EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Mark**
Respondents:	**1. Kyles Legal Practice Ltd**
	2. Crimedirect Ltd
	3. Mr N Peacock
	4. Mr J Turner

Heard at:	**North Shields**	**On:**	**23, 24 September 2019**
Before:	**Employment Judge Davies**		

Representation

Claimant:	Ms Millns (counsel)
Respondent:	Mr Vials (solicitor)

JUDGMENT having been given to the parties on 24 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. INTRODUCTION

1.1 These are claims for ordinary and automatically unfair dismissal, protected disclosure detriment, breach of contract and claims for wages and other payments brought by the Claimant, Mr A Mark, against four Respondents: Kyles Legal Practice Limited, Crimedirect Ltd, Mr N Peacock and Mr J Turner. This was a preliminary hearing to decide the question whether the Claimant was an employee or worker of the First or Second Respondent at the time of the events the subject of this dispute between the parties. At the start of the hearing the Claimant withdrew his claim against the Second Respondent and I therefore determined whether he was an employee or worker of the First Respondent only.

1.2 The Claimant has been represented by Ms Millns (counsel) and the Respondent by Mr Vials (solicitor). I was provided with a lengthy file of documents and I considered those to which the parties drew my attention. I admitted a small number of additional documents by agreement during the course of the hearing. I heard evidence from the Claimant himself and for the Respondent I heard evidence from Ms Higginbotham (para-legal), Ms Mearns (receptionist), Ms Hossak (solicitor) and Mr Turner (director).

2. THE ISSUES

2.1 The issues to be determined today had been agreed at a previous preliminary hearing and were, essentially:

2.1.1 Was the Claimant an employee of the First Respondent as defined in s 230(1) and (2) Employment Rights Act 1996; and

2.1.2 Was the Claimant a worker of the First Respondent as defined in s 230(3) Employment Rights Act 1996?

2.2 Ms Millns confirmed at the outset that she was not arguing that Mr Mark could bring himself within the extended definition of worker in section 43K Employment Rights Act 1996.

3. FINDINGS OF FACT

3.1 It seemed to me that much of what happened was not in dispute. The parties placed a different interpretation on those facts in many respects, but for the most part they did not fundamentally disagree about what happened. The Claimant is a barrister. He was called to the bar in 1981 and has worked in the criminal field ever since. In 2010 he had discussions with Mr Peacock, his former pupil, about setting up a business to provide their service as advocates in a different way from the traditional approach of independent practice at the bar. As a result, they set up the First Respondent, Kyles Legal Practice Limited. They were the two directors and each had a fifty percent shareholding. They approached Mr Turner, a solicitor known to them, with an offer to come and work for them as an employed solicitor. In the event it became clear that as a matter of regulation by the Solicitors Regulation Authority they needed to have a solicitor as a director of the company. Mr Turner was therefore asked to become a director and he agreed. He was given a class B share and he became a third director.

3.2 All three directors have made substantial loans to the First Respondent at one time or another. I was shown the relevant Shareholders Agreement. It included restrictive covenants as one might expect. Those allowed the shareholders to do work outside of the business with the consent of all the shareholders. As company directors the three individuals were, of course, under a duty to act in the best interests of the company. The Shareholders Agreement and Articles of Association of the company were clearly drawn up with legal advice. No other written contract was drawn to my attention. There were no written terms of employment of the Claimant or any director. The Claimant accepted in his evidence that he became aware at a subsequent date of the requirement to provide employees with written terms of employment, but no steps were taken at any stage to produce written terms of employment for him.

3.3 There is no dispute that at the outset the three directors agreed they would each receive £30,000 per annum, as would other fee earners within the business who were not directors. The directors were initially to be paid through the PAYE system. The Claimant's evidence was that the idea was that he would do the lion's share of the Crown Court advocacy and Mr Peacock would do Magistrates Court advocacy and police station work. He agreed that originally they decided that they would all be paid through the PAYE system. Mr Turner's evidence was that at that stage the business was not producing a profit and therefore they were not allowed to declare a dividend and pay themselves in that way. However, by 2016 at the latest there was a change so that each of the three directors was paid by way of dividend. Mr Turner's evidence was that this was done on the advice of the accountants. The company was now making a profit and therefore was in a position to declare dividends. The Claimant agreed that this was done on the accountant's advice. He said that the directors agreed that they should be paid in the most efficient way for the company and the shareholders.

