EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107157/19

Held in Aberdeen on 18 October & 28 November 2019

Employment Judge N M Hosie

Mr D Kerr	**Claimant** **In Person**
Attollo Offshore Limited	**Respondent** **Represented by:** **Mr D Hay,** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claimant was not an employee of the respondent in terms of s.230(1) of the Employment Rights Act 1996 and his complaints of unfair dismissal and wrongful dismissal are dismissed for want of jurisdiction; and

2. the claimant was a worker in terms of s.230(3)(b) of the Employment Rights Act 1996 and his claim for holiday pay succeeds.

REASONS

Introduction

1. Douglas Kerr claimed that he was an employee of the respondent Company and that he was unfairly dismissed, wrongfully dismissed, and entitled to holiday pay. In the alternative, he claimed he was a "worker" and entitled to holiday pay.

2. The respondent denied the claim in its entirety. It maintained it was entitled to terminate the claimant's "engagement" with immediate effect as he was a "self-employed contractor" and not an employee. The respondent also maintained that the claimant was not a "worker" and was not entitled to any holiday pay.

3. This case came before me, by way of a preliminary hearing, to consider and determine the claimant's status with the respondent Company.

The evidence

4. I heard evidence first from the claimant and then on his behalf from: -

- Joan Gammack, who has been employed by the respondent since August 2016 as a "PA" and Business Support Manager

I then heard evidence from the respondent's Managing Director, Ben Moore.

Both Mr Kerr and Mr Moore spoke to written witness statements which are referred to for their terms.

Documents

5. A joint bundle of documentary productions was lodged by the parties ("P").

Submissions

6. After hearing the evidence on 18 October 2019, I directed the parties to make written submissions. The claimant had already made written submissions. I received submissions from the respondent's Counsel on 1 November 2019. I received the claimant's "updated" written submissions on 15 November, which included comments on the respondent's submissions. I was able to consider the evidence which I had heard along with the parties' submissions and reach a decision on 28 November.

7. In his written submissions the claimant complained that he had not been allowed sufficient time to consider Mr Moore's statement. I do not accept that was so. No formal Order was issued for the exchange of witness statements prior to the Hearing. However, on 8 October, shortly before the start of the Hearing, the claimant sent an e-mail to the Tribunal to enquire whether he would be allowed to refer to notes when he was giving evidence. The Tribunal Clerk responded by e-mail on 14 October as follows: *" Your correspondence was placed before Judge Hendry who has asked me to respond. He appreciates the difficulty that you have as an unrepresented party. Notes are normally not allowed without the permission of the Judge dealing with the hearing. However, you are free to lodge a Witness Statement (numbered paragraphs and pages) in which you set out your position, and as long as this is intimated to the respondents it can be lodged and then referred to at the hearing".*

8. The claimant submitted his written statement to the Tribunal by way of e-mail at 20:56 on 17 October, the day before the start of the Hearing. It does not appear to have been copied to the respondent's representative but, in any event, it was available for the start of the Hearing, the respondent's Counsel confirmed that he had seen a copy and that he was able to proceed with cross

examination. Accordingly, after the claimant was sworn in he confirmed the terms of his statement. It was "taken as read" and the respondent's Counsel then proceeded with cross examination.

9. Subsequently, I was advised by the respondent's Counsel that he wished to submit a written statement from his witness Ben Moore, the respondent's Managing Director. I took the view, mindful of the fact that the claimant was unrepresented and having regard to the *"Overriding objective"* in the Rules of Procedure and the requirement to deal with cases *"fairly and justly"* and to ensure that *"the parties are on an equal footing"*, that this should be allowed, provided the claimant was given a copy and allowed sufficient time to consider it. I took the view that this was of assistance to the claimant as the alternative would have been for him to listen and note Mr Moore's examination-in-chief and devise cross examination questions as he gave his evidence. By receiving a copy of Mr Moore's statement he would have time to prepare his cross examination questions in advance.

10. Accordingly, as with the claimant, after Mr Moore was sworn in he confirmed the terms of his statement. It was "taken as read" and the claimant then proceeded with cross examination. He did not complain that he had not been allowed sufficient time to prepare. Had he done so I would have given him more time. His cross examination was not brief.

