



Reserved judgment

## **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimant**

**Respondent**

**AND**

Mr A Scott

Brightwells Limited

### **RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING**

**HELD AT** Birmingham **ON** 13<sup>th</sup> and 14<sup>th</sup> February 2020

**EMPLOYMENT JUDGE** Richardson

#### **Representatives**

**For the Claimant:** Mr A McGrath, Counsel

**For the Respondent:** Mr D Flood, Counsel

#### **JUDGMENT**

The judgment of the Tribunal is that

**(1) The claimant was employed by the respondent from January 2011 as a night watchman under S230(3)(a) Employment Rights Act 1996.**

**(2) Concurrent to night watchman duties, from early January 2011 until 7<sup>th</sup> February 2012 the claimant was employed as a porter under S230(3)(a).**

#### **REASONS**

##### **The issues**

1. The issue to be determined is the employment status of the claimant. He claims that he is an employee, alternatively a limb (b) worker under S230(3) Employment Rights Act 1996 in respect of both his engagement as night watchman and also as porter. The respondent asserts that the claimant is a self-employed contractor and remained so throughout the relevant period.

##### **Proceedings and evidence**

2. I was provided with an agreed bundle exhibited as R1. I heard oral

testimony from the claimant and his wife, Mrs M Scott. The respondent's witnesses were Mr N Gorst, Managing Director of the respondent; Mr S Wilson, independent Security Manager, and Mr P Fitzgerald, Head of Accounts and Company Secretary.

### **Findings of Fact**

3. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time.

4. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of the witnesses and the consistency of their evidence with surrounding facts and documents. I refer to my assessment of the witnesses in my conclusions. My findings of fact relevant to the issues which have been determined are as follows.

#### **2008**

4.1 The respondent is a nationally known auction house specialising in agricultural equipment, vehicles and livestock. It operates on several sites with a head office in Leominster.

4.2 The respondent introduced on 6<sup>th</sup> April 2008 a standard contract for self-employed contractors. It was the respondent's practice to re-issue annually the document entitled "Self Employed Contract for Services" bearing the referenced document creation date of 6<sup>th</sup> April 2008 to persons taken on other than as employees, such as porters engaged in auction sales weeks.

#### **2010**

4.3 The claimant is a 52 year old man. In the autumn of 2010 he was living in a caravan/mobile home in a caravan park which prohibited permanent residence. He lived with his wife and a large dog, a German Shepherd.

4.4 Through a personal friend, Mr Keith Guyatt, the claimant was introduced to Mr Gorst. Mr Guyatt had provided his security services to the respondent through his own company KG Guyatt Associates Ltd. Mr Guyatt was also the respondent's credit controller. He later sold his security company to Mr Wilson in about 2009. In about September/October 2010 Mr Guyatt brought Mr Gorst, and another member of the respondent's management team, to the claimant's mobile home with a view to discussing and ascertaining whether the claimant would be willing to undertake residential based security duties at the respondent's proposed new site at Madley in about six months' time. The meeting went well. Mr Gorst was very impressed by the claimant's German Shepherd's guarding abilities and the fact that the dog was alert and well trained.

The claimant agreed to move to the Madley site when required to act as night watchman.

4.5 At about this time the respondent's site at Shobdon Airfield had been experiencing a number of thefts. Mr Guyatt phoned the claimant a few weeks after the meeting with Mr Gorst and asked if he would be willing to move to the Shobdon site; it had just been burgled the night before. On 5<sup>th</sup> November 2010 on very short notice and with the respondent's assistance in moving his mobile home, the claimant relocated his mobile home to the respondent's Shobdon Airfield site to take up his duties as night watchman. This was a temporary assignment until the Madley site was ready. Temporary utilities, such as a portable generator, were provided by the respondent. Facilities on site were basic and inconvenient. No payment was made for the claimant's night watchman duties because the claimant was in receipt of State benefits. The claimant was instructed to be on site 24/7 and to report personally to Mr Gorst any matters that the claimant was concerned about; he was told to observe all activities on site, including staff deliveries and collections.

4.6 A few weeks later the claimant's benefits ceased in December 2010 because the benefits office believed, correctly, that the claimant was working.

4.7 Mr Guyatt, who had retained his post with the respondent as credit controller, remained the claimant's main point of contact until about 2012 when Mr Wilson took over communication with the claimant.

## **2011**

4.8 In January 2011 Mr Gorst offered the claimant porter work during the respondent's sales weeks. This provided the claimant with around 10 days' work per month at an hourly rate of £8 per hour; amounting to £700 - £800 per month gross which was about the sum that the claimant had received in benefits. His role of porter was in addition to night watchman duties at Shobdon. In February 2011 the respondent purchased a (water) bowser for the claimant who filled it, initially at Mr Gorst's home using Mr Gorst's pickup to tow the bowser, and later at the respondent's premises at Leominster. A mains cable was also laid but the last 70 metres to the claimant's mobile home had to be by an extension.

4.9 The claimant was provided with a copy of the respondent's standard Self Employed Contract for Services in about March 2011. The claimant was told by Mr Guyatt that if he did not sign the contract, he would not get paid although he had already been paid for January and February 2011. The claimant signed the document and annotated it requesting clarification as to his position as the contract seemed to have nothing to do with night watchman duties. There was no copy of this document in R1.

4.10 In about April 2011 the claimant was given the 'slinger' training provided to porters engaged by the respondent and he was added to the respondent's list of approved drivers.

4.11 The claimant's and Mr Gorst's relationship had tensions which flared up from time to time. In about June 2011 due to a misunderstanding on Mr Gorst's part, he and the claimant ended up shouting at each other because Mr Gorst had assumed that the claimant, having made a cup of tea on site for some workmen, had said he was going to take the pack of tea bags back to his caravan. Mr Gorst assumed the claimant was intending to take the respondent's supply of teabags for his own use, whereas in fact the claimant had used his own tea bags to make tea for the workmen and had merely been reminding himself to take his teabags back to his caravan. This became notorious as 'Teabag Gate' amongst the respondent's staff.

4.12 In about July 2011 whilst working on site as a porter, the claimant was asked by a friend, the Catering Contractor at the Shobdon site, to fit a replacement for an external plug socket on the canteen building which had been stolen the previous night despite the presence of sales week security. The claimant did not provide night watchman duties during sales week. The claimant fitted the new plug on the same day as he received the request and after his porter duties for the day were completed. The following day Mr Gorst reprimanded the claimant for replacing the plug socket because he was not qualified to do so and forbade the claimant from undertaking any such electrical work in the future.

4.13 In about September 2011 Mr Gorst and Mr Guyatt visited the claimant at the Shobdon site to inform him the Madley site was near completion. It was said that the Madley site had been prepared with utilities and drainage. The claimant was offered land for a garden and allotment and a payment of £100 per week. Mr Gorst mentioned to the claimant that it was their intention to build a bungalow within 18 months for the longer term. It was agreed that Mrs Scott could join the claimant on site at Madley in the mobile home.

4.14 Whilst the claimant was on site as night watchman at Shobdon, there were no burglaries. The day after he left the Shobdon site it was burgled.

4.15 The claimant moved his caravan to Madley on 15<sup>th</sup> October 2011 and discovered that the site was not prepared as he had been led to believe. His wife did not join him. He parked in the sales compound so that he could use an extension lead into the office. The claimant had to move daily his mobile home in and out of the sales compound during sales weeks to free up space. This continued until early December 2011.

