EMPLOYMENT TRIBUNALS

Claimant: **Mr G Alimi**

Respondent: **Stratford Advice Arcade (A company limited by guarantee)**

Heard at: **East London Hearing Centre**

On: **20 & 21 November 2019**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Ms Naomi Hart of Counsel instructed by Advocate

Respondent: Mr P Lockley of Counsel instructed by Edwards Duthie Sharmash

JUDGMENT

1. **The Claimant was not 'an employee' of the Respondent for the purposes of Sub-Section 230(1) of the Employment Rights Act 1996.**

2. **The Claimant was a worker and in employment for the purposes of sections 230(3)(b) of the Employment Rights Act 1996 and section 82 of the Equality Act 2010.**

REASONS

1. The Respondent is a charity incorporated as a company limited by guarantee which lets space at a building known as the Stratford Advice Arcade to various voluntary sector organisations and similar businesses. The Claimant was engaged by the Respondent from 3 February 2011 until 28 February 2019 when the relationship ended. During this period he worked as a 'Finance Officer' essentially working as a bookkeeper and accountant.

2. Following the termination of the relationship the Claimant has brought claims of (1) unfair dismissal, (2) a claim for breach of contract (notice pay), (3) claims that he has suffered detriments on the grounds of having made protected disclosures, (4) claims that there have been unlawful deductions from his wages, (5) claims for holiday pay and (6) claims for equal pay brought under the Equality Act 2010. The Tribunal would only have jurisdiction to entertain the first two of those complaints if the Claimant was at the time the complaints arose working under a contract of employment with the Respondent. In respect of the third to fifth claim it is sufficient for the Claimant to establish that he has the status of a 'worker'. For the equal pay claim the Claimant needs to show that he was in 'employment' for the purposes of Section 83(2)(a) of the Equality Act 2010. It is the Respondent's case that the Claimant neither worked under a contract of employment nor was he a worker. The Respondent contends that the Claimant was a self employed accountant and that the company was merely a client.

3. On 9 September 2010 there was a preliminary hearing before EJ Prichard who ordered that the issue of employment status be decided as a preliminary issue in the case. He made orders for disclosure and for exchange of witness statements.

The hearing

4. I was provided with a bundle which had 934 pages. During the hearing each party complained about the adequacy of the disclosure made by the opposing party. During the hearing there was some additional disclosure which I shall refer to below.

5. The Claimant had prepared and exchanged a witness statement on his own behalf and the Respondent had prepared a statement from Ms Olivene Howell who was at all material times the Centre Manager reporting only to the Trustees of the Respondent. The level of antipathy between the two witnesses was apparent from the outset of the hearing. I am very grateful to both Counsel for the measured approach that they both took in presenting their client's case.

6. On the first day I spent some time pre-reading before I heard evidence from the parties. I noted that I had not been provided with any accounts or tax returns by the Claimant which it appeared to me might be relevant documents. I indicated to the Respondent that it was a matter for it whether it sought any orders in that regard. The parties indicated that any disclosure would be given voluntarily. I heard from the Claimant from 12:00 on the first day until 15:50. A discussion then took place before Ms Howell gave evidence which concluded with Ms Howell agreeing to undertake a further search for documents relating to who provided accountancy software and the Claimant agreeing to provide any accounts of tax returns that he had.

7. On the second day of the hearing the Respondent clarified its position in relation to the provision of software. I deal with that below. The Claimant had provided only limited accounts comprising a spreadsheet listing the sums he received in 2013 and one page of his tax return for the year 2012 – 2013. The Claimant was recalled to give evidence about those documents. He concluded his evidence at 10:25. Ms Howell then gave evidence during what was left of the morning.

8. Both Counsel had provided written submissions/skeleton arguments and spoke to these during their submissions. I will not set these out in these reasons but shall refer to the salient points during my discussions below. Ms Hart had prepared and provided a comprehensive bundle of the most important authorities for which I and

Mr Lockley both expressed our thanks. I am sure that the Claimant is very grateful for the assistance he has received and Ms Hart is to be commended taking on this case pro-bono.

9. I have had regard to all of the submissions that were made to me but in the interests of brevity shall not set them out in full here. I deal with the arguments I considered to be central to my decision in the discussions and conclusions below.

10. Unfortunately hearing submissions took up all the remaining time and I was unable to deliver an oral judgment. I apologise for the delay in providing these reasons and can only point towards the volume of other cases as the reason for this.

