be able to complete work quickly and would be less expensive than the Council's internal maintenance team. Mr Hale started giving plastering and general maintenance work to Platinum Plasterers.
21. There was no written contract or contemporaneous documentary evidence of the agreement between the Council and Mr Orford or Platinum Plasterers. Rather there was a verbal agreement between Mr Hale, Mr Orford and Mr White

that the Council would offer plastering and general maintenance work to Platinum Plasterers and that Mr Orford and Mr White would complete this work and send the Council an invoice for each job completed. Mr Orford and Mr White were told there was enough work to keep them fully occupied; on this understanding they were able to offer lower prices as they were guaranteed work and guaranteed payment.

22. Shortly after Platinum Plasterers started work for the Council, still in 2009, Mr White emigrated to Australia. Mr Orford, now a sole proprietor, continued to work for the Council under the name Platinum Plasterers.

23. Whilst Mr Orford was able to undertake all plastering and general maintenance work, Mr Hale and Ms Edwards used A&N Plumbing and other businesses for plumbing, carpentry or electrical work.

24. Mr Orford, Ms Edwards and Mr Hale's evidence is that from as early as 2009, Mr Orford's relationship with the Council and the service he provided was quite different from any other tradesperson. As the number of properties in the PSL scheme rapidly grew so did the Council's need for Mr Orford. Lots of PSL properties were older properties or had been damaged by their previous occupants. Within a short period of time, Mr Orford was a "first point of contact" for maintenance work and was so busy he had no time to work for anyone other than the Council. Ms Edwards and Mr Hale confirmed they were aware of this situation. Ms Edwards explained that it would have been impossible for the PSL scheme to take on so many properties without Mr Orford being a "maintenance man" on duty all the time and flexible enough to switch tasks and work on whichever task was most urgent for the Council. She explained Mr Orford provided the service the Council needed, of "getting that house running, getting heating in there to be able to get children into a home". She described him as an integral part of her team, a "totally different relationship" to other tradespeople and estimates that Mr Orford was undertaking 15 different job instructions on a daily basis for the Council. She would personally phone Mr Orford 3 times a day with urgent work tasks. She described Mr Orford as "always having the keys and running the storage systems" for furniture for PSL properties. She explained the demand for Mr Orford's work was so great that whilst he was working on one PSL property, he would regularly be told to stop work on that task and start work on a different more urgent PSL task.

25. Mr Hale explained Mr Orford could undertake most tasks required in getting a property ready for habitation, so he had a unique role and was working constantly for the Council. The tasks he undertook varied dramatically. Mr Hale described Mr Orford's role as being "property turnaround" whereas contractors like A&N Plumbing or the carpenter would be instructed for a single task.

26. Even in 2016, when Ms Mills Butcher joined the TA team, the PSL property work was routinely instructed on an urgent basis. She explained when a property became empty the Council needed to make sure it was ready for the next tenant with 5 working days or less. Whilst the thrust of Ms Mills Butcher's evidence was that she regarded Mr Orford as a contractor, in cross examination, she accepted he was different from other tradespeople as other tradespeople had told her they were not available as they were completing work for other clients - Mr Orford had always accepted her work and never told her he was not available to work for the Council.