4.16 The claimant was paid, at Mr Gorst's suggestion, £100 per week in addition to the dedicated plot of land for his mobile home and the utilities.

4.17 To avoid the frequent disruption and effort of moving his caravan in and out of the sales compound, the claimant approached Mr Gorst to ask whether he could locate his caravan at the rear of the compound permanently. Mr Gorst agreed.

4.18 The building contractors on the site assisted the claimant in setting up the parking place for his caravan. Waste, however, was no more than a hole dug in the ground.

4.19 The claimant purchased and took delivery of a 32ft x 8ft portacabin to serve as an office and dog kennel and a resting place when he was on duty at night to avoid disturbing his wife once she had joined him on the Madley site.

4.20 During 2011 the claimant was provided with access to the respondent's Wi-Fi without charge.

## **2012**

4.21 At the end of January 2012 the claimant submitted a claim for wages; Mr Gorst disputed the sum claimed by the claimant and after some argument, his hourly rate was increased to £8.50 for work in the compound as porter.

4.22 In February 2012 the claimant and Mr Gorst had another altercation. Mr Gorst instructed the claimant to carry out a minor electrical repair. Although the claimant was sufficiently skilled to carry out the repair, he reminded Mr Gorst that he had been reprimanded in July the previous year for doing electrical work on site. Mr Gorst was angered by the claimant's perceived lack of cooperation and his insubordination. The claimant's porter work was immediately terminated.

4.23 With Mr Guyatt and Mr T Court, the respondent's then joint managing director, acting as mediators between the claimant and Mr Gorst, it was agreed that the claimant would receive £1000 per month for his security work. It was agreed that the claimant could purchase another guard dog at the respondent's expense, together with a contribution to the expenses of food and vetting being reimbursed. The claimant bought "Brightwell Boy" for £325 from Worcester. He invoiced the respondent and was reimbursed £325.

4.24 The claimant invoiced the respondent for £1000 on a monthly basis at the end of each month, a practice which continued throughout the period relevant to these proceedings. The invoices were addressed to Mr Gorst and were stated to be for night watchman duties. It was submitted by the respondent that the claimant's invoicing for night watchman's duties was sporadic. The evidence in R1 showed over a two year period 2016 and 2018 that the claimant routinely invoiced at the end of each month and I accept that was the claimant's general practice.

4.25 In early April 2012 the claimant's wife moved in with him permanently on the Madley site. Mr Guyatt had been the respondent's main point of contact with the claimant.

4.26 In July 2012 the claimant and Mr Wilson met. The claimant was given a contract for security services to sign and date (found at page 58-60 of R1). The claimant and Mr Wilson signed the counterparts of the document. The document was headed "Contract for Security Services" between the respondent and the claimant, who was described as a "Self Employed Contractor". The duration of the agreement was 30<sup>th</sup> June 2012 to 29<sup>th</sup> June 2013. The relevant terms of the agreement for the purpose of this preliminary hearing were:

(1) *CONTRACT DESCRIPTION*

*To provide the following services to the Company.*

*Night watchman at the Madley Site:-*

*To watch over and patrol the site during the periods specified Monday to Sunday inclusive from the time that Brightwells staff vacate the site in the afternoon until 8am the next morning.*

*In addition during the weekends (day times) to keep a watching brief on Brightwells property when Brightwells staff are not on site suitably advising any persons trespassing as set out below and inform the security manager where necessary, and always maintain a log.*

*Excluded from these duties is the period from 8am on the Monday preceding the sale to 5pm on the Monday following the sale.*

(2) *DESCRIPTION OF THE CONTRACT*

*During the times specified in (1) above to fulfil the duties of a night watchman and maintain a continuous presence noting any instances of trespass and all other matters that may affect the site.*

*In the event of any situation occurring which is of importance to the security or issues that affect the site to report this immediately to the Security Manager, Mr S Wilson or to whomever he may direct from time to time direct.*

(5) *TERMINATION*

*This Agreement may be terminated on three months' notice by either party at any time. Once notice has been served, the Contractor must remove all his equipment from the site before the end of the Notice Period.*

(6) *CONTRACTOR'S EQUIPMENT*

*The Contractor may part at the Company's discretion one suitable mobile home, 2 x vehicles and may situate the portacabin on the land designated.*

*This occupation is pursuant to the performance of the contract and upon termination the Contractor must vacate the site with immediate effect.*

*(7) REMUNERATION*

*A remuneration for this service, the Contractor shall invoice to the Company the sum of £1,000 per month. The frequency and timing of these invoices is at the discretion of the Contractor. The Contractor is responsible for his own National Insurance contributions.*

*(8) UTILITIES*

*The Contractor during the course of the contract may use the Company's electricity and water supplies situated adjoining the land designated. The Contractor shall make sure that this use is fair and reasonable.*

*(9) ACTIVITIES ON THE LAND*

*The Contractor's occupancy of the land must be in pursuance of the performance of this contract and must not include any trade or business. No illegal activity may take place and no unauthorised persons must be allowed to enter the Company property.*

*(10) DOG OWNERSHIP*

*The Contractor is allowed to keep up to two pet dogs on the land conditional upon them being properly secured and looked after. These animals are entirely the responsibility of the Contractor and must be kept under control at all times. Exercising must only take place in the field adjoining the compound. When approaching members of the public, Brightwells employees or the public the dogs must be kept on a lead.*

*(12) EXCLUSION FROM THIS CONTRACT*

*This contract is a contract between the Company and his Contractor, No contract of employment or other contract may arise out of this contract or by its performance.*

4.27 The document is signed by Mr Wilson and the claimant and dated 5<sup>th</sup> July 2012. The document was based on the respondent's standard April 2008 self-employed contract for services, but adapted specifically for the claimant's role as night watchman.

4.28 Despite the term at paragraph (10) of the contract, the claimant believed that it had been agreed that the respondent would contribute to the upkeep of Brightwells Lad. He raised the question of the dog's upkeep with Mr Court who said he would discuss it with Mr Guyatt. Mr Guyatt after discussion with Mr Gorst informed the claimant that although there had been an agreement to purchase and pay the costs of the dog's upkeep, Mr Gorst was no longer prepared to commit to the upkeep of the dog. Nevertheless, Mr Guyatt gave the claimant £100 initially towards the cost of the dog and thereafter gave the claimant £50

regularly for the upkeep of Brightwells Lad. On a few occasions Mrs Scott was handed the money by Mr Wilson to give to the claimant.

4.29 The claimant's night watchman's duties began when he received a text each evening usually between 5pm and 7pm from the last of the respondent's employees on site, to say the site was cleared; all personnel off site. In the morning a text notified him when the first member of staff arrived on site, usually around 7am. It was a sensible arrangement so that the claimant would know the site was cleared of personnel and could exercise his dogs through the compound.

4.30 Mr Wilson and the claimant agreed protocols for dealing with any trespassers. As the claimant was not SIA accredited, it was agreed that he would telephone Mr Wilson immediately he became of trespassers on the site. A year later, in 2013 the claimant asked Mr Wilson for a review of his terms including an increase in pay. It was refused. The request for a contract review was brushed off each year by Mr Wilson in 2014, 2015, 2016 and 2017 with the general response that Mr Gorst was not prepared to discuss a contract review. I return below to issues surrounding the signed self-employed contract for services between 2013 – 2017.