General findings of fact

11. The witness statements of the Claimant and Olivene Howell both included passages of argument and allegations of dishonesty irrelevant to the matters I needed to consider. During the hearing the level of antagonism between these two witnesses was very clear. I was not assisted by this. I have restricted my findings of fact to the matters which I consider are relevant to the matters that I needed to determine.

12. Insofar as the cross allegations of dishonesty were intended to inform my view of the credibility of the Claimant and/or Olivene Howell I do not consider that any allegation had any significant weight when weighing up the matters I needed to consider.

The Respondent

13. The Respondent is a charity that owns a building in Stratford which it administers and lets out to a number of voluntary sector and similar organisations. It operates, through a board of trustees. It would seem that relationships between the trustees and between the trustees and the employees have not always been happy. I do not need to make any findings about the causes for that.

The Claimant

14. The Claimant graduated from East London University in 1998. He obtained an ACCA qualification in 2001 before studying for a Master's Degree at Southbank University where he obtained a MSc in Accounting and Finance in 2003. During his studies the Claimant had worked for various accounting firms/companies and continued to do so until 2005. In 2005 the Claimant set up his own business and traded under the name 'G.A Group & Co'. He operated a business bank account and was registered as self-employed with HMRC. He was, at all times, a sole trader.

15. The Claimant has not given any disclosure in relation to the period prior to 2010 and I cannot judge how successful or otherwise that accountancy business was. However, in 2010 I am satisfied that the business was at a low ebb because the Claimant was in receipt of state benefits and was seeking work (to put it neutrally) through what was then known as the Job Centre.

The engagement of the Claimant

16. In 2010 the Respondent advertised a position of a 'Temporary Finance Officer' in the Newham Job Centre. A job description was prepared at the time. Essentially the role was that of a book-keeper with payroll responsibilities. The post-holder was expected to assist with preparing reports and budgets but was not responsible for making up the statutory accounts. Insofar as it is material I find that it had been intended to recruit a temporary employee with a view to a more permanent arrangement on the basis that that person would have the same status as other employees of the organisation. That is, an employee paid through the payroll.

17. The Claimant applied for the role and was shortlisted together with at least one other candidate. The Claimant was interviewed on 14 January 2011. When another candidate dropped out the Claimant was telephoned on 19 January 2011 and told he would be offered the job subject to references. He sent an e-mail on that day giving the name of FT as a referee referring to him as 'my client'. I am satisfied that the Claimant still had some clients for whom he might do some work occasionally. That said I accept his business did not provide him with sufficient to live off at that stage.

18. On 21 January 2011 Olivene Howell wrote to the Claimant formally offering him the position subject to obtaining satisfactory references. The terms of the offer were that the Claimant would work for 21 hours per week over 3 days. He would be paid monthly at a rate of £14.00 per hour. The term of the arrangement was a minimum of 1 month and thereafter subject to review. Nothing was said at that stage about holiday pay pension or other benefits.

19. Prior to the Claimant starting work there was a further meeting between him and Olivene Howell. When that meeting took place and what occurred in that meeting is contentious.

20. Olivene Howell says the meeting took place on 2 February 2011 just before the Claimant started work. She says that that during the meeting a proposal that the arrangement was altered to a freelance arrangement came from the Claimant.

21. The Respondent has produced a letter dated 2 February 2011 which on its face was written by Olivene Howell. That letter contains the following paragraph:

> '*You will be paid £14.00 per hour, paid fortnightly and the agreed terms are that you are engaged on a freelance basis; therefore the Stratford Advice Arcade takes no responsibility for PAYE deductions.'*

22. What then happened in practice following that meeting was that the Claimant sent invoices to the Respondent on headed paper. The headed paper had a logo and bore the name 'G.A. Group & Co.' Under the name was a banner saying 'Accountants and Taxation Consultants'. The Claimant's home address was given together with his contact details. Below the header were the words Mr G. Alimi T/A G.A. Group & Co.

23. The first of those invoices includes work up to 9 February 2011 and I have seen bank records which show that the invoice was paid by BACS transfer on the same day to a bank account held in the name of 'G.A. Group & Co'. The invoice contained a description of the work done which was (in the first invoice*) 'For professional Services rendered in respect of 'Finance Officer'*. The dates of work were set out followed by the words 'Due care and attention throughout the period'. There was a footer to the invoice which said*: 'Specialists in Tax and VAT investigations – Helping and supporting Local Businesses to Develop'*.