11. I remained mindful throughout the Hearing that the claimant was unrepresented, as I always do with unrepresented parties. I was satisfied at the start of the Hearing that the claimant knew the procedure. The claimant was given sufficient time to consider Mr Moore's statement. I only proceeded with his cross examination after he confirmed he was in a position to do so. Far from being prejudicial, in my view having a copy of Mr Moore's statement prior to having to cross examine him was of assistance to the claimant.

The facts

12. Having heard the evidence and considered the documentary productions, I found the following facts to have been established, relative to the issues with which I was concerned.

Claimant's first period of engagement from January 2015 to November 2016

13. The respondent Company started trading in early January 2015. The claimant had two periods of employment (using that term in a neutral sense) with the respondent. The first was between January 2015 and November 2016. The respondent's Managing Director, Mr Moore, required someone to set up a health and safety management system for his new business. The claimant was recommended to him by Robert Shearer, a member of the claimant's family (P61). The claimant was in his 70s and retired, and Mr Moore thought his many years of experience in health and safety would be useful in his new business venture. On 21 May 2015, he sent an e-mail to the claimant to enquire whether he would be interested in coming to work for him (P64).

14. The claimant was engaged as the respondent's Quality, Health and Safety & Environment ("QHSE") Manager. The role was not full-time. The claimant was not understood to be an employee by either party. The claimant regarded himself as a "*freelance consultant".* There was no written contract between the parties for this first engagement, but a job description had been prepared (P206-8), which was illustrative of the tasks undertaken by the claimant.

15. Once Mr Moore had set up the HR and payroll systems for his Company he offered everyone who was working for him Contracts of Employment. This included Bill Melvin who accepted the offer.

16. Mr Moore offered the claimant a Contract of Employment in February 2016, but this was declined. The claimant advised Mr Moore that he wished to continue to work as a self-employed contractor, a *"freelance consultant",* as

he put it (P65). He continued his engagement with the respondent on that basis and continued to submit Invoices to the respondent in the name of "Kerr Consultant" (P417, for example).

17. While his position was not entirely clear, it appeared that the claimant disputed Mr Moore's assertion that he had offered him a Contract of Employment at that time. However, Mr Moore gave his evidence in a measured, consistent and thoroughly convincing manner and presented as a credible and reliable witness. Further, the claimant's e-mail of 19 February 2016 was consistent with Mr Moore's evidence (P65). I was satisfied, therefore, that the claimant was offered a Contract of Employment in February 2016 but that he declined.

18. The claimant's first engagement with the respondent came to an end in November 2016.

Claimant's second period of engagement from January 2017 to February 2019

19. As Mr Moore was tendering for a new project, he contacted the claimant in January 2017 to ask him if he would be interested in returning to work for the respondent Company and he agreed (P76/77). He started on 19 January 2017.

Written contract

20. On 26 January 2017 the parties signed a "Contract for Services" (P54-60).

21. The claimant maintained that he only signed the contract *"under duress*", but I did not find that to be so.

22. The claimant found some support for his contention from his witness, Ms Gammack, who said in evidence that the claimant had signed *"under duress".*

However, she was unable to explain the nature of the *"duress".* All that she said was that Mr Moore had made certain amendments to the proposed Contract to reflect issues which the claimant had raised, but these amendments were *"not to the claimant's liking".*

23. However, I heard no evidence of the claimant challenging the nature of the Contract which states clearly that it is a "Contract for Services"; that he was appointed "as a self-employed contractor"; that he would be responsible for Income Tax and National Insurance payments; and that the respondent would pay him a "fee", based on an hourly rate on the basis of Invoices which the claimant would be required to submit. Thereafter, consistent with that Contract, the claimant submitted paper Invoices, under the heading "D Kerr Consultant" or "Kerr Consultant", which included a timesheet with details of hours worked each month (P414-455).

24. The claimant was never paid through PAYE on the respondent's payroll. He was paid by bank transfer. The claimant also accounted to HMRC in his own tax returns. There was no sick pay or holiday pay paid to the claimant.