### **2013**

4.31 In about mid 2013 the claimant was provided with a jacket and baseball cap bearing the endorsement 'Brightwells.com' and Brightwells respectively. The claimant wore these for work.

4.32 In the years 2011 – 2013 the claimant worked with Mr Guyatt in buying and selling cars from the respondent's site. The claimant's involvement was to undertake some mechanical repairs and to valet the vehicles in preparation for sale. In 2013 the respondent prohibited the use of their site for Mr Guyatt's car sale activities. Thereafter Mr Guyatt moved his sales of vehicles to his home where for a short time the claimant worked with him at weekends.

### **2016**

4.33 Following an assault by trespassers on site requiring the claimant to be treated in hospital, Mr Wilson suggested that the claimant purchase a GoPro security recorder which cost over £1,000. Mr Gorst authorised the purchase and it was paid for by the respondent.

### **2017**

4.34 On 24<sup>th</sup> April 2017 the claimant was asked in an email by the respondent's clerk in the finance department whether he had signed and returned the Self Employed Contract for Services which had been re-issued, as it always was at



that time of year for self-employed subcontractors. The respondent's rule was that without a signed contract, no pay would be received. The claimant was aware of this requirement.

4.35 The claimant responded by email to the accounts clerk to confirm that he had signed it.

4.36 I refer below to the respondent's issue annually of the Self Employed Contract for Services standard form document.

4.37 In June 2017 the claimant was diagnosed with a medical condition which required surgery. The claimant underwent surgery on 2<sup>nd</sup> July 2017 and discharged himself from hospital on 9<sup>th</sup> July 2017, returning to his motorhome on the Madley site. During the claimant's one week's absence, Mrs Scott acted as night watchman with the dogs. It is disputed whether this was done at the request of Mr Wilson. I preferred Mrs Scott's evidence. She agreed to cover for her husband's absence because Mr Wilson told her that if she did not, he would appoint someone else to do it. Mrs Scott's account of their conversation was detailed and had a ring of truth to it. Mrs Scott was concerned that the dogs would bark at someone they did not know in the compound. Mrs Scott covered her husband's night watchman duties between 2<sup>nd</sup> – 9<sup>th</sup> July 2017. Mr Wilson asked Mrs Scott to invoice Brightwells. She declined. The claimant invoiced at the end of the month in the normal way.

4.38 On 8<sup>th</sup> November 2017 the claimant challenged an individual who was taking photographs of the claimant's property. The individual was a planning official from the Herefordshire Council planning department. The claimant was informed that an enforcement notice was to be issued as no planning permission had been obtained for the claimant to live on the Madley site.

## **2018**

4.39 In late December 2017/ early January 2018 the respondent made an application to Herefordshire Council Planning Services for the retention of demountable buildings and caravan for use as warden's accommodation at the respondent's Madley site. The application related to the claimant's caravan, motorhome, portacabin and garden on the Madley site. The application was made with reference to Section E1 Employment Provision of the Herefordshire Council's Local Plan. In support of the application for grant of planning permission, reference is made by the respondent's planning consultant's to "year round employment of a single worker" on the respondent's Madley site.

4.40 The narrative in the respondent's planning application case included a statement that there was a need for a visible overnight presence on site; that it was a strong deterrent to intruders to have an employee on site to respond to alarms when activated; the on-site warden service was serving an important 24

hour function in respect of health and safety and environmental considerations to mention a few.

4.41 Mr Gorst assured the claimant that the situation in which the claimant was occupying the Madley site in breach of planning laws, would be retrospectively resolved.

4.42 In January 2018 a septic tank was installed on the claimant's plot. Hitherto the claimant's waste had been discharged into an open hole/ditch.

4.43 In March 2018 Mr Wilson delivered a copy of the annually renewable self-employed contract for services to the claimant for him to sign.

4.44 At the end of March 2018 the respondent had a complaint from a client that two vehicles left at the Madley site with full fuel tanks, had, when collected, shown low fuel levels. The respondent's IT manager set up video surveillance. The claimant saw the IT manager on a few occasions moving between vehicles and wondered what he was doing. Later the claimant investigated what the IT manager had been doing; he found a small camera, which he described as a 'camera trap device' on the step of a lorry. The claimant picked it up and took it back to his portacabin.

4.45 In early April 2018 Mr Wilson visited the claimant to update him on the planning permission application for the site. The claimant showed to Mr Wilson the camera he had found. Mr Wilson showed no surprise. Mr Wilson told the claimant about the client complaint concerning missing fuel. As a result, Mr Wilson said, he had investigated the matter and had concluded that the claimant was the culprit.

4.46 Earlier video camera footage captured by a portable security camera had shown the claimant taking fuel from a vehicle. Mr Wilson confirmed he had not seen the footage. The claimant was informed that he would not be shown the footage either and that the respondent wished the matter to be dealt with "quietly" without any embarrassment which may be caused to them or the client, by involving the police. Mr Wilson informed the claimant that the respondent intended to issue the claimant with a final written warning.

4.47 About a week or so later Mr Wilson delivered to the claimant a "Final Written Warning" letter dated 14<sup>th</sup> April 2018 and signed by Mr Wilson on the direction from the respondent's directors. The letter commenced with the words "*I write to issue you with a final written warning in connection to your contract to provide security services dated 5<sup>th</sup> July 2012 ("the Agreement").*"

4.48 The letter went on to confirm that a portable security camera had revealed that the claimant had removed diesel from a vehicle on the respondent's site on 24<sup>th</sup> March 2018. It said this had been a breach of integrity by the claimant and

was unacceptable behaviour for a night watchman whose role it was to keep the site and property on site overnight secure and free from interference.

The letter stated:

*The Company has concluded that while it considers your behaviour to amount to a material breach of the Agreement, entitling it to terminate the Agreement with immediate effect, it will not on this occasion take such a. Instead a final written warning is being issued, and will remain active for a period of 12 months from the date of this letter.*

*During this time, if the Company concludes that you are guilty of any further transgression or unacceptable behaviour, it may terminate the Agreement immediately with no entitlement to notice, and you and your wife shall have a period of 1 month in which to vacate the premises.*

4.49 The letter required both the claimant and his wife to countersign. The claimant refused to sign and claimed he wished to see the evidence. He also intended to seek legal advice and stated that this would take 10 to 14 days. Mr Wilson chased up the claimant's signature on 20<sup>th</sup> April and explained that if the claimant signed the final written warning, Mr Gorst and the Chairman, Mr Parry, would consider the matter closed.

4.50 The claimant attended a meeting with Mr Gorst, Mr Wilson and Mr Binnersley, the then Joint Managing Director on 24<sup>th</sup> April 2018. It was confirmed that the claimant must sign the final written warning "or else". The claimant insisted that he had agreed with Mr Wilson that he would need 10 – 14 days to seek legal advice and that he still intended to do so. He left the meeting. On 30<sup>th</sup> April 2018 the claimant phoned Mr Wilson and informed him that he and his wife were not going to sign the final written warning.

4.51 In May 2018 the claimant was instructed by Mr Wilson to access the respondent's site through the respondent's main and rear gates and not through the adjacent farm track. He was told not to talk to the owner of the access track as the respondent was not on good terms with him.

4.52 On 22<sup>nd</sup> June 2018 Mr Wilson confirmed to the claimant that the final written warning issue appeared to have been forgotten.