24. The Claimant was asked to complete a timesheet as were other employees. The timesheets I have seen were headed 'employee timesheet'. Other than the fact that the Claimant was required to complete a timesheet I do not consider the use of an 'employee timesheet' to assist me in the issues I have to determine. The Respondent was not treating the Claimant as an employee at this stage. I infer that the timesheets were used because that is what was available.

25. The Claimant's witness statement (for which his Counsel has no responsibility) has the heading 'Dishonest, Deception and Wickedness'. Under this heading the Claimant has suggested that this new arrangement was imposed upon him and that he never agreed to it. In his evidence in chief he said that the first time he had seen the letter dated 2 February 2011 was in May of 2012. In his witness statement he says that an assertion by Olivene Howell in a letter written to him on 5 March 2012 that the details of his self-employed status were confirmed in the letter of 2 February 2011 was fabricated. He says that she 'forged that letter'. In his cross-examination he said that the first time he had seen the letter of 2 February 2011 was March 2011.

26. The Claimant says that in the very first days of his employment he raised accounting irregularities. He says that at a meeting on 9 February 2011 it was Olivene Howell who raised the possibility of the Claimant working on a freelance basis. He suggests that he told her that the role was not a self-employed position. He does not go on to explain in his witness statement why on the same day he issued his first invoice to the Respondent other that saying that he was told that this would not affect his employment status. The implication is that it was Olivene Howell who imposed this arrangement. He goes on to say that on 29 June 2011 Olivene Howell repeated the position that *'with regard to your contract, SAA can not employ you (Ganiy) under PAYE but only as Self-employed'*.

27. I have had regard to the fact that from 2012 the Claimant was expressing dissatisfaction with the contractual arrangements. However, I do not accept the Claimant's account of events. I have set out below that I find that the Claimant has deliberately chosen to withhold his business accounts rather than being unable to do so. As such he is not doing his best to assist me. That aside I consider it important that when Olivene Howell wrote to the Claimant on 5 March 2012 and made reference to her letter of 2 February 2011. In his reply of 6 March 2012 the Claimant does not question that he was given a letter on that date. In two places the natural meaning of his words suggest that he accepts that he was. In one place her says *'the letter given to me on 2 February 2011'*. In another he refers to the terms of that letter. It is quite clear that he had read it at that point. I am prepared to assume he made an error when he said in evidence that he first saw the letter of 2 February 2011 in May 2012 and that he meant to say March. That said I do not find it plausible that if he was only given the letter of 2 February 2011 in March 2012. If that had been the case I would have

expected the Claimant to have stated that he had only recently seen the letter. I reject his suggestion that he had not.

28. I therefore conclude that the meeting where there change from employed to self employed status was discussed was, as Olivene Howell has said, on a date before 2 February 2011 just before the Claimant started work. I do not accept that that topic could have arisen again on 9 February 2011 although, given that the first invoice was raised and paid on that day, it is quite possible that the mechanics of what had already been agreed were discussed. I do not accept that the Claimant was told that a temporary arrangement whereby he invoiced the respondent would not affect his employment status. He is an accountant and knew perfectly well that if he was employed he should be taxed under the PAYE system.

29. I further reject the Claimant's suggestion that he was pressurised into this arrangement. He has suggested that the change was to his obvious disadvantage and that this provides powerful evidence that it was imposed. I do not agree. Self-employment comes with some tax advantages. Tax may be deferred and professional expenses may be deducted (as the Claimant apparently did). I accept that there might be disadvantages to the arrangements relating to holiday pay, pension and other employment rights. It would depend entirely on the Claimant's plans for his business which arrangements were likely to be more beneficial. He may have perceived that the self-employed arrangement was more beneficial but later recognised that it might not have been.

30. I am satisfied that the Claimant had a pre-existing business, was registered as self-employed, had a business bank account and that he still had some clients – particularly his referees. I would accept that the business was not viable prior to him obtaining a position with the Respondent. However, a guarantee of 3 days work per week would give a solid base to that failing business. I have to choose between the Claimant's and Olivene Howell's account of the discussion on or around 2 February 2011. I do not accept the Claimant's account of when he got the letter of 2 February 2011. I criticise him below for failing to give proper disclosure. Whilst recognising that Olivene Howell clearly dislikes the Claimant intensely and has a motive to give evidence contrary to his case, I find that her account of the negotiations is more likely to be correct and that the suggestion that the Claimant worked on a freelance basis came from him and not her.