25. Further, as I recorded above, the respondent's Managing Director, Mr Moore, presented as a credible and reliable witness. He denied, that he had coerced the claimant into signing the Contract. He said this in his evidence:-

"*18. At this time the Company was considerably bigger than when he initially started with me in 2015 and I was aware of the importance of the paperwork for both employees and contractors. At this time, I did not offer Doug Kerr a contract of employment as he declined it previously, and referred to his status as self-employed, and I had no reason to believe that he would have changed his mind between then and the commencement of the second period of engagement in January 2017. Doug Kerr did not request to come on board as an employee, or to receive a contract of employment, he gave no indication that he was not happy for the arrangement between us to be on the same self-employed basis as he had been engaged previously. I had a contract for services prepared, and the intention between us was that Doug would come on board again with the Company as a self-employed consultant and he continued to invoice us as before from Kerr Consultants.*

19. I know that Doug has stated within the "background" section of his ET1 paper apart (page 13 of the bundle) that he feels he was made to sign the

contract "under duress". I do not know what he is referring to by this as there was no duress placed upon Doug to sign the contract. I was not forcing him to work for me. If he had not wanted to carry out work for the company, or to sign the self-employed contract, I would simply have found somebody else to carry out health and safety tasks for the Company….."

26. The claimant did not allege that he had signed the Contract *"under duress"* or protest between January 2017 when he signed the Contract and February 2019 when his engagement with the respondent Company ended. Nor did he make such a claim when he took advice from the CAB who wrote to the respondent on 11 March 2019 and only claimed he was a "worker" (P138/139). He first made the claim when he raised Tribunal proceedings in May 2019.

27. I find in fact, therefore, that the Contract for Services was freely entered into by the parties and was not signed "under duress" by the claimant.

28. Indeed, for what it is worth, the claimant had many years' working experience and the assured manner in which he conducted the Tribunal Hearing, the manner in which he gave evidence and his researches and knowledge of the relevant law, as demonstrated by his detailed and articulate written submissions, did not suggest to me that he was the sort of person who could be forced in to signing a contract with which he did not agree.

29. As with his first period of engagement, therefore, the claimant was considered by both parties to be a "self employed contractor", not an employee.

30. So far as the manner in which the claimant carried out his work for the respondent Company, his duties and responsibilities, were concerned, I have made further findings in fact below in addressing the various factors which are necessary to weigh when considering and determining the issue of employment status.

31. Mr Moore terminated the claimant's engagement with his Company on 18 February 2019. He said that the reason was that the claimant was,

"repeatedly disruptive, often threatened to leave and was becoming more and more difficult to work with". He advised the claimant of this. Mr Moore believed that he was terminating the claimant's engagement in accordance with the terms of the written Contract. He believed that as the claimant was not an employee, but rather a "self employed contractor", he was entitled to terminate his engagement summarily. On 19 February, Mr Moore wrote to the claimant to confirm his decision (P.135/136).

32. On 28 February 2019, the claimant sent an e-mail to Mr Moore in which he asked for the reason for his dismissal (P.137). He did not claim in that e-mail that he had only signed the contract *"under duress"* and it could not therefore be relied upon. He did not claim that he was an employee.

33. Mr Moore took the view that as the claimant was not an employee he had not been "dismissed" and he was not subject to the respondent's grievance and disciplinary procedures. He decided, therefore, not to reply to the claimant's e-mail.

34. On 11 March 2019, the Citizens Advice Bureau ("the CAB") wrote to Mr Moore on behalf of the claimant (P138/139). They did not claim that the claimant was an employee. They claimed that he was "a worker". They did not claim that he had signed the contract *"under duress".*

35. Ms Gammack did reply by e-mail on 19 March (P.140) but I heard no evidence of any further discussion with the CAB.

Claimant's submissions

36. As I recorded above, the claimant made written submissions which are referred to for their terms and which I summarise.

37. In support of his submissions, he referred to the following cases:-

Autoclenz v. Belcher & Others [2011] ICR 1157
Davis v. New England College of Arundel [1997] ICR 6
Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2QB 497
Hall (Inspector of Taxes) v. Lorimer [1994] ICR 218
Whitaker v. Minister of Pensions [1967] 1QB 156
Market Investigations Ltd v. Minister of Social Security [1969] 2QB 173.

