EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Fadlalla	**v**	**The Oxfordshire Taxi Co Ltd**

Heard at: Watford **On**: 30 April & 1 May 2019

Before Employment Judge Manley

Representation

For the Claimant: Ms N Cunningham, Counsel

For the Respondent: Mr M Paulin, Counsel

RESERVED JUDGMENT

1. The doctrine of issue estoppel applies so that the claimant is debarred from arguing matters related to his employment status with the respondent which were previously determined.

2. If the doctrine of issue estoppel does not apply, I find that the claimant was not a worker for the respondent.

3. The claims for unlawful deduction of wages, failure to pay the national minimum wage and holiday pay and trade union detriment cannot therefore proceed.

4. The claim is dismissed.

REASONS

Introduction

1. Some aspects of this matter were considered at an interim relief hearing in February and March 2018. Judgment was delivered orally by Employment Judge Lewis after a two-day hearing in which it was determined that the claimant was not an **employee** of the respondent. Reasons were sent to the

parties on 9 May 2018. In a detailed judgment ("the Lewis judgment"), reasons were given for the central findings. The claimant's claims for unfair dismissal and breach of contract, along with his interim relief application, therefore failed.

2. The claimant has some outstanding claims for which he needs to show that he was a **worker** for the respondent and that is in dispute. That was the primary issue for determination at this hearing. The question is whether he was a worker under s 230 (3) Employment Rights Act 1996 (ERA), where a claimant without a contract of employment have become known as a limb b) worker.

3. At the beginning of this hearing, I was handed an opening skeleton argument by the respondent's representative which submitted that the doctrine of **issue estoppel** applied. In summary, the respondent submits that the Lewis judgment contained findings which were relevant not only to the determination of whether the claimant was an employee but also to whether he was a worker. The findings in that judgment to which I was referred were that the claimant had the right to put forward a substitute and had done so on several occasions, that there was no mutuality of obligation or requirement for personal service and the claimant was carrying on a business undertaking.

4. The claimant's representative responded orally and said that issue estoppel did not apply in these circumstances. The claimant submitted that the issue which had been determined in the Lewis judgment was whether the claimant was an employee and the issue of whether he was a worker had not yet been determined. The claimant further submitted that I was not bound by the facts as found in the Lewis judgment but accepted that I am, of course, bound by the decision on whether he was an employee.

5. I considered representations on this point at the commencement of the hearing. I decided that it would be proportionate and in accordance with the overriding objective to hear evidence, particularly as the witnesses were all present, limited to any evidence relevant to the worker definition. I informed the parties that I would decide whether the claimant was or was not a worker as defined and also whether the doctrine of issue estoppel applies at the conclusion of the hearing. I reserved my judgment and further discussion on the issue estoppel question is discussed later.

Evidence

6. A bundle of prepared witness statements was before me. I was told that the first six statements were prepared for this hearing and I also had sight of, but took very little account of, those that had been prepared for the Lewis hearing. Those witness statements provide a considerable level of detail that was not necessary for me to consider, given that a very large proportion of the necessary factual background is agreed. I heard relatively brief evidence from Mr Singh, Ms Galloway-Spring and Mr Saeed for the respondent as well as from the claimant and a former colleague on his behalf.

7. I also had extensive documentation. I noted that, at the previous hearing, the documentation was over 500 pages. The two lever arch files presented to me at this hearing were around 750 pages. It goes without saying that I did not read them all but looked at those referred to in the witness statements and on cross examination.

Facts

8. Many of the relevant facts were previously decided and set out in the Lewis judgment. No real issues were taken with most of the facts as set out in that judgment, although further questions were asked, particularly with respect to the question of personal service. It seems sensible to add those facts now to make this judgment understandable on its own. The facts appear between paragraphs 16 and 42 as follows:

16 The respondent is a family owned company, and part of a group which provides a number of transport-related services and facilities (e.g. car hire following accidents). It has operated for over 50 years under the leadership of the Green family. I was concerned solely with its taxi business, based in Oxford. Mr Green, writing with evident pride, wrote that it operates 24 hours a day every day of the year, and covers up to 30,000 bookings per week. Its operating name is 001 Taxis. It operates in Oxford in an environment which is both regulated and competitive.

17 The claimant, who was born in 1968, has worked as a driver for 001 intermittently since 1997. He mentioned two long gaps in his service, between 2007 and 2011 for study, and between about April and November 2015, when he was engaged with family matters, including spending several months in Sudan. In this case, I was solely concerned with the position after November 2015.