27. Mr Orford was given tasks by telephone or email by various officers within the Council's TA team and the Council's Housing Support Accommodation Team. Mr Orford would ask the officer instructing him to get authorisation from Mr Hale as Mr Orford regarded Mr Hale as "his immediate superior". Mr Orford would undertake the work and send the Council an invoice for the task. In 2017, the Council introduced a requirement for job sheets to be completed. This meant the officer instructing Mr Orford would complete a job sheet and email this to Mr Orford and Mr Orford would attach the job sheet to his invoice.
28. The work being completed by Mr Orford included clearing out broken furniture, deep cleaning kitchens / bathrooms, decorating, plastering, moving furniture into / out of storage, shampooing or removing carpets, fixing cupboards, fitting light bulbs, topping up gas and electricity meters, fitting curtain rails, treating mould / damp, removing rubbish, repairing blinds.
29. Mr Orford would order beds and other urgent items on behalf of the Council; Mr Orford was expected to do this. The employment judge notes:
- a. p478, an email of 6<sup>th</sup> December 2016 in which the Council's Emergency Accommodation Officer writes to Mr Orford *"Hi Deano, What's the crack on the beds mate? Have we ordered more?"*
  - b. p479, an email of 9<sup>th</sup> December 2016, in which the Council's Housing Options Officer writes to Mr Orford *"Hi Dean Sorry can you clear the debt on the gas meter as well please. Gas card is at the property and debt is around £68.00. Cheers"*
  - c. p480, an email of 12<sup>th</sup> December 2016 in which the Council's Emergency Accommodation Officer writes to Mr Orford, *"Hi Dean Can you get 2 single beds delivered to the above address by the end of the day tomorrow? Cheers."*
  - d. p481, an email on 20<sup>th</sup> December 2016, in which Ms Mills Butcher writes to Mr Orford, *"Hi Can you please top up £20 on the 3 flats @ Morden Flats"*.
  - e. P482, an email of 6<sup>th</sup> January 2017 in which Ms Mills Butcher writes to Mr Orford, *"Can you please put £10 on flats at Morden Lane today, £30 on gas and £10 on electric @ 2 Marshfield Street."*
  - f. P477, an email of 2<sup>nd</sup> November 2016 from the Council's Housing Needs Assistant to Mr Orford *"Hi Dean We need to collect the new electric key for .....Code for new key is...from EDF Energy. This will reset the meter and clear the debt. When you are finished at the property could you please top the meter up by 10 pounds and bring the key back to the office as the tenant can't have this. EDF have asked if you could just have a visual check of the meter due to its height .....I believe they are still way too high at the moment. They would not give us the code unless we would take responsibility for you dean so please don't fall!"*
30. Since 2009, the only person working as Platinum Plasterers has been Mr Orford. During 2017 / 18, very occasionally, Mr Orford was assisted by his father and/or Mr John (Mr Orford's friend), but this has been very occasionally, when

Mr Orford was too busy to complete his work alone or covering emergency work that came up during Mr Orford's one-week annual holiday. The employment judge notes that when Mr Orford was on holiday, the Council would save jobs for him to complete upon his return rather than give this work to another person. P476, an email of 17<sup>th</sup> August 2016, from the Council's Emergency Accommodation Officer to Mr Orford starts "*Hi Dean Hope you had a good break in London...sorry but jobs may come thick and fast today as we have been saving them up.*"

31. Mr Orford has always sent the Council invoices for tasks completed. Each invoice is on a proforma invoice headed "Platinum Plasterers", on which Mr Orford has handwritten the tasks completed at a particular property and handwritten an amount for materials and an amount for labour. There are no terms or conditions attached to any invoice. The Council paid Mr Orford in accordance with the Construction Industry Scheme. This meant the Council deducted tax from any payments for work that was of a type covered by the scheme, eg painting, decorating. The Council provided Mr Orford with a monthly statement confirming the CIS deductions made and paid to HMRC.
32. When Mr Hale was receiving Mr Orford's invoices, he would make sure they were paid within 14 days of receipt, using the Council's Urgent Payment request. Mr Hale took voluntary redundancy in September 2016. In 2017, as a result of a change in the Council's staffing levels, the system was changed so that Mr Orford received payment within 30 days of receipt of invoice.
33. Mr Orford's accounts indicate that in the year ending 2014 his turnover was £39,339; in 2015 it was £42,343; in 2016 it was £44,595 and in 2017 it was £64,946. Mr Orford confirmed this turnover is entirely from his work for the Council.
34. Mr Hale's evidence was that Ms Coombar in the Accounts Department had told him that if Mr Orford's sole income was from the Council Mr Orford may be considered to be an employee for tax purposes.
35. Ms Edwards's evidence was that Ms Coombar had phoned her and told her that she was concerned Mr Orford was "passing the point when he could no longer be considered anything other than an employee of the Council". Ms Edwards's evidence was that she had referred this concern on to her line manager, but she was not aware of this being acted upon.
36. When Ms Edwards and Mr Hale worked at the Council, Mr Orford attended team meetings every 4 to 6 weeks. These meetings would consider ongoing projects and forthcoming work. Mr Orford was also copied into emails planning ongoing work and discussing tenants' circumstances.
37. Mr Orford had set jobs, which he was expected to undertake without a jobsheet or direct instruction, such as cleaning the communal areas every 2 weeks and collecting rubbish.
38. Mr Orford used his own van and tools. The Council provided Mr Orford with refuse bags, high visibility safety vests, safety gloves and litter pickers.
39. Many years ago, Mr Orford was provided with a key safe by Ms Edwards, to secure keys for PSL properties in his van. His evidence was that he was