3.4 The three directors continued in broad terms to be paid the same amount. I accept Mr Turner's evidence that there were occasions when they did not receive the full agreed amount or did not receive it all in one go. In that respect they were different from the others working in the business, who were accepted to be employees. There was at least one occasion when all three directors agreed to forego any payment. There was an occasion when the Claimant, who had access to the bank account, paid £4,000 to each of the directors. Mr Turner and Mr Peacock returned theirs on the basis that they did not think that the company had enough money in the bank at that stage, but the Claimant did not. There were other occasions where they received their payment but in "dribs and drabs." When the change was made to making payments by way of dividends, it was agreed between the three directors that the First Respondent would also pay their tax liabilities and that this would be used to reduce the amount of the outstanding loans to each of them. I saw the Claimant's tax return for the year ending April 2017. He declared to HMRC that he was not an employee and was not self-employed.

3.5 The evidence before me, again not disputed, was that the Claimant was paid his monthly amount regardless of the amount of work he did. Although the intention had been that he would do the lion's share of the Crown Court work, I accept the evidence of the Respondent's witnesses that in practice he did not do so. I found each of the Respondent's witnesses to be convincing in that respect. Each came at this from a different perspective and each had different involvement in the Claimant's working practices. From each of those different perspectives they had formed the clear view that the Claimant was not doing the majority of the Crown Court work. The Claimant accepted that he was free to take on or turn down any particular case. Accordingly, I find that when instructions were sent to him internally within the firm, he did regularly turn down instructions. There was no consequence for him when he did that. The First Respondent's Crown Court work was regularly outsourced to external counsel.

3.6 It was not disputed that the Claimant had no set working hours or working days. He did not have an allocated quota of holidays. He was able to take annual leave whenever he chose to do so. He would tell Ms Mearns that he was taking holiday and she would book it out in the diary. Her evidence, which I accept, was that she did not question him as to why the diary was being booked out because he was a director; anybody else had to go through Ms Hossack. There were occasions when the Claimant took time off either because of his own ill-health or because he needed to care for a relative. Those were not insignificant periods and during those periods he simply carried on being remunerated in this same way. That evidence indicates that there was no direct link between the work the Claimant did and the remuneration he received.

3.7 The First Respondent paid the Claimant's travel expenses when he worked outside of the immediate local area. Mr Turner said that this was done by agreement of the three directors and I accept that evidence. The First Respondent paid for the Claimant's practising certificate and again I accept Mr Turner's evidence that it did so for all the legally qualified directors and for those who were accepted to be employees. The Claimant's evidence was that the First Respondent paid for professional text books and materials of that kind. Mr Turner said that it had a library of such texts available for everybody and again I accept that professional texts were provided by the First Respondent in this way and that the Claimant did not need to

pay for his own. The First Respondent also paid for the Claimant's indemnity insurance. I did not understand it to be disputed that this was done by global insurance for the firm as a whole, which included the Claimant and the other directors.

3.8 The Claimant's position with respect to the Bar Council or Bar Standards Board was that he was an employed barrister. As such, he could only accept work through the First Respondent. I was shown parts of the Bar Code of Conduct from the relevant time, and Guidance produced by the Bar Council relating to employed barristers. That was potentially relevant to the parties' intentions when they entered a business relationship together. It was clearly the Claimant's understanding that he needed to be an employed barrister in order to be able to practise within the terms of his practising certificate. It is not for me to determine what precisely the Bar Council means by an employed barrister as a basis for deciding the Claimant's status. That would be the tail wagging the dog. I have to make a finding about what was agreed between these parties and whether that amounted to the relationship of worker and/or employee. That may have consequences as regards the Bar Council.