18 I was therefore concerned with a working relationship which has been in place, on and off, for some 20 years. The relevance of such background is that in returning to work for the respondent in late 2015, the claimant knew and understood its arrangements and systems. He was a university graduate. Any suggestion that the respondent sought in some way to deceive or mislead the claimant was, in my view, misplaced.

19 I cannot make a comprehensive finding about the regulatory systems in place. The work of the claimant and respondent was subject to at least five regulatory regimes, and possibly more. I was told of those applied by the local authorities (City of Oxford being different from those in South Oxfordshire); of the regulation of individual drivers, including the claimant; of the regulation of individual vehicles; and of the requirements of those who contracted with the respondent, such as Oxfordshire County Council (OCC). The regulatory regimes were well known to all those involved in these events. All recognised the importance of adhering strictly to the relevant requirements.

20 The claimant had at the material times, i.e. from late 2015 onwards, a Hackney Carriage Vehicle Licence issued by South Oxfordshire District Council (the current version at C172). It named both the claimant and the vehicle to which it applied and, as it said, it authorised him to ply for hire within the district. In other words, a Hackney Licence entitled the holder to take flagdown business within the district which issued it and nowhere else. The claimant could ply for hire with his light on and accept flagdown business anywhere in South Oxfordshire. (The parties understood that Hackney Licences are a rare and valuable commodity in Oxford, and the claimant said that he applied in South Oxfordshire, in part for that reason, and partly because his vehicle did not meet Oxford City requirements.)

21 The Hackney Licence also entitled the claimant to work through any licensed private hire operator in the UK as a private hire. In other words, it entitled him to accept work from the respondent (or any of its competitors) through a system of the type described below. The Hackney Licence also entitled him to accept direct business from the public, not using the flagdown procedure. A member of the public might, for example, telephone the claimant direct on his mobile number to make a booking.

22 Finally, possession of the licence enabled the claimant to apply for other opportunities, such as a permit to use the VIP taxi rank at Henley Royal Regatta (C148). (Henley is within South Oxfordshire District and therefore within the claimant's Hackney district.)

23 The claimant's Hackney licence was linked to a Mercedes minibus, which the claimant acquired in late 2015 for a price of £7,500.00. During his prior work for the respondent, he had not owned his own vehicle, but had driven one leased from a company within the Green family businesses. The 2014 contract to which I was referred related to that period, and to that extent was in place for different circumstances. Ownership of his own vehicle gave the claimant more choice and greater flexibility. As stated, he had the right, within South Oxfordshire, to ply for business with a light box, and to accept flagdown fares. He made his own arrangements with those fares for payment.

24 The respondent is a private hire operator licensed by Oxford City Council.

25 The working arrangement between the claimant and the respondent was, on my finding, the following so far as material. The working relationship was not set out directly in writing, although aspects of the working systems were in writing. I deal separately with two forms of arrangement, which I call the arrangement for immediate work (my term, which was not used by any party) compared with the school run.

26 When the claimant wanted to work through the respondent for immediate taxi driving opportunities, he had to make himself available by paying the respondent an administration fee of £120.00 per week (called 'rent') and obtain use of the icabbi app, for which he paid £12.00 per week.

27 When the claimant was at work, he logged on to the respondent through the icabbi app, and once he had done so, he was automatically considered to be available to be allocated work. Mr Paulin said that he was then in a "virtual cab rank", although my phrase for the same thing would be an electronic queue. By joining the queue, the claimant declared his availability for hire. Mr Singh, whose knowledge and understanding of the business systems appeared profound, stressed that the system implied a duty on both sides to operate it fairly. The basic rule of fairness on the part of the respondent was that the next available driver would receive the next available job. Fairness on the part of the driver implied that he would accept the next allocated job if available.

28 Once a passenger's request had been passed to the claimant through the respondent, the claimant (or any driver) had the right to reject it, without giving a reason. However, if he did so, he was at risk of sanction. (The debate on whether this was properly called a "penalty," which was the word adopted by the icabbi software, was of no assistance.) The sanction was to be knocked out of the queue for a period between 20 minutes and an hour, depending on circumstances. I accept that this was no more than a practical element of the duty of fairness. If a driver was at the head of a queue and available for a job, but turned it down, that implied that the driver was cherry picking rather than taking first come, first served. As a matter of fairness therefore, he might be sent back down the queue to wait for the next job.