“custodian of the keys” and would have up to 60 keys at a time secured in his van. Mr Orford would often contact contractors and contractors were used to approaching Mr Orford as a point of contact for keys to a PSL property. Ms Mills Butcher’s evidence was that Mr Orford was supposed to return keys to individual properties to the office. She believed he had only retained keys to the common parts and didn’t realise (until this tribunal hearing) that Mr Orford had been provided with a key safe by Ms Edwards. The employment judge notes that Ms Mills Butcher has only worked in the TA team since 2016; whilst Ms Mills Butcher has given the best evidence she is able to provide, she is clearly not aware of the agreement and practices that had evolved between Mr Orford, Ms Edwards and Mr Hale, during the 7 year period from 2009 onwards.

40. Mr Orford also had keys for two lock up facilities belonging to the Council, that the Council used to store furniture and Mr Orford used to store plaster. Mr Orford represented the Council when he placed things in The Storage Company

41. Mr Orford signed Waste Transfer Notices on behalf of the Council.

42. Mr Orford attended the Council’s Asbestos training course that was put on for employees. This was paid for by the Council.

43. In 2013, Mr Hale set up Void Solutions Limited. Mr Orford was named as a director of this company. Mr Hale had intended to start his own business refurbishing properties, but this business has never traded.

44. In early 2018, the Council decided the PLS property repair and maintenance work should be given to Newport Norse.

45. On 29<sup>th</sup> March 2018, Mr Rose phoned Mr Orford and told him Newport Norse would be taking over the work in 4 days’ time. Mr Orford was upset and replied that Mr Rose must have known of this 3 to 6 months ago. Mr Rose said he could not have told Mr Orford sooner as the Council had been worried about how to cover maintenance work in the meantime. Mr Rose offered to introduce Mr Orford to Newport Norse for Mr Orford to work for them.

46. Shortly after this call, Mr Orford spoke to Ms Mills Butcher. She said “Has [Mr Rose] told you the news?” Mr Orford asked whether they wanted him to finish the jobs he was currently working on and Ms Mills Butcher confirmed they did.

47. On 3<sup>rd</sup> or 4<sup>th</sup> April 2018, Mr Orford was told there was another two to three weeks work with the Council if he wanted it. Mr Orford explained he had little choice but to take this work, as he had given up all his previous work contacts (from pre-2009) so he had no other work available. Eventually he received an email advising him his final day of work with the Council would be 19<sup>th</sup> June 2018.

48. The employment judge notes Ms Mills Butcher’s email of 12<sup>th</sup> June 2018 to Mr Orford (p630),

*“...I know it’s been a really difficult process for yourself, and it’s been a hard transition, however sadly I do need to draw a close to the works so we can all address new working arrangements going forward...I’m in interviews all day today, however I’m around Thursday if you want to talk this over.”*

## The Law

49. Only an “employee” can present a claim of unfair dismissal. S230 (1) Employment Rights Act 1996 provides:

“(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.”

50. As Counsel for the Respondent has submitted, an employee works under a contract of service, whereas a self-employed person works under a contract for services.

51. As there is no precise definition of a contract of service the courts and tribunals have adopted a mixed test to identify whether an individual was working under a contract of service. The starting point is Mr Justice MacKenna’s formulation of the test in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB,

“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

....As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. 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...

...As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

What matters is lawful authority to command so far as there is scope for it. and there must always be some room for it, if only in incidental or collateral matters.

To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

...An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the



contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control...”

52. For a contract of employment to exist, four essential elements must be fulfilled:
- a. a contract (either express or implied) must exist between the Council and Mr Orford;
  - b. there must be an obligation on Mr Orford to provide work personally;
  - c. there must be mutual obligation, ie an obligation on the Council to provide Mr Orford with work and an obligation on Mr Orford to accept and complete any work offered to him; and
  - d. the Council must have sufficient degree of control over Mr Orford.