3.9 Before too long disagreements emerged between the three directors. In 2013 in the course of those disagreements the Claimant expressed a wish to practise not only as an employed barrister but also as a member of the independent bar. Mr Turner voiced his strong opposition to that. His evidence when cross-examined was that this was therefore put on hold for a year. Overnight an e-mail was produced, which confirmed that evidence. Mr Turner explained that the shareholders agreement allowed the directors to work elsewhere, but that they had to get one another's agreement. Mr Turner said that this was the context in which he voiced his opposition to the Claimant's having a dual practice. Mr Turner said that he was entitled within the terms of the shareholders agreement to object. If necessary, it would have had to go to a Board meeting for the shareholders to decide one way or another.

3.10 The disagreements between the three directors continued and grew. It is not necessary for me to go into those. I simply touch on some matters from late last year and early this year that may be relevant to my decision about the nature of the relationship entered into at the outset. Mr Turner and Mr Peacock were contacted by a third party and this led them to identify what they believed to be evidence that the Claimant had leaked confidential information about the First Respondent and had then taken steps to cover his tracks by attempting to delete relevant e-mails. They took a decision to remove him as a director of the Second Respondent. They were not in a position to do that for the First Respondent, because of the nature of the shareholdings. Mr Turner and Mr Peacock convened a Board meeting. The Claimant was invited but did not attend. Mr Turner and Mr Peacock decided at the Board meeting that the Claimant should be removed from the First Respondent's day to day business. They also decided that he should not be allowed to conduct a Crown Court trial that he was due to conduct in early January 2019. Mr Turner accepted that the Claimant was stopped from doing that trial. A memo was written to staff informing them that the Claimant would not be involved in the day to day business of the firm. The Claimant himself was told words to the effect that he was being suspended.

3.11 Ms Millns drew my attention to a variety of documents from the time of this dispute. Some were minutes of meetings, some were file notes, some were correspondence between the parties' solicitors. There is voluminous such material within the file. The odd sentence here or there may use the word "suspension" or talk in terms of "salary" or "resignation." However, Ms Millns's careful analysis of specific sentences from

specific documents did not particularly assist me in determining what was agreed or understood between the parties at the time. That was principally because it is difficult to know why particular words were used on particular occasions, especially when one can find other examples of different language being used to describe the same thing. Each of the examples Ms Millns identified was, in my view, consistent with a number of possibilities: one was that the parties viewed their relationship in a particular way, but it could equally be that the author of the document was loose with his or her language, or that there was a mistake or disagreement, or any number of other explanations. I therefore did not find the close textual analysis of these documents to be of particular assistance.

3.12 As already indicated, by January 2019 steps were taken by Mr Peacock and Mr Turner to remove the Claimant from the First Respondent's day to day business and to prevent him from conducting a particular trial.

3.13 In terms of the overall position, the Claimant did not set out in his evidence what he said the contract between himself and the First Respondent was, what its terms were or how they had been agreed. I asked him about that when he gave his evidence and he said that what had been agreed was that he would do the Crown Court work and would be paid the remuneration of £30,000, the same as the other directors. That subsequently became dividends. A little later in his evidence, the Claimant said that when Mr Peacock, Mr Turner and he set up the firm the agreement was that he would do the Crown Court work. He said that they had entered into this agreement verbally and "by way of custom and practice." It was an agreement that each of them would do "that which would bring in the most money." When Mr Peacock asked him if he would join him in business, Mr Peacock said, "You can do that work and we can keep the litigation fee and the advocate's fee." The Claimant accepted when cross-examined that he made no mention or suggestion until May 2019, after all the events described above, that he was a worker or employee of the First Respondent. I also noted the following comments made by the Claimant during the course of his evidence. At one stage he said, "I was the director and the owner. My role was to go to the Crown Court as I did previously and do the serious Crown Court work that would bring income to the firm that would otherwise be lost if I was at the independent bar." He also said that as an owner and shareholder, "Any work you did would profit the business. That was the whole reason the company was set up. Mr Peacock and I would do the Crown Court work. That would be funnelled into the business to create extra income. The litigation fee and the advocate's fee would both come to the firm." The Claimant said, "There was no contract saying you have to X or Y. My role was to do the Crown Court work to assist in making more money." The Claimant also said that he had no boss or manager and was answerable to "my other two directors."