29 The payment arrangements for such jobs were that the payment made by the passenger belonged in its entirety to the claimant. If the passenger paid cash, that was simplest and most straightforward. If the passenger had an account or paid for the booking by credit card, such that the money came to the respondent, the respondent paid it over to the claimant in full.

30 I noted a number of other minor points. The claimant agreed that he was responsible for items of required equipment within the vehicle, e.g. a fire extinguisher. The claimant was responsible for insuring the vehicle, and for keeping it clean and roadworthy. The respondent provided the claimant with detachable badging, and the claimant was required to use only the respondent's badging or logo when working through the respondent. He had greater freedom on other occasions. The claimant was required to adhere to a dress code while undertaking the school run. When not working for the respondent, the claimant was free to work for any other provider or operator.

31 I accept the evidence of Mr Green and Mr Singh that the above summarises (no doubt in simplified form) the arrangement by which the respondent's drivers have always worked, and which according to both is the common template for the industry. In that context, I note that the above description is very similar to that which applied to Mr Mingeley in Leeds in the years 1997 to 2001 (paragraph 3, page 729).

32 In addition to immediate taxi requests, the respondent had a substantial volume of account-based work. I need go no further for present purposes than consideration of a school run for OCC, which required delivery of a small number of vulnerable pupils with special needs to school every day of the school term, and their collection and return home on the same days. It was a requirement of the respondent's contract with OCC that every journey be undertaken by two members of staff, a driver and an escort. The nature of the work added an additional layer of regulation, which was that drivers and escorts had to be authorised in accordance with safeguarding requirements. Ms Greenwood was employed by the respondent to manage the school run contracts, and I was taken to what appeared to be tendering information submitted by the respondent to OCC when applying for the contract (C85A).

33 I accept the general point made by Ms Greenwood in evidence, which was that she did not offer school contract work to drivers, but that drivers applied for it. I also accept that the same was true of escorts, and that the respondent maintained a list of accredited individuals who wished to undertake escort work, who were offered work as and when it became available.

34 The school run work was undertaken in many respects in the same way as that of immediate task work. The driver was required to log on 30 minutes before the first collection, and logged off after delivery to the school. He was then under no obligation to work for the respondent until he did the afternoon run, but was free to do so if available.

35 The rate of payment for the school run was set by contract between OCC and the respondent, and the respondent paid the entirety of the contract price per run to the driver. It did not deduct a share or overhead or commission. One unusual feature of the system was payment of the escort. The cost of the escort was included in the contract price agreed between OCC and the respondent. The respondent paid the driver a sum which included payment to both driver and escort, and the driver was then responsible for making payment to the escort. I was told that the respondent did not require the driver to pay the full amount of escort payment to the escort.

36 The dispute before me, the school run, focused on a number of central points.

37 One was the commitment given by the respondent to the claimant about the school run work. It was common ground that the contract awarded by OCC to the respondent was for three years. The claimant asserted that he had been guaranteed work on the contract for three years by Ms Greenwood's predecessor, who was the witness whose statement had been served and who was not available. I make no finding on this point.

38 A second dispute was as to substitution. I was taken in detail to pages R40-47, and accept that those showed that the claimant was unavailable

for the school run, and offered substitute drivers (whom he had arranged), on 15 December 2017, 4 July 2016, 12 July 2016, 14 August 2016, 22 November 2016, 9 December 2016 and 18 December 2017. On each occasion, the claimant provided a substitute from the respondent's own pool of drivers. A transcribed telephone conversation of 15 December 2017 between Ms Greenwood and the claimant (R40) was no more than an instance of this.

39 *I accept that throughout the period of the school run contract, the claimant had the right to withdraw from any particular run and to put forward a substitute. The substitute had to meet the relevant regulatory requirements, as to driving, licensing, and safeguarding. To that extent therefore there was not an unrestricted pool of substitutes (this was a point in Halawi). I accept that while the instances quoted were all instances where the substitute was known to the respondent (and identified by a respondent driver number), that was in fact not a requirement, and that the claimant was free to nominate a substitute, who could demonstrate that he met the requirements, even if he had never worked before for the respondent.*