31. I find further support for the suggestion that the letter of 2 February 2011 was written on that date is the fact that it does not mention the Claimant's trading name G.A. Group & Co. By March 2012 when the Claimant says the latter was 'forged' Olivene Howell knew of the Claimant's trading name which she does mention in her letter of 5 March 2012. That would tend to suggest that the letters were written at different times. I discount the possibility that this was a careful attempt to lay an evidential trail anticipating future proceedings.

32. In October 2011 the Newham Job Centre wrote to the Respondent asking whether the Claimant 'had successfully completed 6 months of employment. Olivene Howell responded on 18 October 2011 and confirmed that he had. The Claimant seeks to emphasise that the expression she used was 'employment'. I accept Olivene Howell's evidence that she did not give this matter any thought regarding it as a 'tick box exercise' to assist with the Job Centre's statistics.

33. Accordingly, I am satisfied that the Claimant, of his own free choice, asked to work on a freelance basis and that, initially at least, he then conducted himself in accordance with that agreement.

Other staff members

34. The terms and conditions of other staff members were in almost all cases reduced to writing and an employment contract put in place. Such other employees were paid through the PAYE system. They were given paid annual leave and sick pay. They were later enrolled in a NEST pension scheme. The Respondent puts weight upon a term in the written contracts that had the effect that employees needed to disclose any 'private work' that they had to the Board of Directors, could not carry out such work on the Respondent's time and should avoid any conflicts of interest.

The terms applicable to the Claimant

35. As I found above the parties had agreed that the arrangement was to be 'freelance' and that the Claimant would be paid £14.00 per hour and be responsible for his own tax and national insurance arrangements. I am satisfied that that sum was not the product of any negotiation but had been decided upon when the job was originally advertised.

36. It was agreed that the Claimant would work for 21 hours a week over three days. In reality, this meant that the Claimant worked from 9-5pm each of those days with one hour off for lunch which he habitually spent in the local mosque at mid-day prayers.

37. There was a suggestion from the Respondent that the Claimant was free to choose which days he worked. In practice, with very rare exceptions, the Claimant worked Mondays, Tuesdays and Wednesdays. He varied that when he went away or during Eid. I note that when he did so he would inform the Respondent. In the light of that I find that there was an understanding that the Claimant would work regular hours on regular days unless there was a good reason not to.

38. The Claimant was not given paid annual leave. It is clear that he did have some periods of leave. However, he would generally make up the time.

39. The Claimant was not enrolled in the Nest pension scheme.

The Claimant's work, reporting lines and integration

40. There was some dispute before me about whether the Claimant undertook all of the duties set outlined the job description when the Finance Officer role was first advertised. The job description had a summary of the core duties which said:

> *'The Finance Officer is required to manage the payroll package, oversee the petty cash and interpret accounting information in accordance with the Quickbooks accounting package preparing accounts to audit.'*

41. Below that summary there were 14 numbered points describing various aspects of those core duties. Many of those duties could fairly be described as bookkeeping or recordkeeping.

42. The third duty listed is: *'To administer the Finance sub-group, co-ordinate meetings, write reports, attend meetings and action the recommendations.'* I am satisfied that the Claimant did attend meetings both with the board and with the Respondent's accountants. On occasions the board meetings were outside office hours. The Claimant did write reports. Olivene Howell suggested that these were not always what was required but I do not need to make any findings in respect of that.

43. The 9th duty on the job description required the post holder to be responsible for the administration of any outstanding debts. Olivene Howell told me that the Claimant took no responsibility for this and, in particular, did not chase debtors for whom he did accounting work. The Claimant pointed towards a debtors list that he had prepared and said that he did fulfil this duty. I find that both accounts are broadly correct in that the Claimant in reconciling the books, identify debtors but that he did not have a significant role in chasing the debtors thus identified.

44. It was agreed before me that the Claimant was referred to by, and used, the title of 'Finance Officer' and had pushed back against being called the bookkeeper. I am satisfied that at the outset of the engagement the Claimant was expected to fulfil the tasks in the job description but that over time some of the duties were undertaken by others. I do not find that this organic change was the subject of any express or implied agreement.