3.14 Mr Turner said that the overriding desire in 2010 was to break down the traditional barriers between the Bar and solicitors and to save on costs. The intention was to keep as much work as possible in-house. The three directors were to receive the same remuneration. The three of them did not take orders from anyone. The remuneration was agreed between them and there was the expectation that they would, "Involve themselves in the fee earning of the firm." There was no target, they were partners in the business. Mr Turner said that they agreed they would work, "Collectively for the good of the company." They did not all do as much as each other. There were no targets but there would be little point in having a firm if you did not get something for your investment.

3.15 I find that that was the basis of the agreement between the parties. Mr Turner's evidence and the Claimant's came very much to the same thing. There was no discussion in 2010 or indeed at any time about employment status, worker status, or contractual terms of engagement. Rather, there was a discussion between three professionals, two barristers and a solicitor, who were setting up a business together and who agreed that they would collectively work to bring money in and would be remunerated from the business in equal terms. Each of them would receive £30,000. Initially they would receive their payment by way of PAYE and in the Claimant's case he would bring value to the business by doing Crown Court advocacy.

4. LEGAL PRINCIPLES

4.1 The relevant definitions of employee and worker are contained in s 230 Employment Rights Act 1996, which provides, so far as material, as follows:

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

4.2 The starting point in determining whether an individual is an employee, a worker or neither is to identify the terms of the contract between the parties and what they mean: *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC. That is a matter of basic contract law. The Tribunal must decide on the facts whether there was a contract, considering first whether terms were agreed expressly (in writing or verbally) and then whether further terms ought to be implied on the basis that the Tribunal can presume that it would have been the intention of the parties to include them in the agreement.

4.3 There is no single test for determining whether an individual is an employee within the meaning of s 230(1). Each case depends on its own facts. There is, however, an "irreducible minimum", without which there can be no contract of employment. That minimum comprises:

4.3.1 *Mutuality of obligation* - an obligation on the employer to provide work and on the employee to accept and perform the work offered;

4.3.2 *Control* – put simply, that ultimate authority over the purported employee in the performance of his or her work must rest with the employer; and

4.3.3 *Personal service* - the employee must be obliged to perform the work personally, subject to a limited power of delegation.

See: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433 QBD; *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 CA; *Carmichael v National Power plc* [2000] IRLR 43.

4.4 The threshold for establishing worker status is lower. There are three requirements:

4.4.1 the individual must have entered into or work under a contract with another party for work or services;

4.4.2 the individual must undertake to perform that work personally for the other party; and

4.4.3 the other party must not be the client or customer of the individual's profession or business.

See: *The Hospital Medical Group Ltd v Westwood* [2013] ICR 415.

4.5 There is no simple answer to the question which side of the line any particular individual falls. In each case it is necessary to apply the words of the statute to the facts of the individual case. The concept of "subordination" may be a useful aid in answering the question, but it is not a freestanding and universal characteristic of being a worker: *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32. Other approaches that may assist include (1) considering whether the purported worker actively markets his or her services as an independent person to the world in general or whether he or she is recruited by the principal to work for the principal as an integral part of the principal's operations: see *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 EAT and (2) identifying whether the dominant purpose of the contract is fundamentally to be located in the field of dependent work relationships, or is fundamentally a contract between two independent business undertakings: see *James v Redcats (Brands) Ltd* [2007] ICR 1006.

4.6 The question of personal service is a distinct element of the definition, to be considered separately from the question whether the individual is carrying on his or her own business undertaking: see *Redrow Homes (Yorkshire) ltd v Wright* [2004] ICR 1126, CA.

4.7 Freedom to do a job oneself or through someone else is inconsistent with a contract of service although a "limited or occasional" power of delegation may not be. An essential feature of a contract of service is the performance of "at least part of the work" by the servant himself: see *Pimlico Plumbers* [2018] UKSC 29 at para 22. An unfettered right to substitute another person to do the work or perform the services is therefore inconsistent with an undertaking to do so personally: see *Pimlico Plumbers CA* at para 84. A conditional right to substitute another person may or may not be inconsistent with personal performance depending on the conditionality. This will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution. Put another way, it will depend on the extent to which the right of substitution is limited or occasional. By way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. On the other hand, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. A right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance: see *Pimlico Plumbers* CA at para 84. In some cases a helpful test to assess the significance of the right to substitute may be to consider whether

the "dominant feature" of the contract remains personal performance on the individual's part: *Pimlico Plumbers* SC at para 32.