40 *I was taken to a volume of evidence about what might happen in the event of the claimant being available to drive but no escort being available. There was dispute as to where responsibility lay to find an escort. I accept Ms Greenwood's evidence that it was the primary responsibility of the driver to find an escort; but that if the driver were unable to do so, and notified the respondent, the respondent would try to find one, and might draw on a pool of awaiting escorts. As with drivers, the pool of escorts was not an open one, and had to be filled by people authorised by the local authority. In preferring Ms Greenwood's evidence on this, I attach considerable weight to transcripts of conversations which she had with the claimant on 7 and 15 September 2017 (132A-C) in which the language used by the claimant seemed to me in keeping with Ms Greenwood's evidence: "I'm still looking around to secure an escort… stuck for tomorrow… by Monday morning I'll have an escort for you… I'm struggling for escort again… I tried to find somebody else but I'm just struggling".*

41 *A matter which seemed to me important related to Henley Royal Regatta. On 24 June 2017, the claimant sent a message to the respondent "to let you know that I have VIP permits to the Henley Royal Regatta this coming week. I am allowed into the VIP area to drop and pick up. I have left a copy for you at the office. Please sort a good price for this service." (C96-98). It was explained to me that there is significant regulation of vehicle traffic in Henley during the regatta. The claimant as a South Oxfordshire Hackney driver could readily obtain access to VIP parking, but the respondent as an Oxford-based private operator could not. The claimant had obtained the permit without cost and of his own initiative, and could make best (ie potentially most lucrative) use of it through the respondent.*

42 *I also attached weight to the claimant's tax returns (8-39) for the two years 2015/16 and 2016/17. They showed the claimant having submitted tax*

returns on the basis of self-employment as a Hackney operator and having paid voluntary class 2 (self-employed) national insurance contributions. In the latter year, he claimed allowances of £9,502.00, including capital allowance for the full cost of his vehicle (R21)".

9 Some parts of the Lewis judgment which appear under the heading "*discussion*", were also relied upon by the respondent and I set these out now.

> *43. I approach this matter through the three questions raised in Ready Mix Concrete. My first question was whether, to paraphrase the headnote of that case, the claimant agreed in consideration of a wage to provide his own work and skill in the performance of some service for the respondent.*
>
> *44. I find that that was not the bargain between the parties. I find that their agreement was that the claimant paid the respondent a sum for administration, and paid for the icabbi app, and in return the respondent placed the claimant in the electronic queue, which it undertook to operate fairly and from which, from time to time, it offered the claimant individual assignments at times when he was logged as available to work. The respondent did not pay the claimant a wage, but accounted to him in full for any fares which were paid to it for such assignments. It did not require the claimant to account to it for any part of any amount paid by the passenger to him. This was the transmission of fees paid by a third party, not remuneration paid by the respondent.*
>
> *45. Apart from the school run, the claimant was under no obligation to be available at any time, or for any specific time or assignment; and for the assignments of the school run, he had a right to substitute (which he exercised in practice) which was restricted only by the necessity that any substitute was properly accredited.*
>
> *46 It follows therefore that the claim fails at the first Ready Mix hurdle, namely personal service. Nevertheless, I now deal with the second and third Ready Mix stages.*
>
> *47 (*not relevant for worker status)
>
> *48 The third element in Ready Mix is whether "the other provisions of the contract were consistent with its being a contract of service". I understand that to be more of an overview, and to require me to step back from the detail. I find that the overall provisions and circumstances overwhelmingly are inconsistent with a contract of employment, and I refer to the following, which are not in priority nor necessarily an exhaustive list:-*

48.1That the claimant was independently and personally licensed as a Hackney driver, which conferred privileges and entitlements wholly unrelated to the respondent;

48.2That in entering into arrangements with the respondent, the claimant was free to opt out of a whole generic category of work: I accept Ms Greenwood's evidence that drivers who for example did not wish to do hospital work or NHS work were at liberty to decline to do so;

48.3The unqualified right of the claimant to absent himself from availability for work for any period of time and for any reason, without obligation to explain any reason;

48.4The ability to substitute, which I find was unqualified (subject only to the substitute being appropriately qualified to undertake the role), and which was exercised in practice;

48.5 The freedom to work for rivals, in a competitive environment, and to do so while at the same time maintaining his working relationship with the respondent;

48.6While I approach tax matters with hesitation, and in the understanding that different considerations apply, I attach some weight to repeated declarations of self employed status made in writing by the claimant (an educated man); to his payment of voluntary class 2 national insurance; and to his claim for full capital allowance. I note that the claimant had, by late 2015, worked for the respondent for about 14 of the previous 18 years, and I take it that on returning to the respondent, as owner of his own vehicle, he exercised an informed choice about the arrangements within which he wished to work;

48.7I attach some weight to the Henley Regatta matter because I find that it shows a meeting of arm's length economic interests. The respondent had access to a customer base in Oxford as a private operator. It had no access to the VIP system at the regatta. The claimant had access to VIP parking at the regatta, but apart from driving round the District with his light on, no access to a customer base. The claimant's message to the respondent was an appeal to mutual self interest.