4.53 In 2018 the respondent obtained a contract to sell by auction ex MOD vehicles. The terms and conditions of the sale of MOD vehicles excluded any employee, agent or contractor of the respondent from purchasing any of the MOD vehicles through auction. Unaware of this term of the respondent's contract with the MOD, on 14<sup>th</sup> September 2018 the claimant was successful in bidding at the respondent's auction for an ex-MOD electric vehicle, believing it to be no different from vehicles he had purchased through the auction room in the past. The claimant was not permitted to continue with the purchase and by

November 2018 his account with the respondent was blocked by Mr Gorst as the claimant was buying “too much”.

## 2019

4.54 In January 2019 the claimant sought legal advice on his employment status. He sent a grievance letter to the respondent on 14<sup>th</sup> February 2019. The subject matter of the grievance is not relevant to determining the issue of employment status.

4.55 The claimant filed proceedings on 13<sup>th</sup> June 2019 following a period of ACAS Early Conciliation. He claimed arrears of holiday pay, wages, and auto enrolled pension contributions on the basis that he was an employee, alternatively a worker.

4.56 As background context, the retrospective application for planning permission for the claimant’s plot on the Madley site was not approved by the planning department. In November 2019 enforcement action was threatened by Herefordshire Council to remove the claimant’s caravan, portacabin etc. from the site at Madley.

4.57 In fact planning permission had been granted in October 2018 for another location on the Madley site, the south eastern corner, to house the claimant’s mobile home/caravan and portacabin. There were no facilities already installed on the permissible new location. The grant of permission was subject, shortly stated, to a desk study report on the site and risk assessment specifically in relation to the potential contamination of the site. The grant of permission stated:

*The occupation of the caravan shall be limited to a person solely or mainly employed in the business of occupying the plot edged red on the attached plan....”.*

4.58 The respondent took the view that the cost of installing utilities for a second time was too great a financial investment and could not on any event be achieved by the November 2019 deadline for enforcement action. That deadline for vacating the site was eventually extended by the planning authority for one month until 18<sup>th</sup> December 2019. A soil analysis was undertaken by the respondent at a cost of around £4,000 in early 2020.

4.59 The claimant had been looking for an offsite location for his caravan, portacabin and vehicles. He was given assistance by the respondent to move his property. Over Christmas and New Year, Mr Wilson patrolled the Madley site during the day. The claimant continued night patrol of the site with his dogs once he had received the Whats App message that the site was clear of personnel. That arrangement was still in place at the time of the hearing.

4.60 During 2019 the claimant had installed in his portacabin a CCTV monitoring screen showing live images from 16 cameras of the industrial estate on land adjacent to the respondent's compound. The 16 CCTV camera screen belonged to NPD, the occupier of the neighbouring site and that the cameras were operated by NPD. The claimant also drove onto the NPD site with his dogs to exercise them and to visit a friend.

### **Annual self employed contract for services 2013 – 2018**

4.61 I have referred above to the respondent standard, generic self-employed contract for services introduced in April 2008. This standard form contract was issued to casual labour such as porters working during sales weeks at the respondent's various sites.

4.62 It was the respondent's practice to re-issue a copy of this standard form contract each year and obtain the signature of the 'self-employed' contractor.

4.63 Mr Wilson hand delivered the self-employed contract for services to the claimant each year. Apart from 2012, the claimant always refused to sign it in front of Mr Wilson

4.64 The respondent relied on copies of this standard form contract which, it was claimed, had been signed by the claimant each year between 2013 – 2018 inclusive. Copies of these documents were found in R1. The claimant claims that he did not sign any such document. He admits that he signed one contract in 2011 which he annotated with an objection as to its relevance, and the second contract he signed and dated 5<sup>th</sup> July 2012.

4.65 The relevant clauses of the standard self-employed contract for services purportedly signed by the claimant each year 2013 – 2018 are:

#### *Background*

- A. *Brightwells' business includes the operation of livestock and other markets, and operations ancillary to the operation of those markets, including droving of livestock, portering and cleaning. Brightwells operates such markets at various locations ("the Markets").*
- B. *The Operative has skills and abilities which may from time to time be available to Brightwells (the "Services"). The precise nature of the Services shall be agreed verbally from time to time between the parties.*
- C. *Brightwells and the Operative agree that if the Operative offers to make his services available to Brightwells and is engaged by Brightwells, the terms and conditions of this Contract for Services shall apply.*

*D. It is the intention of the parties that when the Operative provides the Services to Brightwells in relation to a particular Market, such provision of services shall constitute a separate and distinctive engagement under this Contract for Services.*

4.66 Under 'Operative Provisions' the contract states:

1. *Brightwells is not obliged to offer work at any Market to the Operative, neither is the Operative obliged to accept any work offered. The Operative is not obliged to make his Services available at any time. Specifically both parties agree that they do not intend to create or imply any mutuality of obligations at any time either during or in between any individual engagement.*
2. *...*
3. *The Operative is free to use his own initiative as how best to complete the Services. The Operative must ensure that he is compliant with all statutory, health and safety and animal welfare regulations in force when providing the services.*
4. *The Operative is free to provide any services to any other party at the same time as being engaged by Brightwells and Brightwells acknowledges that it will not have first call on the services of the Operative in priority to any other third party.*
5. *The Operative is responsible for providing his own personal protective clothing such as boots and waterproofs. The provision of other tools or equipment will be agreed between the parties.*
6. *The Operative accepts that he is legally and contractually responsible for the Services, and that he is responsible for covering his own risk with a suitable policy of insurance, should he deem this necessary."*

4.67 Under paragraph 10 it states:

*"The Operative is responsible for his own National Insurance contributions"*

4.68 Under paragraph 12 it states:

*"The Operative is not entitled to participate in Brightwell's grievance and disciplinary procedure. "*

4.69 Under paragraph 14 it states:

*"The Operative may at his discretion use a substitute or hire assistance to perform the Services. The substitute or hire assistant may be rejected by Brightwells only if in the reasonable opinion of Brightwells such substitute or hired assistant does not possess the necessary skills or qualifications to carry on the Services."*

4.70 Each annual version of this self employed contract for services had provision for the signature of the respondent and the claimant. Mr Wilson signed one of the contracts (2013). Members of the respondent's accounts department signed the contracts on behalf of the respondent in 2014 – 2018 inclusive.

4.71 Although the contracts were hand delivered by Mr Wilson to the claimant each year, it was not established that the claimant had signed the contracts in question for the reasons in my conclusions.

### **Submissions**

5. By consent written submissions were sent by both parties representatives for which I thank them. I have read the submissions and the authorities referred to and provided by both Counsel.

### **Law**

6. A concise statement of the applicable law is as follows.

#### Section 230 Employment Rights Act 1996

(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 the 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.

....."

7. The classic definition of a contract of employment was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497***:

“A contract of service exists if these three conditions are fulfilled.

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service ...”

8. There is a multitude of case law on the issue of employee/worker/self-employed status. In addition to Ready Mixed Concrete I was referred a significant number of authorities most notably including:

***Autoclenz v Boucher [2011] UKSC 41***

***Express & Echo Publications Ltd v Tanton [1999] IRLR 367***

***Farer v Heart of Birmingham Teaching Primary Care Trust [2016] ICR 1088***

***Pimlico Plumbers v Smith [2017] IRLR 323***

***Uber v Aslam [2019] IRLR 257***

9. I have taken into account relevant principles deriving from these authorities.

### **Conclusions**

10. My assessment of the witnesses is as follows. I found Mr Gorst to be an honest witness. He was not guarded or evasive in his evidence during robust cross examination. He readily acknowledged or accepted failings, whether his own or the respondent's, even when it must have been embarrassing at times to do so. I accept that he may not genuinely have remembered detail of conversations in 2010 or 2011. Largely his evidence on the chronology of events supported the claimant's account of the history of his relationship with the respondent.