5. APPLICATION OF LAW TO FACTS

5.1 In applying those principles, I have started with the question was there a contract between the Claimant and the First Respondent and, if so, what its terms were.

5.2 It is well-established that there can be a contract of employment between someone who is a shareholder and/or a director and a company. It is for me to find on the facts of this case whether there was such a contract between the Claimant and the First Respondent. The Claimant has not satisfied me in this case that there was any contract between him and the First Respondent. I find that no express contract was entered into, whether in writing or verbally. The parties' evidence about what was said in 2010 does not seem to me to be evidence of a contract being entered into between the First Respondent and the Claimant. It was evidence of three business owners agreeing between themselves how they were going to operate their business. The Claimant was not negotiating with or contracting with the others in their capacity as representatives of the company. He was agreeing with them how they were going to run their business.

5.3 I turn to the question whether a contract of employment should be implied and I find that it should not. There is no basis for inferring that the parties should be presumed to have intended to make such a contract. Fundamentally, I find that all the parties' conduct in this case is plainly referable to their agreement as three shareholders and directors about how they would run a business, make a profit and see a return on their investment. It is simply not necessary or appropriate to imply a contract of employment in order to make sense of that conduct and there is no legal basis for doing so. It is true that the three directors were initially paid by way of PAYE. That subsequently changed to payment by way of dividends and nobody suggested that the change in payment method changed the nature of the relationship between the parties. That by itself makes it clear that whether they were paid through PAYE or by way of dividends is not determinative of the nature of the relationship between them. In fact, Mr Turner gave a clear explanation for why the directors could not be paid by way of dividends initially. In any event the way in which remuneration was paid is only one relevant factor. For the reasons I have set out, and particularly given the way that both Mr Turner and the Claimant described their discussions and agreements at the outset, I am not persuaded that the mere fact that these payments were initially made through PAYE is sufficient to establish that there was here a contract between the Claimant and the First Respondent.

5.4 Without a contract there can be no contract of employment or contract as a worker. However, even if I had found there was a contract I would have had no hesitation in finding that it was not a contract of employment or a worker's contract. The basic elements of the employment relationship were not present, in particular the element of control. Almost all of the factors I have described above show the Claimant being very much in charge of his own destiny, working when he chose to work, not working when he chose not to work and not being subject to or subordinate to anybody else. He was answerable only to his other two shareholders and directors in the boardroom. The opposition of Mr Turner to the Claimant operating dual practice in

2013 does not evidence the kind of control that would have turned this into an employment relationship. It is entirely consistent with the operation of the shareholders agreement as drafted. Nor would I have been persuaded that what happened at the end of the relationship was evidence that this was in fact an employment relationship. This had been an increasingly bitter dispute between the directors and shareholders over a number of years. It was proving intractable. Two of the three shareholders were now of the view that the third had leaked confidential information and then tried to conceal that conduct. It was inevitable that something would have to give. What happened was a decision to exclude the Claimant from involvement in the day to day operation of the business. In the context in which it occurred, that by itself could not possibly bear the burden of demonstrating that what these parties agreed at the outset and what they did for a number of years amounted to a relationship of employment.

5.5 As to whether this was a worker's contract, again I would have found that the necessary elements were not present. Fundamentally, the question is whether the individual falls on the side of proper self-employment or on the side of being a worker. One facet of that is the requirement for personal service. The case law makes clear that if an individual has the occasional or conditional right to send a substitute to perform his or her work, that is not necessarily inconsistent with the requirement of personal service, whereas a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work will usually be inconsistent with personal performance. On the findings of fact set out above, this case fell into the second category. This was not a scenario of occasional or conditional substitution. This was a relationship in which an individual could choose whether to work or not and could and did outsource the work to somebody else to do it instead of them. That is the antithesis of a requirement of personal service. For that reason alone, I would have found, if there had been a contract between the Claimant and the First Respondent, that he was not a worker in any event.

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Employment Judge Davies
24 October 2019