45. The Job Description suggests that the finance Officer would report to the Centre Manager (Olivene Howell). I have seen e-mail correspondence that confirms that when the Claimant altered his ordinary working pattern he informed Olivene Howell and she on some occasions asked him to cover other duties. In that sense he reported to her. I find that the Claimant's duties were such that he knew what had to be done and for the most part got on with it without any interference.

46. The Claimant sat at an assigned desk and used a computer provided by the Respondent. A dispute arose as to whether the Claimant supplied software, 'Quickbooks' or whether it was supplied by the Respondent. There is no dispute that when the Claimant first started the Respondent had use of 'Quickbooks'. It was referred to in the job description. Olivene Howell says that it ceased paying for that software in 2014 and thereafter the Claimant provided the software. The Claimant says that all the Respondent stopped paying for was the support package and that he never supplied any software. He accepts that he has a copy of 'Quickbooks' supplied to him by his bank, Barclays, but that he does not use it. I directed that Olivene Howell carried out a search for any evidence of continued payments for Quickbooks. She told me that after a thorough search she had not found any document evidencing any payment to Quickbooks after 2014. I do not accept the Claimant's suggestion that the Respondent was simply paying for a support package. The invoices I have seen clearly refer to a single user subscription. I find that it is more likely than not that the use of the software was under a subscription. I accept Olivene Howell's evidence that she searched for any evidence of continued payments and found none. From that conclude that the software was provided by the Claimant as Olevene Howell said.

47. In 2012 the Respondent's accountants contacted Olivene Howell saying that it was conducting some Quickbooks training and asking whether the Claimant would wish to attend. In fact he did not. I do not conclude that this was an instance of the Respondent taking any responsibility for training the Claimant.

48. Olivene Howell suggests that the Claimant operated outside the usual staffing structure. She says that the other employees working behind the reception desk were rostered to open and close the centre which opened at 08:00 – 21:30 Mondays to Fridays and 09:00 – 13:00 on Saturdays. I accept Olivene Howell's evidence that she and the other administrative staff would cover the holidays of the Caretaker and ensure that the core hours of the business were covered by working on a shift system. That required keyholders and knowledge of the alarm code. The Claimant did not suggest that he was ever asked to share those responsibilities.

49. It was suggested that the Claimant did not participate in the weekly team meeting. Olivene Howell suggested that whilst the other staff would gather around a table the Claimant would sit at his desk with his back to the others. Whilst I accept that the Claimant did not play a full role in these meetings I find this evidence of little assistance. It is clear to me that the relationship between the Claimant and Olivene Howell was poor almost from the outset of his engagement. It is quite impossible for me to tell whether the Claimant did not play an active roll these meetings for this reason or because he was treated differently from the PAYE employees.

50. There were at least some occasions when Olivene Howell e-mailed the Claimant asking him to cover either for her or for one of the admin/receptionists. She says that the fact that she needed to ask the Claimant demonstrates that she could not direct him to undertake these tasks. The Claimant says that he was required to do what was asked of him. There were very few people working at the Respondent's premises and on occasions there were staff shortages. One e-mail request that the Claimant assist arose when a staff member was abroad. In those circumstances, I find that it was a case of 'all hands to the pumps'. Despite their differences both the Claimant and Olivene Howell are strong supporters of the aims of the Respondent and the voluntary sector in general. The fact that the Claimant was asked occasionally to lend a hand, and did so, does not lead me to conclude that he was obliged to do so.

51. In summary, I find that the Claimant had a distinct role within the organisation which he was able to carry out without significant supervision. His role was necessary for the proper functioning of the Respondent's business. In carrying out his roll he worked alongside others and exchanged information with them.

<u>The Claimant's complaints about his contract</u>

52. The Claimant says that he raised the question of his employment status on 29 June 2011. He says that Olivene Howell was very angry towards him and said *'with regard to your job contract SAA can not employ you under PAYE system but only as self employed'*. This seems like a very odd thing to have said. Olivene Howell denies that there was such a conversation. Only 15 days earlier on 14 June 2011 the Claimant had asked Olivene Howell to provide a letter setting out his employment status and salary. The letter was addressed 'to whom it may concern' although in handwriting Olivene Howell added the words HMRC on the file copy. That letter

describes the Claimant as self employed. The Claimant accepts that he asked for this letter. He says that it was because he wanted something in writing. Olivene Howell says that she believed it was for HMRC – hence the note. In any event I find that the letter did no more or less than set out what had been agreed and what had been acted upon. I do not believe that there was any reason for Olivene Howell to have raised the issue of employment status at any meeting that took place on 29 June 2011 and find it more likely than not that she did not.