53. If the four essential elements are established, I should go on to consider the surrounding circumstances as these will also indicate whether this is a contract of service (and Mr Orford is an employee) or a contract for services (and Mr Orford was not an employee).

54. I have been provided with a number of authorities to assist me in this task:

- a. *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511
- b. *Cox v Ministry of Justice* [2016] ICR 470
- c. *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181
- d. *Plastering Contractors Stanmore Ltd v Holden* (UKEAT/0074/14/LA)
- e. *Wilson v Circular Distributors Ltd* [2006] IRLR 38
- f. *St Ives Plymouth Ltd v Haggerty* [2008] All ER (D)
- g. *Massey v Crown Life Insurance Co Ltd* [1978] 2 All ER 576
- h. *James v London Borough of Greenwich* [2008] IRLR 302
- i. *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386

55. From these authorities I have derived the following:

- a. “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”: whilst there must be an obligation on the claimant to personally perform the work, it is possible for this to still exist despite a limited or occasional delegation of work.
- b. Mutual obligations are necessary for there to be a contract at all. I should consider whether there was one contract or a succession of shorter assignments. If I find there was one contract, is there a natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable, amount of work for the respondent in return for being given that work? If so, was there such control as to make it a contract of employment so as to give rise to rights of unfair dismissal? Are there factors which negate a contract of employment?
- c. In order to establish a continuing contract there must be some level of mutual obligation between the employer and employee during the period when no work is being performed.
- d. I should consider the extent to which the claimant was integrated into the respondent's business. As part of this, it might be helpful to consider whether the claimant actively marketed his services to the

world in general or whether he was recruited by the respondent to work as an integral part of their operations.

- e. If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it.
- f. It is possible for a person to be an employee, notwithstanding that they have provided their services through a limited company, to their employer. The formation of a company may be strong evidence of status, but this fact has to be evaluated in the context of other facts found.

## **Conclusions**

### **The contract**

56. There was no written contract. There is scant evidence of the oral agreement reached between Mr Hale, Mr Orford and Mr White in 2009. Is this a series of contracts being given to a contractor, as the Respondent's Counsel submits? I have concluded this agreement and the relationship between Mr Orford and the respondent became much more than a relationship of contractor and local authority. Mr Hale and Ms Edwards both identified Mr Orford as performing a unique ongoing role, very different from that of a contractor.

57. I have concluded that within months of Mr Orford starting work for the respondent, by late 2009 / early 2010, an overarching contract existed. There is a need to imply such a contract, as the parties acted as if such a contract had expressly been agreed. Mr Orford was expected to be available 24 hours a day 7 days a week to undertake work on the PSL properties. He was the go-to maintenance man on duty all the time and flexible enough to switch tasks and work on whichever task was most urgent for the Council. Actual plastering formed very little proportion of his tasks, rather he was expected to undertake whatever was needed to get a property habitable in a very tight time frame. In meeting the Council's expectations, by 2009 / 2010, Mr Orford had ceased working for any other party and was not marketing his services to the world in general. The Council were fully aware of this as they were giving him 15 instructions a day and instructing him to leave one task and start work on another task.

58. Mr Orford had been told the Council's work would keep him fully occupied; on this understanding he had offered and was working at lower prices as he was guaranteed work and guaranteed payment. Mr Orford only took one week's holiday each year – during this period, the Council would save work for him to complete upon his return, rather than give this work to a different person.

59. Further evidence of an overarching contract is:

- a. the fact the Council arranged for Mr Orford to attend an asbestos training course and did not charge Mr Orford for this course;
- b. Mr Orford routinely being copied into Council emails discussing tenant's circumstances and other confidential information;
- c. Mr Orford being provided with a key safe and keeping keys for up to 60 PSL properties;

- d. The level of responsibility given to Mr Orford, for instance, choosing and purchasing beds, signing waste certificates on behalf of the Council; and
- e. The manner in which the contract with Mr Orford was terminated.