38. He addressed the following factors.

Mutuality of obligation

39. There was an agreement that the claimant would work a minimum of 9 hours per week and that any extra hours, *"shall be approved by the Managing Director"* (P.55). However, the claimant did not need to request approval of hours in advance from the Managing Director and all his *"invoices/timesheets excepting the last one were paid without question".*

40. There was no provision for a right of substitution in the Contract and the claimant submitted this was never contemplated.

41. The respondent, it was submitted, *"is an organisation with modern working practices i.e. encouraging employees to work flexibly and from home and others who were employed as employees could also work from home".* Further, although there were some 10 employees there were only 8 desks in the office.

Control

42. A job description was prepared (P.207).

43. The claimant also drew to my attention that, *"the contract demonstrates control"* as it narrates that, *"the contractor agrees to report directly to the*

Managing Director informing him of progress" (P.55). The contract also narrates a number of other duties for the claimant.

44. Further, his work was assessed on a daily and weekly basis (P.132); he was asked to carry out inductions (P.90); he was responsible for, *"managing progress of QHSE matters using the Team Work System".*

45. The claimant also drew to my attention that the respondent's Disciplinary and Grievance Policy (P.297) and its Dignity at Work Procedure (P.288) were applicable to both employees and contractors.

46. The claimant also maintained that he undertook training and that he requested training (P.97). However, this was refused as the respondent did not consider it necessary.

"Equipment/risk/profit"

47. The claimant drew the following to my attention:-

- *" I was offered a laptop by the respondent.*
- *The respondent provided the necessary PPE with the respondent's logo.*
- *There was no financial risk to me.*
- *I also did not profit in line with the respondent's performance or my own.*
- *I was provided with a car parking space like other managers.*
- *I was reimbursed for out of pocket expenses.*
- *I was not providing services to any other organisation during my engagement with the respondent.*
- *Any helpers were directly employed by the respondent.*
- *The work undertaken and noted in the job description requires a working knowledge of the respondent's business operations therefore it is fanciful to suggest that I could send a substitute.*"

"Integration/held out to be an employee of the respondent"

48. The claimant detailed a number of factors in this regard:-

- He had a business card in which he was referred to as the QHSE Manager (P.141).

- He was noted on the respondent's management review minutes of 2018 as "Attollo Offshore" (P.400).
- Third parties with whom he interacted would believe that he was an employee (P.421 for example).
- He was noted as the "Sentio Representative" on the respondent's Business Management System Manual (P.174).
- He signed QMI Invoices on behalf of the respondent (P.117 and others).
- He attended team meetings with the rest of the employees (P.452 and P.450, for example).
- He attended social events organised by the respondent.
- He managed other employees of the respondent (P.120/121).
- He was responsible for mentoring employees of the respondent (P.105).
- He was involved in the hiring of an employee of the respondent.
- Work for which he was responsible is essential to the respondent's business.
- He took holidays "subject to the needs of the respondent".
- He was an emergency point of contact for the respondent (P.353).
- He was referred to as the QHSE Manager in the respondent's Procedures and other documents (P.210, P.224, P.206 and P.198 for example).
- E-mails referred to the team including the claimant (PP.104-105).
- Essentially he was noted as the "Auditee Rep (P.324A). However, latterly he was noted on the internal audit as part of the "Audit Team" (P.394A).

"Similarities to others employed by the respondents as employees"

49. The claimant detailed a number of these "similarities":-

- He was supplied with PPE with the respondent's logo.
- He did not have indemnity insurance and was never asked for proof of such.
- While travelling on company business he was covered by the respondent's insurance.
- The respondent was flexible in terms of working practices.
- Other managers also worked from home on occasions and had flexible hours.
- He attended team meetings and social occasions.
- He had a car parking space.
- He held office keys and a fob to the respondent's premises.
- He was offered a laptop from the respondent.
- The requirement of work to be undertaken often changed as it would for a manager who was an employee.
- He submitted time sheets/invoices, and these were "virtually the same as the timesheets submitted by employees".
- He was paid at the same time as other employees.
- He was not noted on the respondent's "client, vendor or supply list" (P.458, paragraph 4).

- There was a possibility of him being paid a bonus of KPI's were met (P.60).