48.8I find that the claimant has taken an element of economic risk. The risk is that having made his capital investment, obtained his qualification, and invested further in recurrent overheads (such payment of 'rent'), he took the economic risk that his income would generate an income and a living for him. His risk was related to the general volume of passenger

10 As far as the facts are concerned, I adopt those as set out above and contained within the Lewis Judgment at paragraphs 16 – 42. I now find further facts on the basis of evidence at this hearing about the school run to those which appear at paragraphs 32 to 40 in the Lewis judgment.

11 The claimant gave evidence that he believed that he was secure in the schools' contract (as referred to in the Lewis judgment at paragraph 37). Ms Galloway-Spring's evidence was that she made no such promise. I accept that evidence. She may have mentioned there was an overarching three-year contract but that did not bind any individual school. I accept what the claimant and his witness said which is that the respondent might well ring the usual driver who had most often carried out that task to see why they had not attended or logged on.

12 I also heard further evidence in relation to substitution which is dealt with at paragraphs 38 to 40. It is clear that the claimant could substitute, and I was taken to a document where he said that he had arranged a substitute for the school run. The respondent's case is that the claimant had the "*first refusal*" for that particular school run but, if he did not log on or declined it, the school run would simply be offered to another driver. It was put to the respondent's witnesses that continuity was important given the vulnerable nature of the passengers. It was agreed that it was, to some extent, but the respondent said that it was not part of the contractual arrangement. The claimant gave evidence that he could only substitute with a respondent driver with the appropriate qualifications, but the respondent's case is that it would not be necessarily a respondent's driver. That point was already covered in the Lewis judgment and was accepted as being accurate. I find that the claimant did know that he could and did put forward substitutes, but he was also aware that the respondent would find one in certain circumstances.

13 The other evidence which I heard, and which may not have been mentioned at the Lewis hearing, concerned the wording of the contract between the council and the respondent with respect to the school run. The document refers to "*staff*" of the respondent. It is suggested that this imposes some limits on sub-contracting. I am quite clear that this is a standard document and I obviously heard no one from OCC to see why see they used that language. It is common for language which does not necessarily fit into the legal definition to be used and I do not accept that takes me any further with the question of personal service.

14 The other evidence which was put before me is a document which showed more detail on the number of times that the claimant declined work. The claimant did not accept the data produced by the respondent but there is no reason to doubt that there were a significant number of times that the claimant declined certain jobs over the period of his relationship with the respondent.

15 The respondent's witnesses were asked several questions about letters it had sent to drivers which, it was suggested, made it clear that drivers were not free to do other work. In particular, I saw (at page 167f) an instruction

for those drivers who wish to drive executive vehicles. That stated that, if drivers declined jobs "*without a very good reason*", they would be downgraded. This meant that a driver could not carry out executive vehicle work. There is no suggestion that this had happened to the claimant. Mr Singh categorised that and other such statements as "*guidance*".

16 A further document was a newsletter which appeared at 277d under Mr Singh's own name. This appears under the heading "*Competition*" and reads as follows:

> *"It has come to our attention that some drivers within OO1 have been either operating their own companies in Oxford or covering bookings for them. We will not tolerate either and have ongoing investigations that will confirm whether drivers are covering work. A few examples are GetRyde and Westfields Chauffeur. If you have or are covering work for these companies, you will need to make a decision to work for them and leave OO1 or work for OO1 and do not accept any other work from any of these companies. Once we have completed our investigations we will remove any driver from OO1 who is working or covering work. This information has come from remaining OO1 drivers who feel that work is being taken away from them from these companies, because some drivers have allegedly handed customers of OO1 a business card which is not associated with OO1. We will not tolerate this to continue. We will be using mystery shoppers to identify drivers covering or working for GetRyde and Westfield Chauffeur or any other new suspicious companies new around Oxford. Any driver found covering work will be asked to leave OO1."*

17 The claimant's case is that those comments would appear to suggest exclusivity on the part of drivers. Mr Singh explained that this was not what was meant by that document and explained that it was because the respondent was having some difficulties with some drivers giving cards for named competitors taxi companies. Mr Singh's explanation for the way in which that particular concern was written was that the respondent had a typist at this time who had drafted the newsletter without his full involvement although he accepted that he had signed it. This is not a particularly credible explanation. In other respects, Mr Singh's evidence appeared honest and open and I was surprised by this explanation. In any event, I do not find that the newsletter is sufficient evidence that the claimant was not expected to work elsewhere given that it was known he had his own business.