53. The Claimant did raise the issue of the contractual arrangements in February 2012. There was an e-mail exchange which shows that the matter was discussed in a meeting on 29 February 2012. In an e-mail of that date the Claimant asked that his contract be reviewed by the board. He said that it looked like he was still on probation. He further asked what holiday pay he would be entitled to. In the final sentence of that e-mail he said: *'However, I can still be paying my Tax and NIC by myself and this would save the organisation some money as well'.*

54. Olivene Howell responded to the Claimant on 5 March 2012. I have referred to that letter above. She asserted that in accordance with what had been agreed on 2 February 2011 the agreement between the parties was with 'G.A Group & Co' and that the Claimant was not entitled to holiday pay. Olivene Howell says in that letter, and I accept, that that letter was written only after the position was checked with the Board of Trustees. I have referred to the Claimant's response dated 6 March 2012 above. In particular, my finding that the Claimant accepted that he had been given the letter of 2 February 2011. The Claimant goes on to ask that his rate of pay be reviewed to reflect the savings that the Respondent was making by not being obliged to make employer's NIC contributions. No action was taken on that letter at that stage and the Claimant's rate of pay was not altered.

55. On 16 September 2013 the Claimant wrote to the Board of Trustees. He asked for his contract to be reviewed. He compared his terms with a recent employee and the previous finance officer. His letter contains no assertion that he is an employee. On the contrary he proposes two options the first being that he is offered permanent employment. It is implicit in his letter that he accepts that would be a change. The second option he proposes is to maintain the status quo but that he was given a pay increase and a long term contract. It took the board an inordinately long time to respond to that letter. On 12 May 2014 Ronn Webb, on behalf of the board, informed the Claimant that the board had agreed to increase his rate by £1.50 per hour.

56. In 2016 the Respondent enrolled its PAYE employees into a NEST pension scheme. The Claimant was the person designated as the 'full access delegate'. In other words, he did the administration for the Respondent. He was not enrolled nor did he, at that stage, suggest he should have been.

57. On 14 August 2016 Olivene Howell provided the Claimant with a further 'To whom it may concern' letter confirming his remuneration and referring to him as working on a freelance basis.

58. In April 2017 the Claimant again raised the question of holiday pay with Olivene Howell who in turn referred the matter to the board. On 27 April 2017 Olivene Howell

sent the Claimant an e-mail in which she told him that the board were reviewing the 'resourcing requirements'.

59. In May 2018 all PAYE staff were awarded a pay rise (after many years without one). The Claimant was excluded. The board meeting outcome was circulated by e-mail of 17 May 2017. In that e-mail is the sentence *'Ganiy is excluded as he is not a permanent member of staff and the board have agreed to conduct a review of our book-keeping arrangements'.*

60. The Claimant raised a grievance on 28 September 2018. In that grievance he states that believes that he is and always has been an employee of the Respondent and that this is what had been agreed. This is the position that he has maintained before me.

Other work done by the Claimant

61. The Respondent contends that the Claimant had a number of other clients for whom he did work. The Claimant accepts that he had some clients but says that many were introduced by Olivene Howell.

62. Having read the papers I noticed that the scope of the work done by the Claimant for others was an issue in the proceedings and questioned why the Claimant had not disclosed his own accounts and tax returns. The Claimant agreed to do so and I expected them to be produced on the following day. What was produced was:

62.1. One page of the Claimant's tax return for the year ending 2013. This showed the tax calculation where profits of £17, 746 were declared.

62.2. A spreadsheet showing 'drawings' and expenditure for the year ending 2013

62.3. A spreadsheet showing income for the year ending 2013 which showed a total income of £20,733.50 from a total of 4 sources. The Respondent, ELBWO, Margret Apothecary and Mrs White.

63. The Claimant told me that he had difficulty recovering his tax records from an old computer. I do not accept that is the case. There seems no reason why he could recover part of one year's tax return and not the other parts (including the abbreviated accounts that are included in a self-employed person's tax return. I cannot understand why only one year's documents would be available. The Claimant told me that he has not done his recent accounts because of the pressure upon him. That is an extraordinary statement from a person holding themselves out as a tax specialist. Mr Lockey invited me to draw inferences from the failure to disclose these documents. The Claimant says that he has completed tax returns. He is an accountant and would understand the importance of keeping those documents safely. I infer that the Claimant's accounts contain material that he does not wish the Tribunal to see.