Respondent's Submissions

50. The respondent's Counsel also made written submissions which are referred to for their terms and which I summarise.

"Observations on the evidence"

51. Counsel drew to my attention alleged inconsistencies in the claimant's evidence. He submitted there were, *"examples of attempting to gloss over or reimagine the world as it then was in order to suit his purposes in advancing his interest in his claim now".* Counsel submitted that where there was conflict in the evidence, that the evidence of the respondent's Managing Director, Mr Moore, should be preferred to that of the claimant.

"The key facts"

52. Counsel then set out what he considered to be the "key facts". I have addressed these either in my findings in fact above or in my deliberations below in relation to the various factors which I considered.

"The law and its application to the facts"

53. Counsel referred to the following cases:-

Stevenson Jordan & Harrison Ltd v. MacDonald & Evans [1952] 1TLR101
Autoclenz
Ready Mixed Concrete
Nethermere (St. Neots) Ltd v. Gardener [1984] ICR 612;
Hall
Carmichael v. National Power Plc [1989] ICR 1226;

54. Counsel submitted that, *"the importance of written terms of agreement between parties is of significance. The issue can be determined solely by reference to documents where it appears from their terms that they were*

*intended to constitute an exclusive memorial of their relationship and this is consistent with Scottish statute law (per Lord Irvine of Lairg at 1230-1231, per Lord Hoffman at 1234 in **Carmichael**); and Contracts (Scotland) Act 1997 section 1(1)".*

55. It was submitted that, *"the presence of contractual documentation will set up a presumption from which evidence can be adduced to rebut it. That is what happened in the **Autoclenz** case. Evidence is required and the onus to that effect rests on the party who is asserting that the contract does not reflect the reality of the situation"*.

56. It was submitted that in the present case the claimant failed to rebut the presumption and to establish that, *"the assertion of self-employed status was a sham".*

57. Counsel disputed that the Contract had been signed under duress. He said this in support of his submission:-

"*The claimant has offered virtually no evidence as to what that duress amounted to, and how it prevailed upon him to sign the contract, beyond his witness statement at paragraph [7] where he simply states that Mr Moore shouted "just sign it" and "his manner was aggressive". That is not expanded upon in the claimant's statement, nor was it when the Employment Judge gave the claimant the opportunity to expand upon it in oral evidence. Further, Ms Gammack added no evidence to advance the suggestion of duress, despite having been set up to that effect. Whilst she used the words "you signed under duress" in her evidence, when asked to explain why she said that she responded with "because questions you had raised had not been changed to your liking". It is submitted that the evidence adduced on this point goes no distance to establishing some form of coercion on the part of Mr Moore. The claimant was at the time of signing an experienced working man some 50 years older than Mr Moore. The claimant was confident and robust in evidence and the Tribunal can assume that he conducted himself in evidence in a similar manner to the way he would have conducted himself at the meeting where he signed the contract. There is nothing adduced to suggest the terms of the contract were a sham and Mr Moore's account that he did not place the claimant under duress should be preferred.*"

58. Counsel further submitted that, *"the evidence supports that the terms of the contract reflected the reality of the situation. Feeing and payment and tax*

arrangements were all as provided for"; the claimant had flexibility in how he carried out his work; self-employed status was the same status he had during his first engagement with the respondent, which he himself had asserted. Counsel submitted that the only evidence was that of the job description and an assertion that the claimant was, *"an embedded part of the respondent's staff to clients and other external parties".*

59. However, Counsel submitted that it was not necessary to distinguish the claimant from the rest of its workforce to clients nor with such a small undertaking as the respondent Company was it surprising that the claimant would be invited to participate in social functions along with the employed workforce. Counsel then referred to Ms Gammack's evidence on this point which he described as *"enlightening. When asked early in her examination-in-chief as to the claimant's role, she answered "I was aware you were a consultant during the terms of your employment". Ms Gammack was also clear on the claimant's status in response to the claimant's question "How would third parties know I was self-employed?" To which the answer was "It was never discussed, why would it be discussed?". "There was no reason to identify you as a consultant or a staff member, that's not behaviour I or Ben [Moore] would undertake".*

60. Counsel further submitted that, *"control and mutuality of obligation particularly have not been demonstrated to anything like the degree to displace the presumption set up by the terms of the Service Contract between the parties. In the absence of such demonstrable evidence the claimant has failed to establish that he is an employee and his claims advanced under the contract of employment, being unfair dismissal and wrongful dismissal, should be dismissed."*