11. With regard to Mr Fitzgerald, I believe that he told the truth but his evidence was of little value in determining the issue to be determined in this hearing. With regard to Mrs Scott I found her to be an honest witness. With regard to the claimant, I found his account of the history of his relationship with the respondent to be largely believable. I did not accept all of his evidence, however as being entirely genuine at all times.



12. With regard to Mr Wilson's evidence, as with the claimant's, there were times when I did not accept parts of his evidence as truthful or accurate. Neither the claimant nor Mr Wilson were fundamentally dishonest witnesses. On occasions I just did not believe their evidence to be reliable.

### **Claimant's status as night watchman at Shobdon?**

13. The issue is whether at Shobdon performing the duties of night watchman, the claimant was self-employed, running a business on his own account; a business where the respondent was his client. Or whether in the alternative, was he an employee or a "limb (b)" worker?

14. The respondent put forward three phases of engagement which were broadly agreed by the claimant. Phase One was 5<sup>th</sup> November 2010 to 15<sup>th</sup> October 2011 when the claimant lived on the Shobdon site providing night watchman services.

15. Phase Two was the period in which the claimant worked as a porter during sales weeks, in addition to his night watchman duties, between January 2011 to 7<sup>th</sup> February 2012 whilst at the Shobdon site between November 2010 – October 2011 and the Madley site from October 2011.

16. Phase Three from February 2012 the claimant was no longer given porter duties but continued in his night watchman duties on the Madley site. I largely follow this structure but take phase three as starting in October 2011.

17. I deal with the Shobdon site night watchman duties first by looking at the application of the law as set out in **Ready Mix Concrete** to the facts.

18. The claimant provided a personal service, without doubt, at Shobdon. It was a very valuable service. During his residence as night watchman on the Shobdon site, all burglaries ceased. His German Shepherd dog was alert, vocal and a very effective deterrent to thieves.

19. There was no written agreement between the parties. There was very little agreed orally.

20. The claimant was assisted by the respondent in setting up site at Shobdon. He was provided with a site to park his mobile home; utilities, to the extent they were available, were free of charge. He went to Shobdon as a matter of urgency at the request of the respondent following yet another burglary overnight. It had not been planned to engage the claimant's services at Shobdon. Being located at Shobdon was accepted by both parties as temporary until the Madley site was up and running in a few months' time where the claimant would provide night watchman services as agreed in September 2010. The temporary location extended to 14 months.

21. The urgency of moving to Shobdon because of the level of burglaries, may well explain the absence of agreed terms of engagement. Apart from agreeing or at the very least understanding that the night watchman's role at Shobdon was temporary, nothing else, no other term of engagement was agreed.

22. There was no obligation on the claimant that he must accept the offer of work as night watchman at Shobdon on 4<sup>th</sup> November 2010. He could have refused without affecting the plan that he would start work at Madley when the site was finished. The claimant remained there voluntarily without wage. He not doubt did so in anticipation of the more permanent role promised at Madley where he would have a permanent site with, he anticipated, installed utilities. The Madley site took longer to be ready than had been in expected in September 2010.

23. The claimant was given a broad instruction to report anything untoward to Mr Gorst direct whether concerning trespassers or staff. Any night security service whether provided by a security company or a private individual would report any incident.

24. The claimant was in sole control of his pet German Shepherd. There was no evidence of any directions relating to the use of the German Shepherd at Shobdon apart from the necessity to have the dog there, on site, as a deterrent. It was important to Mr Gorst that the dog was under the claimant's control at all times.

25. With regard to whether the claimant could use a substitute for his services at Shobdon, it was the services of the claimant *with* his German Shepherd dog which was the great attraction to Mr Gorst and that was why the claimant was asked if he could go to Shobdon. No other person apart from the claimant's wife could possibly be substituted for him, because of the dog; and his wife was not living there. There was no discussion between the parties on substitution if the claimant was unable to be on duty at any point, nor, as I have already stated, on any other term of engagement.

26. There was no exchange of money for the claimant's services as night watchman whilst at Shobdon. However, the provision of free utilities and caravan pitch in return to personal services can in my view amount to remuneration. It is possible to place a value on those services – the claimant was paying £75 per week for his caravan/motorhome pitch prior to moving his caravan to the Shobdon airfield site; at Shobdon he did not pay for his pitch. There is also a cost and therefore a value that could be calculated, if only an estimated calculation, on the provision of utilities. There was no discussion whatsoever about value of services or wages for night watchman's duties.

27. Stepping back to look at the evidence as a whole of the Shobdon night watchman role, including the context in which it arose, sensibly and realistically I find that the claimant's status at Shobdon a night watchman cannot be said to amount genuinely to self-employed status. The respondent was not the claimant's customer. He was not paid for night watchman's duties. There was no evidence of any other source of income. Even if the pitch and the utilities had a calculable value, it cannot reasonably be said that the claimant was in business on his own account, earning a living and making a profit. The claimant was not independent of the respondent. He was not self employed as a night watchman at Shobdon.

28. Was he a limb (b) worker or an employee in a night watchman capacity at Shobdon? The claimant said that he believed he was an employee when he accepted the offer of moving to the Shobdon site temporarily on 5<sup>th</sup> November 2010 before the Madley site became available in February 2012. I find that not to be entirely believable at the point he moved to Shobdon. The claimant was on benefits when he first moved to the Shobdon site and I do not believe that he believed that he was an employee at this point. He knew the situation was temporary. In cross examination the claimant accepted that he believed he would be an employee when he acted as night watchman at Madley in due course. And yet there was a mutuality of obligation once the claimant was on site. He had been offered a pitch and utilities free of charge and had an obligation to provide his services once he started to avail himself of those utilities and the site for his mobile home.

29. With regard to how to perform the services, the claimant was left to his own devices with minimum instruction. The claimant had very much the feeling at least initially that he was doing the respondent a favour, helping them out, by responding so quickly to their urgent request to park his mobile home at Shobdon and take his dog with him.

30. There was no control on how the claimant provided his services except for the stipulation that he was on duty overnight every night from the time that the site was vacated by the respondent's staff until they returned in the morning. It is difficult to see what control the respondent could exert on the claimant in how he and his dog patrolled the site. The extent of control was the extent to which the claimant was required to be on site on duty. No protocols for dealing with trespassers were agreed. No instructions were given on how to conduct his services. The respondent was very satisfied throughout that the presence of the claimant and his dog prevented any burglaries at Shobdon.

31. I have considered carefully all of the evidence relating to this stage of the claimant's and respondent's relationship and how it began on 5<sup>th</sup> November 2010. The claimant was not an employee or a worker when he began the night watchman duties at Shobdon. There was no mutuality of obligation, no control and no agreed terms defining the relationship. Once the benefits ceased

however in December 2010, I consider whether that changed the relationship. does the relationship. The financial value of the mobile home pitch and the utilities and the provision of night watchman duties continue – they are a constant. On the available evidence, the way that the claimant provides his services as night watchman is not subject to any further element of control than existed initially.