### **Personal Service**

60. Mr Orford was required to personally perform this contract. I note he was assisted by his father and friend very occasionally in 2017 / 18, but as Lord Wilson pointed out in *Pimlico Plumbers v Smith* [2018] UKSC 29, “assistance in performance is not the substitution of performance”. Mr Orford’s father and friend dealt with emergencies during Mr Orford’s one-week holiday, but even then, the Council would hold back jobs for Mr Orford to complete upon his return. Mackenna J noted in *Ready Mixed Concrete* that “limited or occasional power of delegation” may not be inconsistent with a contract of service. I am satisfied that Mr Orford was required to personally perform this contract and that the dominant feature of this contract was that it would be performed by Mr Orford himself.

### **Mutual Obligations**

61. The manner in which the contract was ended is very telling of the true relationship between Mr Orford and the Council. Mr Rose is a senior manager at the Council (responsible for strategic and operational management of housing needs). He had previously had very little contact with Mr Orford. Ms Mills Butcher has previously given Mr Orford instructions on a regular basis. If there was no obligation to provide Mr Orford with work, Ms Mills Butcher would have just stopped giving Mr Orford work or would have explained there was no further work available for Mr Orford. Instead, Mr Rose telephoned Mr Orford and offered to introduce him to Newport Norse. Further Ms Mills Butcher acknowledged it was a “really difficult process” for Mr Orford and offered to “talk this over” if Mr Orford wanted to.

62. From very early on in the contract, there was an obligation on the Council to provide Mr Orford with work; he had been told the Council’s work would “keep him fully occupied” and on this basis had charged at reduced rates.

63. Equally there was an obligation on Mr Orford to accept and complete any work offered to him – Ms Edwards’s evidence was that he had to be on duty all the time and flexible enough to switch tasks and work on whichever task was most urgent for the Council. This is further supported by p476, which demonstrates Mr Orford was expected to complete all work given to him “*sorry but jobs may come thick and fast today...*”

64. I am satisfied that there was an ongoing mutual obligation that persisted from 2009 onwards and this was the reason Mr Orford felt unable to ever turn down work from the Council or work for any other party and the reason for Mr Rose and Ms Mill Butcher feeling so bad about bringing Mr Orford’s work to an end.

### **Sufficient Control**

65. Whilst Mr Orford was not supervised, quite clearly the Council did exercise control over which tasks he prioritised, taking him off one task and instructing him to work on a different more urgent task. In addition, the emails in the bundle

demonstrate Mr Orford was routinely given lists of instructions and expected to complete tasks within tight time-frames, without checking whether he could meet these deadlines – he was just expected to meet them.

**Other circumstances**

66. It has been submitted that the fact Mr Orford was paid more than the Council would usually pay a maintenance person and the fact he was paid under the trading name Platinum Plasterers are indicative of him being self-employed rather than an employee. I accept these facts would point toward that status. However, these facts are not a bar to him being an employee. Rather, these facts are to be considered with all the other circumstances of his situation. In this case, Mr Orford was highly integrated into the Council's PSL team – he was a key person in that team, the go-to person to get a property turned around, he was copied in on emails containing sensitive information about tenants' circumstances, he attended planning meetings, took responsibility for keys, co-ordinated trades people and signed waste management transfers on behalf of the Council.

67. The truth is in 2009 / 2010 the relationship that existed between the Council and Mr Orford rapidly evolved into one of master and servant – it was only by Mr Orford complying with the Council's every instruction, completing work quickly, turning his hand to whatever tasks were necessary, rapidly moving from property to property, often changing tasks at short notice as instructed by Mr Hale and Ms Edwards and the rest of the team and more importantly by his being at their beck and call around the clock, that the Council were able to repair so many PSL properties and hit the performance indicators they achieved. By the time Ms Mill Butcher moved into this team, Mr Orford's relationship with the Council had been one of employee and employer for many years. Mr Orford continued to perform his contract of service and others in the team continued to treat him as a fellow employee until his contract was terminated on 19<sup>th</sup> June 2018.

68. At the hearing, it was suggested that once the issue of employment status was determined the parties may be able to resolve any remaining issues. In the event of there being further issues to be determined, parties are requested agree suitable case management directions and write to the Tribunal within 14 days of receipt of this Judgment, confirming the directions that have been agreed.

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Employment Judge Howden-Evans

Dated: 30<sup>th</sup> May 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....31 May 2019.....

.....  
FOR EMPLOYMENT TRIBUNALS