Worker status

61. So far as this issue, in relation to the claim for holiday pay, was concerned, Counsel made the following submissions:-

"*22. In respect of the related question of worker's status, it is clear that the threshold test is lower than for an employee (section 230(3)(b)(ERA). What is required is a contract to perform personally any work or other services for the other party. It is accepted that there was a contract in place between the parties and that this was a contract for services. It is recognised by the respondent that the claimant is on stronger ground in respect of his argument to the effect that he was a worker whilst engaged with the respondent. It is accepted that all of the work provided by the claimant to the respondent was personal and there was no substitution in the contract, the respondent would note that the Court of Appeal has observed that it does not necessary follow from the fact that work is done personally that there is an undertaking that it be done personally (Redrow Homes (Yorkshire) Ltd v. Wright [2004] ICR 1126.*"

Discussion and decision

Employee status

62. The right not to be unfairly dismissed, in terms of s.94 of the Employment Rights Act 1996 ("the 1996 Act") was given to "an employee". Unless the claimant is either admitted to be, or can be found in law to be, "an employee" at the point of termination of his employment, the complaint of unfair dismissal cannot proceed.

63. In terms of s.230 (1) of the 1996 Act, an "employee" is defined as being an individual who has entered into or works under a contract of employment. By sub-section (2), a "contract of employment" is stated to mean, *"a contract of service or apprenticeship, whether express or implied, and (if it is express) "whether oral or in writing".* For that, there must in the first place be a contract of some kind – i.e. an intention to create legal obligations.

64. As to the test to be applied, according to Harvey on Industrial Relations and Employment law (A1[38]):-

"*The general approach is to deny that any one test or feature is conclusive. All the so-called tests should be regarded as useful general approaches, but in every case it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an "employee".*

65. The definition in s.230 does not provide much in the way of assistance in determining whether or not in any particular case the individual bringing the complaint is an employee or not. Determination of a person's status, therefore, is a question of fact for the Tribunal to be ascertained by examining the particular circumstances of each case.

66. As to the definition of an "employee" Harvey (A1[6]) in dealing with the matter in a general way says this:-

"…….workers may generally (though there are exceptions) be divided into two classes: employee and independent contractor. The employee undertakes to serve; the contractor does not. The employee sells his labour; the contractor sells the end product of his labour. In the one case the employer buys the individual; in the other he buys the job. The law expresses that by saying that the employee enters a contract of employment; the contractor enters a contract for services."

67. The modern approach to ascertain which category a worker (using that as a neutral term for present purposes) might belong, is to weigh up all the factors characterising their relationship in what is described as a "multiple test". This is said to have its origins in **Ready Mixed Concrete**, to which I was referred. In that case, McKenna J posed three questions which require to be answered:

(i) Did the servant, in consideration of the wage or other remuneration, provide his own work and skill in performance of some service?
(ii) Was it agreed, expressly or impliedly that in the performance of that service the worker would be subject to the others' control in a sufficient degree to make that other master?
(iii) Were the other provisions of the contract consistent with it being a contract of service?

68. In order to determine the issue, therefore, it is necessary for the Tribunal to examine the evidence bearing upon the characteristics of the relationship and from that to form a view of the overall picture. As Mummery J said in **Hall**:-

"*This is not a mechanical exercise of running through items in a checklist to see whether they are present in, or absent from, a given the situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.*"

69. This approach was affirmed by the Court of Appeal. It was also confirmed by the Court of Appeal in ***Montgomery v. Johnston Underwood Ltd [2001] IRLR 269*** where, in referring to ***Ready Mixed Concrete*** as remaining the *"best guide",* Buckley J at paragraph 23 said:-"*As several recent cases have illustrated, it directs Tribunals to consider the whole picture to see whether a contract of employment emerges. It is though, important that "mutual obligation" and "control" to a sufficient extent are first identified before looking at the whole".*

70. It seems, therefore, that although the Tribunal must have regard to all the factors characterising the relationship, there are certain elements which must be present before it can be said that a contract of employment, as distinct from say that of independent contracting, exist. These are: an obligation to provide one's personal work, mutuality of obligation between the two parties and a sufficient degree of control. In addition to that, it would be necessary to find that features of the relationship and surrounding circumstances are consistent with the normal features of an employment relationship.