32. There seems to me to have been a mutual need for what each party could offer the other – night watchman services in exchange for a pitch and utilities. I considered whether the arrangement was just that – was it a mutually convenient, temporary arrangement which did not give rise to any employment status? The respondent submitted that the claimant was no more than a licensee. Initially I was attracted to the finding that the arrangement was no more than a licence, but the weight of evidence that a mutuality of obligation arose, extinguishes the licensee argument and the viability of that situation lasting for 14 months. It was not expected to last 14 months – in September 2010 the respondent told the claimant that the Madley site would be ready in about six months, ie by March 2011. The motivation for the respondent to provide the claimant with paid porter work once his benefits ceased in December 2010 January 2011 arises because the respondent needed the claimant to remain on site at Shobdon longer.

33. It is clear that the multi factorial approach of **Ready Mixed Concrete** does not sit precisely and comfortably over the arrangement that the claimant and the respondent made in respect of night watchman duties at Shobdon. However, the service was personal and the claimant was in receipt of a kind of “remuneration”. There was also a degree of control in terms of when duties were to be provided.

34. I find that the mutuality of obligation was not there initially. Whilst benefits were paid to the claimant I accept he was a licensee – that he and the respondent had a mutually convenient arrangement. But that ceased once the claimant’s benefits ceased; I do not accept that the description of licensee fits the relationship between the parties throughout the time the claimant resided at Shobdon. The respondent needed the claimant to remain in post at Shobdon and was therefore motivated to provide him with paid work to enable him to do so. That is directly contradictory to the claimant being an independent limb (b) worker. The degree of mutuality of obligation in respect of night watchman duties arises as a result of this assistance given to the claimant by the respondent to enable him to remain at Shobdon.

35. There is no evidence from after January 2011 – February 2012 which is inconsistent with a contract of service for porter work. On the balance of probabilities I find that he became an employee when the respondent felt obliged to provide the claimant with some paid employment in order to remain working as a night watchman at Shobdon. I do not think it material the payment of wages

related to porter work. The remuneration for night porter work was in the provision of a caravan pitch and free utilities.

### **Claimant's status as porter at Shobdon and Madley**

36. As stated, the claimant's state benefits stopped in about December 2010. He had been on the Shobdon site as night watchman for about two months. In January 2011 in order to replace the loss of benefits, the claimant was offered by the respondent the opportunity to work as a porter during sales weeks at a rate of about £200 per week, giving him roughly the same income he would have received had he remained on benefits. The Madley site was still not ready at this time for the claimant to commence night watchman duties.

37. The claimant signed the respondent's standard form Self Employed Contract for Services in about March 2011 – there was no copy of it in R1. The contract the claimant signed was generic – the respondent engaged many porters on this standard form contract. The porters all underwent the health and safety (including slingers) training.

38. When the claimant's benefits stopped, the claimant had no other income. The respondent offered the porter work to him on the agreed rate of £8 per hour to enable the claimant to be able to continue in situ as night watchman at Shobdon because he was not in receipt of weekly or monthly pay for being a night watchman at Shobdon. It was very much in the respondent's interests that the claimant remained at Shobdon performing night watchman duties, keeping the site secure. The claimant worked consistently during sales weeks in this capacity.

39. Offering the claimant the porter work achieved its purpose. He commenced work in January 2011 as porter. There was no discussion between the respondent and the claimant that the claimant's work as a porter would be on 'an as and when required' basis like other porters and in accordance with the self-employed contract for services at paragraph 1 of the Operative Provisions:

*"Brightwells is not obliged to offer work at any Market to the Operative, neither is the Operative obliged to accept any work offered. The Operative is not obliged to make his Services available at any time. Specifically both parties agree that they do not intend to create or imply any mutuality of obligations at any time, either during or in between any individual engagement."*

The individual engagement in this paragraph is reference to the sales weeks in which porters are engaged.

40. The claimant worked as a porter and was paid for January and February 2011 before a self employed contract was produced for his signature. There was

no intention that the claimant would be provided with intermittent porter work, on an as an when required basis, as is stipulated in the self-employed contract for services. The claimant needed an income stream to remain as porter at Shobdon and the respondent recognising that requirement, provided the income.

41. The claimant worked during sales weeks in order to provide him with income broadly equivalent to the benefits he had previously received. That was the respondent's intention. It was not the respondent's intention to be selective in the sales weeks it asked the claimant to work – they needed to provide him with work so that he could remain as night watchman. The porter work was not temporary or sporadic, it was permanent. It is not disputed that the claimant signed a self-employed contract in March 2011 it is said because otherwise he would not have been paid although he had already been paid on three occasions. The claimant explained that he signed the document effectively under protest to ensure he got paid subsequently.

42. The standard self-employed contract for services signed in March 2011 did not reflect the reality of the claimant's situation or on commencement, with the respondent's intention.

43. There is no comparison between the claimant's unique status and the reason why he was given porter work, and the status of the so-called self-employed porters engaged by the respondent on the same standard self-employed contract. The claimant's unique situation was based on the existing relationship, the arrangement to provide night watchman services at Shobdon and the need to enable the claimant to remain at Shobdon. The offer of work as a porter and the claimant's acceptance of it resolved the claimant's financial situation but it also created a mutual obligation to each other.

44. There was no occasion when the claimant required a substitute in the 14 months he did porter work. In any event, a substitute would have had to have had relevant training. The respondent's standard self-employed contract tendered to the claimant in March 2011 reserved the right at paragraph 14 to reject any substitute who did not have, in the respondent's reasonable opinion, necessary skills or qualifications. As a consequence, the respondent had control over whether a substitute could be introduced by a porter. This is inimical with the claimant being self-employed. In any event the claimant had no occasion to use a substitute for his own services. The claimant required the porter work to earn income. The porter role offered to the claimant and which he performed between January 2011 and early February 2012 was unquestionably a personal service.

45. In support of the finding that there was mutuality of obligation for the period January 2011 and February 2012 the following occurred:

- (i) the respondent agreed to pay the claimant £200 per week for porter duties;

- (ii) the provision of porter duties was inextricably linked to the claimant remaining on site at Shobdon as night watchman;
- (iii) the claimant provided a personal service as porter and did not, in truth have the right to substitute a third party for his porter duties; and
- (iv) as a porter he was sufficiently under the respondent's direction control as to what duties he performed during sales weeks. He was required to do slingers training and was entered on the approve drivers register;
- (v) The Self Employed Contract was introduced in March 2011 after the claimant started work and had been paid as porter for two months. Its terms were never discussed and agreed in advance with the claimant. The contract was imposed on the claimant with the caveat that no signature meant no pay. This was an inequality of bargaining power. This is an example, as referred to in **Autoclenz** of an employer attempting to draft its way out of an employment or worker relationship arising. The contract did not reflect the reality of the situation – that there was a huge benefit to the respondent of the claimant remaining in a night watchman capacity at Shobdon and the claimant was offered the porter work to enable him to do so.

46. The claimant moved the Madley site in mid October 2011. He continued nevertheless with the porter role until it ended abruptly on 7<sup>th</sup> February 2012 after the claimant refused to undertake an electrical repair (which was within his capacity and skill set) at the instruction of Mr Gorst. This caused yet a further altercation between the claimant and Mr Gorst. This was too much for Mr Gorst to take and whilst he did not want the claimant engaged as a porter any longer, he did still want the claimant on site at Madley as a night watchman. The claimant's duties as a porter ceased immediately on 7<sup>th</sup> February 2012. He was effectively dismissed from that role. The claimant did not raise any grievance and let the porter work go.