18 The other aspect of which I heard considerable evidence relates to what was referred to in the Lewis Judgment at paragraph 28. This relates to the icabbi software which used the word "*penalty*" when referring to the sanction of the driver being put to the back of the queue if they had declined a job when logged on as available. The evidence I heard added nothing to the finding in the Lewis judgment which was set out clearly in that paragraph and needs no changes.

Law and submissions

19 The first issue was whether the doctrine of issue estoppel applied in this case. I was referred to cases on this. Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2013] 2 All ER 715 is a case about patent infringement heard in the Supreme Court. Lord Sumption set out the general principles of res judicata and the specific principle of "issue estoppel" as follows at paragraph 15:

"there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties"

20 In Arnold v National Westminster Bank plc [1991] 3 All ER 41 Lord Keith (in the House of Lords) said:

"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue"

21 Arnold was said in Virgin Atlantic Airways to be authority for the proposition that;-

"Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully".

22 The case of Soteriou v Ultrachem Limited [2004] IRLA 870 was an employment case in the High Court. Quoting from Thoday v Thoday [1964] P181, it was said issue estoppel was an extension of cause of action estoppel.

"*if in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction…neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or denied that it was fulfilled if the court in the first litigation determined that it was"*

23 The difficulty here is in determining what is an "**issue**". If the **"issue**" is, as the claimant argues, whether the claimant was a worker, that issue has not been determined. Or, can the "**issue**" be the elements which, when looked at together, determine whether someone is a worker? In that case, there are elements of the worker definition which are the same as those for the employee definition which has already been determined. I considered the cases set out above to assist me with that question.

24 If the doctrine of issue estoppel does not apply, I am tasked with determining whether the claimant met the limb b) definition. This was a question of whether he "*undertook 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 the client or customer of any professional business undertaken carried on by the individual*" under s230 (3) b) ERA. A central matter to determine here was whether the claimant undertook to do work personally.

25 It does not appear that there was any dispute that the claimant was working under a contract with the respondent and there was only limited argument about whether it could be said that the respondent was a client or customer of the claimant.

26 As indicated I had written and oral submissions from the representatives. Those submissions are referred to above. In essence, the claimant's case is that the doctrine of issue estoppel does not apply because the issue of whether the claimant was a worker has not been determined. The claimant submits that I am bound by findings which relate to employee status but not to those which relate to worker status. The claimant submits that the dispute between the parties centres on the question of personal service.

27 The respondent submits that the doctrine of issue estoppel does apply and referred me to the cases set out above. The respondent also submits that the claimant must show personal service and relied heavily on paragraph 44 of the Lewis judgment. It is submitted the claimant has not shown any requirement for personal service, a point already determined.

Conclusions

28 I deal first with the question of whether the doctrine of issue estoppel applies in this case. Taking guidance from the cases above, I have concluded that issue estoppel does apply in this case. This is a case where there is an issue common to the causes of action for which the claimant must show he was an employee (unfair dismissal, breach of contract and interim relief) and those for which he must show he was a worker (unlawful deduction of wages national minimum wage, holiday pay and trade union detriment). That issue is whether he was engaged to perform work personally. That was determined in the Lewis judgment against the claimant. It would not be right to re-open that question.

29 If I am wrong about that finding, I have also moved on to determine whether the claimant can show he was a limb b worker. I considered with some care what findings of fact in the Lewis judgment and any additional relevant evidence that I heard today. The question really relates to whether the claimant can be said to undertake and perform personal work when he logged on as available. Of course, he logged on as himself and could not log on as someone else. It is therefore for him to do the work offered, except in two important respects. One is that he could simply decline work. Another is he could send or arranged a substitute. Unfortunately for the claimant this is exactly what he could and did do.

30 For completeness I find that the respondent was not a client or customer of the claimant.

31 In summary, the doctrine of issue estoppel applies in this case to the question of personal service. If it does not, the claimant was not engaged to carry out work personally because of the fact he could and did decline work and he could and did send substitutes. The claim is dismissed.

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Employment Judge Manley

Date: ……13.06.19……..

Sent to the parties on: ..13.06.19.....

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For the Tribunal Office