71. When considering the issues with which I was concerned in the present case having regard to the reliance placed on the express terms of the "Contract for Services" (P.54-60) by the respondent's Counsel, I was mindful that in ***Autoclenz*** the Supreme Court approved a test in respect of employment contracts that goes beyond the express written terms and: "*focuses on the reality of the situation where written documentation may not reflect the reality of the relationship*". Lord Clarke said this at paragraph 29:-

"*I unhesitatingly prefer the approach of Elias J in Kalwak [2008] IRLR 505 CA and [2007] IRLR 560 EAT and of the Court of Appeal in Szilagyi [2009] ICR 835 and in this case to that of the Court of Appeal in Kalwak. The question in every case is, as Akens LJ put it at paragraph 88, quoted above, what was the true agreement between the parties.*"

72. On that basis the Supreme Court held in ***Autoclenz*** that the Employment Tribunal was entitled to disregard the terms of the written contract, in so far as they were inconsistent with what was actually agreed and to find that the claimants were working under contracts of employment.

Contract for Services (P54-60)

73. As I recorded above I rejected the claimant's contention that he only signed this Contract "under duress".

74. I was also satisfied that the claimant was well aware of the implications of signing a "Contract for Services" and that it was on the basis that he would be engaged as a "self employed contractor". He was well aware of the difference between a self employed contractor and an employee. During his first period of employment with the respondent he was offered a Contract of Employment. He declined the offer. He advised the respondent that he wished to remain, *"as a freelance consultant"* (P.65).

75. Further, the parties acted in accordance with the Contract. The claimant submitted Invoices entitled "Kerr Consultant"; the claimant was responsible for his own income tax and national insurance; the claimant did not take paid holidays.

76. The Contract for Services was in clear, unambiguous terms and contained the following provision (P.58):-

"*No employment*

Nothing in this contract shall render or deem to render the Contractor an employee or agent of the Client and the Contractor hereby agrees that they are self-employed independent contractor and not an employee or agent of the client. This contract does not create any mutuality of obligation between the Contractor and the Client.

The Contractor does not qualify for any company benefits from the Client."

77. The written contract, therefore, was of particular significance as far as the issue of status was concerned. However, it was necessary for me, having regard to the guidance in ***Autoclenz***, to consider whether the contract reflected the reality of the situation. As the respondent's Counsel submitted the onus was on the claimant in this regard.

78. I considered, therefore, whether the "reality of the situation" was inconsistent with the terms of the written contract and those factors identified in the case law characterising the relationship which must be present before it can be said that a contract of employment, as distinct from that of independent contracting, exists.

Personal service

79. The claimant worked exclusively for the respondent. However, as I recorded above, the claimant's Managing Director, Mr Moore, presented as credible and reliable. He was also well aware of the contractual implications of the written contract and what could and could not be required of the claimant.

80. While the issue of substitution did not arise and while this would have been difficult given the claimant's knowledge of the respondent's business, in my view, subject to Mr Moore being satisfied as to the competency of any

proposed substitute, he would have accepted a substitute as he knew he was not in a position, contractually, to insist that the claimant carry out the work himself.

Mutuality of obligation

81. This has been said to be an aspect of the "irreducible minimum" necessary to create a contract of employment (per Lord Irvine of Lairg in **Carmichael**).

82. Although the contract required the claimant to work a minimum number of hours and he was allocated work by the respondent he was left very much to his own devices when it came to carrying out the work and how he went about it.

83. Admittedly, his duties were specified in the Contract (P.54/55), but I was satisfied that the submission by the respondent's Counsel that, *"mutuality of obligation had not been demonstrated to anything like the degree to displace the presumption set up by the terms of the Service Contract between the parties"*, was well-founded.

Control

84. Many of the factors I have detailed above in relation to the issue of "mutuality of obligation" are apposite to the issue of control. The claimant was able to carry out his work as he thought best. He had been engaged because of his experience and expertise.

85. The Contract for Services also contained the following provision:-

"*While the contractor's method of working is entirely their own and they are not subject to the control of the Client they shall nevertheless comply with any* ***reasonable request of the Client***"(P.55).