47. In summary, on the evidence and for the reasons set out above, I find that the claimant was employed as a porter under S203(3)(a) Employment Rights Act 1996 between January 2011 until 7<sup>th</sup> February 2012.

### **Claimant's status as night watchman at Madley?**

48. I now consider the claimant's status from the time he moved to the Madley site as night watchman. From October 2011 when the claimant moved to the Madley site he was paid £100 per week for his services as night watchman. He had free utilities, a place to park his caravan, a portacabin which he purchased to facilitate his night watchman duties. He had a fenced garden and allotment. The establishment of a permanent pitch, including its location, was with the agreement and practical assistance of the respondent. It clearly gives a picture of an intentional permanent facility for the claimant to perform the role of night watchman, even more so when the claimant's wife moved in with him in April 2012.

49. On cessation of the porter role on 7<sup>th</sup> February 2012, it was agreed that the claimant would immediately be paid £200 per week to replace the loss of porter work income. A week later, the claimant was offered by the respondent and accepted £1000 per month for his night watchman services. The claimant invoiced monthly and was paid monthly.

50. The claimant was reimbursed by the respondent for the purchase of a second German Shepherd, as pet 'guard' dog to accompany the first who was beginning to age. Thereafter the claimant was regularly paid £50 in cash towards the cost of the new dog. Mr Gorst and Mr Wilson denied knowledge of this. I believe that Mr Gorst may not personally have known the respondent continued to pay towards the dog's costs, despite the respondent having earlier stated that it would, but I do not believe Mr Wilson's was telling the truth when he denied knowledge of any payment for the new dog's upkeep. I preferred the claimant's and Mrs Scott's evidence. Mr Wilson made cash payments to the claimant for his new dog's upkeep.

51. The claimant and the respondent signed a Self Employed contract for Services on 5<sup>th</sup> July 2012. The description of the claimant's duties was accurately set out at paragraph 4.26 (1) and (2) above. The other clauses such as (6) Contractor's Equipment, (7) Remuneration, (8) Utilities and (9) Activities on the Land were all drafted specifically for the claimant's role as night watchman. These clauses do not appear in the respondent's standard generic Self Employment Contract for Services.

52. Was the claimant self employed as a night watchman at Madley? The respondent submitted that the claimant was self-employed and relied on the self-employed agreement signed on 5<sup>th</sup> July 2012 and on the subsequent six annual self-employed agreements 2013 – 2018 inclusive, as evidence of this.

53. The contracts purportedly signed by the claimant each year 2013 – 2018 were countersigned by Mr Williams, or one of the accounts clerks. The claimant denies signing any of them. The signature, purportedly the claimant's, on each document appeared similar to each other, with the exception of one (2014), but did not appear similar to the signature of the claimant on the 5<sup>th</sup> July 2012 contract which the claimant readily acknowledges he signed. The exception in 2014 also did not readily appear to be similar to the signatures on the self-employed contract for services documents for 2013, and 2015 – 2018.

54. The claimant vehemently denied he had signed any contract apart from the 5<sup>th</sup> July 2012 and one contract in March 2011. His evidence is that he had asked each year for a review of his terms of engagement and was refused on each occasion. He denied he had signed the self-employed contract for services in 2017 despite informing the accounts clerk by email on 24<sup>th</sup> April 2017 that he had signed it. The claimant explained that he informed the accounts clerk that he



had signed it to satisfy her and effectively to get her 'off his back'.

55. There are a number of possibilities to explain the signatures on the 2013 - 2018 self employed contracts. The claimant could have deliberately altered his signature because he fundamentally objected to the terms of the self employed contract for services presented each year because he believed, quite rightly, that they did not reflect his role as night watchman, and this 'false signature' was a form of protest which perhaps would render the document ineffective. The claimant knew that he would not get paid unless he signed a contract – that occurred in 2019 when his pay was withheld for two months in April and May 2019 when he refused to sign the contract.

56. Another possibility is that Mr Wilson signed it for the claimant without his knowledge, in order to 'keep the peace'. Mr Wilson denied categorically he had signed any contract on behalf of the claimant because apart from 2012 contract which he had countersigned and returned, he did not know whether the contracts had been signed and had assumed that they had been. There was no explanation for why, when Mr Wilson drafted the Final Written Warning he referred to the 5<sup>th</sup> July 2012 contract rather than the latest version of any of the self-employed contracts for services.

57. I have no reliable evidence to decide where the truth lies regarding the claimant's signatures on these documents 2013 – 2018. The claimant had a ready but glib but not entirely convincing explanation for why he informed the accounts clerk on 24<sup>th</sup> April 2017 that he had signed the contract. The accounts clerked counter signed it on 2<sup>nd</sup> May 2017 after the claimant had purportedly signed in on 28<sup>th</sup> April 2017. So how did the respondent come to have in its records a document bearing a signature which does not appear to be similar to the claimant's signature on the 2012 contract? In cross examination Mr Gorst and Mr Fitzgerald thought it unthinkable that an accounts clerk would have forged the claimant's signature. Mr Wilson was clear he had not returned any of the contracts 2013 – 2018.

58. The burden of proof is on the respondent who relies heavily on these documents to show that the claimant was self-employed. Mr Gorst conceded that the respondent had no evidence apart from the email of 24<sup>th</sup> April 2017, that the claimant had signed any of these standard form contracts. In the circumstances, for the above reasons, I find the self-employed contracts for services between 2013 and 2018 cannot be relied upon.

59. However, even if the claimant *had personally* signed the generic self-employed contract for services, this standard form document does not reflect in any material way the true arrangement operating between the claimant and the respondent in his duties as night watchman at Madley.

60. The respondent has relied on clauses reflective of an intention that the

claimant's role would have "self-employment" status, in an attempt, again, to draft its way out of the claimant having employee or worker status. By automatically issuing a repeat copy of the generic self-employed contract for services annually to the claimant, does not alter the situation, no matter how many times it was re-issued. Even if the self-employed contract for services had been genuinely signed by the claimant between 2013 – 2018 and therefore would have potentially had contractual force, I would not in any event have found that they had any application to the claimant's role of night watchman. The terms of the respondent's standard self-employed contract for services did not reflect the reality of the claimant's role and situation. The claimant provided consistently since February 2012 his services as night watchman. The word "nigh watchman" or "night warden" appears nowhere in the contract for services.

61. The claimant's night watchman services were required daily, 365 days a year. Unlike the contract for services which referred to the 'services' under the contract recital paragraph D "*It is the intention of the parties that when the Operative provides the Services to Brightwells in relation to a particular Market, such provision of Services shall constitute a separate and distinctive engagement under this contract for Services.*" The claimant's services were not required on an as and when basis at any of the respondent's other markets/sites. He was located entirely at Madley. The document was irrelevant to the claimant's role as night watchman.

62. I find that the contract signed on 5<sup>th</sup> July 2012, is a genuine document signed by the claimant and the respondent. Although it expired technically in July 2013, in the absence of any document superseding it, I find that the 2012 document continued to substantially reflect the relationship between respondent and claimant.