86. As with the issue of mutuality of obligation I was satisfied, as the respondent's Counsel submitted, when it came to the issue of control the claimant had failed to displace the presumption created by the Contract for Services.

Other factors

87. The claimant was never paid through PAYE on the respondent's payroll; he accounted to HMRC in his own tax returns; he did not receive holiday pay, although, understandably and as a matter of courtesy, he would check that the Company had sufficient skilled cover when he was on holiday; although the respondent offered him a laptop, he used his own; he had no contractual entitlement to bonus; he was not required to undergo induction training; he did not conduct induction training for others.

88. As expressed by Mummery J in **Hall**, it is necessary to: "*stand back from the detailed picture which has been painted by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole*". This guidance and the comment that, *"this is not a mechanical exercise of running through items in a checklist to see whether they are present in, or absent from a given situation"* were of particular assistance in the present case as in his submissions the claimant had set out, at considerable length, lists of *"similarities"* with employees and how he claimed he had been *"held out"* by the respondent to be an employee. Adopting the approach, expressed by Mummery J, only served to confirm my view that the Contract for Services between the parties reflected the reality of the relationship between the parties and that the claimant was not an employee as defined in s.230 (1) of the 1996 Act. The Contract represented the, *"true agreement between the parties".*

89. In my view, the claimant knew exactly what he was doing when he signed the Contract for Services. He was well aware of the contractual implications. The Contract was in clear unambiguous terms. The claimant had many years'

experience of work and of working as a "self-employed contractor" and he was well aware of how that differed from employee status.

90. Further, the claimant confirmed in evidence that he derived from his self-employed status the financial benefit of being able to set off certain expenses against his income which an employee would not be able to do. He chose to be self-employed rather than an employee. It was a conscious decision.

91. It seemed to me by asserting he was an employee which would entitle him to bring an unfair dismissal complaint was something of an afterthought and by doing so he was "trying to have the best of both worlds".

92. Accordingly, the Tribunal does not have jurisdiction to consider the complaints of unfair and wrongful dismissal, advanced under an alleged Contract of Employment, and they are dismissed.

Holiday pay

93. The respondent's Counsel accepted the claimant is, *"on stronger ground"* in respect of this complaint as he only has to establish that he was a "worker", as opposed to an employee.

94. S.230(3) of the 1996 Act defines a "worker" as 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 out by the individual."

95. As the claimant was not engaged under a contract of employment, I was concerned with the definition in s.230(3)(b). In contrast to "an employee" a limb (b) worker is comprehensively defined in the legislation.

96. To fall within that sub-section an individual must undertake, *"to do or perform personally any work or services for another party to the contract*". Some guidance as to what personal performance means in the case of that sub-section was given in ***Pimlico Plumbers Ltd & Another v. Smith*** [2018] ICR 1511.

97. Further, determining whether a contract includes an obligation of personal performance is a matter of construction and is not necessarily dependent on what happens in practice (***Redrow Homes (Yorkshire) Ltd v. Wright [2004] ICR 1126***).

98. Although there was no substitution clause in the Contract for Services, as I recorded above in my view if the claimant had offered a substitute the claimant's Managing Director, Mr Moore, would have recognised that contractually he could do so, and Mr Moore would have engaged a substitute provided he was satisfied as to his competency. However, that is not inconsistent with a *"contract to perform work personally"* (***Byrne Brothers (Formwork) Ltd v Baird & Ors*** [2002] IRLR 96).

99. So far as the relevance of "mutuality of obligation" was concerned, I was not persuaded that this was a distinct requirement, but there was an element of this as the claimant was required to work a minimum number of hours, for which he would be paid, and he was subject to certain duties.

100. While I was mindful of the guidance in **Redrow**, I arrived at the view, albeit with some hesitation, that the claimant satisfied the definition in s.230(3)(b) and that he was a "worker".

101. That being so, he is entitled to receive holiday pay.

102. So far as the quantification of the holiday pay claim is concerned, I invite the parties, in the first instance, to endeavour to reach agreement extra-judicially, failing which a Remedy Hearing will be fixed.

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Employment Judge: **Nicol Hosie**
Date of Judgment: **06 December 2019**
Date sent to parties: **09 December 2019**