63. Again the respondent relies on this document as evidence of the claimant's self-employed status as set out in the heading: "The Self Employed Contractor". The final paragraph (12) states: *This contract is a contract between the Company and the Contractor. No contract of employment or other contract may arise out of this contract or by its performance.*"

64. The respondent relied on the evidence of selling cars and monitoring services to the neighbouring site, to illustrate that the claimant was in business on his own account and was therefore self employed in accordance with the 2012 contract. If that was the case, the claimant was in breach of clause (9) of the contract which *prohibited* any trade or business being carried out by the claimant. That clause would in fact preclude the claimant from being self-employed as he lived and worked on the Madley site.

65. The claimant had in 2011- 2013 worked preparing vehicles for Mr Guyatt to sell from the Madley site. The claimant cleaned and prepared the cars for sale; he did minor mechanical repairs. That was stopped 2013 by Mr Gorst for

security and health and safety reasons. There was no evidence whether the claimant had obtained significant income from this work, nor whether he was actually in business on his own account as a partner with Mr Guyatt.

66. The respondent also relied on the fact that the claimant had since about 2019 a 16 camera monitor installed in his portacabin focussing on the neighbouring industrial site and was obviously, in their opinion, providing security services for the neighbouring site. That may well be a reasonable assumption. Why else would the claimant have a 16 camera screen focussing on the neighbouring property in his portacabin? There were also tyre marks from the claimant's vehicle going onto the neighbouring site which suggested he visited their site.

67. The claimant again had an explanation. He claimed that the cameras showed all the boundaries of the respondent's site and assisted him in his security work for the respondent. The screen had been installed over 4 years ago because the neighbouring site's cameras had recorded the attack he experienced in August 2017. The additional cameras had been offered to him by the neighbour at that time. Nevertheless the claimant denied that he was providing monitoring services for the neighbour. He accepted that the tyre tracks from his mobile home plot to the neighbouring site were his vehicles tracks but that was because he drove there to exercise his dogs on the neighbouring site. I have some doubt about the truth of the claimant's evidence on this point, particularly why he would exercise his dogs on the neighbour's site. However, the respondent needs evidence to convert its speculation about the claimant providing security services to the neighbouring site into fact.

69. The respondent had its disposal various mechanisms within the Tribunal Procedural Rules to obtain evidence in support of its allegations, such as orders for disclosure of the claimant's bank statements showing income or witness orders. No applications were made. I find that the claimant's explanations were certainly not entirely implausible.

70. Mr Gorst put a stop to Mr Guyatt's and the claimant's car sales in 2013 on the Madley site. Mr Gorst also blocked the account of the claimant who bought and sold the occasional vehicle because he was "selling too much".

71. The above are examples of the respondent enforcing paragraph (9) of the 2012 contract. In contrast, the respondent did not put any prohibition on the claimant monitoring the neighbouring site despite the respondent alleging that the claimant did so for remuneration. The respondent relied on this as evidence of self-employment. However, it is inconsistent with its own term in clause (9) of the 2012 contract. It is also too little too late, occurring as it did (on the respondent's evidence) in 2019.

72. There is evidence of the control that the respondent exerted or attempted

to exert over the claimant. I do not list all relevant material factors illustrating a master/servant relationship (to use old fashioned language). The main factors facts that I take into account are that the respondent:

72.1 paid for:-

- the claimant's use of Wi-Fi;
- the purchase of another 'guard' dog for the Madley site;
- vets bills for a period of four months;
- provided £50 regularly for the dog's upkeep;
- provided the claimant with branded clothing;
- provided funds for the purchase of a security camera following an assault on the claimant in 2016;

72.2 controlled where the claimant set up his home and 'office'.

72.3 provided the claimant with a plot of land to park his caravan, a portacabin to enable him to perform his duties more easily, a garden, establishing a permanent site;

72.4 provided free utilities;

72.5 allowed his wife to live with the claimant on site;

72.6 stipulated that the use of the plot of land was only for the provision of the service of the claimant as night watchman;

72.7 issued a disciplinary warning to the claimant in respect of an allegation of theft of fuel from vehicles parked overnight at the Madley site which does not correlate to self employed status;

72.8 insisted on the claimant countersigning the written warning;

72.9 represented the claimant as an employed night warden in its application for planning permission in order to bring the application within the planning authority's guidelines and so enhance the likelihood of it being granted;

72.10 applied for and was granted planning permission specifically for the claimant's caravan, portacabin and motorhome to remain on site (albeit on a different plot on the Madley site);

72.11 installed a septic tank for the claimant's use at significant cost;

72.12 undertook a soil analysis report on the new proposed site for the claimant.

73. The 2012 contract had an exclusion clause at paragraph (14): *No contract of employment or other contract may arise out of this contract or by its*

*performance*. That clause does not and never did reflect the reality of the relationship. The claimant was not self employed as a night watchman.

74. I find that the claimant was also not a worker. There was a mutuality of obligation created in 2011. The claimant's lack of independence from the respondent has been amply illustrated above, for example by provision of support for him in providing him with the porter work in January 2011 and the interim additional payment of £200 made to the claimant to enable him to continue his night watchman duties in February 2012 prior to agreeing a salary of £1000 per month.

75. The terms of the 2012 contract are largely consistent with employment and none are fatally inconsistent with employment, including the payment being gross with a requirement that the claimant pay his own tax and NIC. It provides three months' notice in clause (5). In contrast the generic standard self-employment contract for services has no provision for notice.

76. Clause (11) requiring the claimant to insure his own property and to maintain public liability insurance for his dogs, is not inconsistent with employment.

77. Clause (12) excluding a contract of employment being created is totally submerged by the countervailing weight of evidence of an employment relationship and it is accordingly ineffective.

78. There was no real right of substitution – it was neither discussed nor practised. The single occasion on which the claimant was completely incapacitated from providing his night watchman services in July 2017 was a one-off occasion. The substitute was a family member who stepped in at the respondent's request and does not remotely amount to a substitute to demonstrate the claimant was either self-employed or a S230 (1) limb (b) worker.

79. The respondent controlled the claimant's services in respect of the location from which he provided them, and the days/hours that he was on duty (paragraph 4.26 contract clauses (1) and (2)).

80. The respondent did not have control over how the claimant provided his night watchman services with his dogs, for example what was the required number of site patrols per night, but the respondent did require the claimant to use his dogs and to keep them under control (paragraph 10) - which he did.

81. They required him to deal with persons on the site at all times in a courteous manner, informing a person entering the site of the extent of the private areas and directing them on how to exit the property (paragraph 3) - which he did. He reported any security issues to the Security Manager as instructed. Overall the claimant's services were extremely valuable to and

greatly appreciated by the respondent.

82. Stepping back and looking at the totality of the evidence relating to the relationship between the claimant and the respondent, I find a material degree of integration of the claimant into the respondent's organisation. The respondent was as reliant on the claimant to provide his much-valued services, and the claimant on the respondent for a place to live and his livelihood. There is nothing about this relationship which remotely looks like the claimant is self employed or a limb (b) worker.

83. I find that the claimant's relationship with the respondent satisfies to an unarguable degree the principles derived from the authorities referred to in paragraphs 7 and 8 above in terms of mutuality of obligation, control and personal performance. The terms of the 2012 contract between the respondent and claimant were consistent with the claimant being engaged on a contract of service.

84. In summary I find that the claimant was employed in accordance with S230(3)(a) Employment Rights Act 1996 by the respondent (i) as a porter from the cessation of benefits, from about January 2011 until 7<sup>th</sup> February 2012; and (ii) as a night watchman from January 2011.

Employment Judge Richardson  
14<sup>th</sup> April 2020