64. The Claimant agreed that shortly after he started work at the Stratford Advice Arcade he was introduced by Olivene Howell to a voluntary sector organisation

'ELBWO'. That organisation needed an investigation into accounting irregularities. The Claimant carried out that work which led to him being engaged to work for 1 day per week at a gross fee of £90 per day. I note that he invoiced every 2 weeks the same as his practice with the Respondent. The work was carried out on a regular basis on the same day each week.

65. The 2012 documents disclose, and the Claimant accepts that he was doing work for 'Margret Apothacary'. That appears to be a reference to Margret Rose Apothecary Limited. Accounts from that company were found in the bundle and are recorded as having been made up by 'G.A. Group & Co'. in y/e 2013 the Claimant's documents show that he billed £340 for his work. Given the small profit made by that company I accept the work was likely to be limited to preparing statutory accounts.

66. The Claimant's documents show that he billed 'Mrs White' £294. Mrs White was a tenant at the Stratford Advice arcade. The Claimant says that Olivene Howell introduced her to him. Olivene Howell denies this. I do not need to resolve that dispute.

67. The bundle contains statutory accounts for Crystal Chambers Limited (for y/e 2015, 2016 and 2017) and for Elizabeth Lanlehin Limited for y/e 2014. In each case the accounts are said to have been prepared by 'G.A. Group & Co'.

68. The Respondent had noted that the Claimant was a statutory director of G.A. Professional Limited a company incorporated in 2009. It had assumed that this was the entity that traded as 'G.A Group & Co'. I accept the Claimant's evidence, supported by the annual returns, that this company has not ever traded and that 'G.A. Group & Co' is a trading name used by the Claimant. In the context of these proceedings it is a red herring.

69. Finally, the Respondent relies upon a website for G.A Group & Co. That website claimed that the business had been established for 12 years and that it has 500 clients. It claims to offer a number of accountancy services. The Claimant says that the website has been designed by a web-designer from a template and that the figure of 500 clients was not a claim made on his instructions. I accept that this claim does not reflect the actual number of clients that the Claimant has. That said the claim to have been established for 12 years is likely to have come from the Claimant as it corresponds approximately with the number of years he has traded as G.A Group & Co.

70. If I were to assume that the income figures for year ending 2013 given on the Claimant's spreadsheet were accurate then he received £14,700 from the Respondent in that year and £6,033.50 from other sources. He deducted £2,987.50 in professional expenses to arrive at the profit declared to HMRC. I note that one item in the drawings spreadsheet discloses a purchase of payroll software.

71. I do not know what the picture is for the other years. I infer that the figures would either tend to show a greater income from other sources or that more professional expenses are deducted.

72. The Claimant's work for others was not discouraged by Olivene Howell and she accepts that she introduced the Claimant to some work. Most of the entities identified above were tenants of the Respondent. Some of these owed the Respondent money. The Respondent has tried to suggest that this gave rise to a conflict of interest. I struggle to understand why that is necessarily the case. I found the point of little assistance but accept the evidence that the Claimant worked for tenants who owed rent to the Respondent.

73. I accept the evidence of Olivene Howell that on occasions the Claimant's clients at the Centre would want to talk to him about their accounts during working hours. Furthermore, I accept that he kept some accounting records for other clients on the Respondent's computer. That said I accept that when the Claimant was at work he principally dedicated himself to working for the Respondent. Had he not done so I would have expected this to be an issue. His dealings with his other clients during working hours were ad hoc and occasional.

74. I accept the fact that it was noted in 2018 that the Claimant had accounts of some of his clients held on the computer based at the Respondent's offices within the Quickbooks software.

The law to be applied

The legislation

75. Section 230 of the Employment Rights Act 1996 provides definitions of the terms used in the Act. The material parts say:

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

and any reference to a worker's contract shall be construed accordingly.

(4)….(6)

76. The section 230(3) definition of 'worker' is adopted by Regulation 2 for the Working Time Regulations 1998 where exactly the same words are set out.

77. Accordingly, all those who qualify as employees will also qualify as workers however some workers are not employees.

78. Under section 83(2)(a) of the Equality Act 2010, "employment" is defined as:

> "… employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

Employment status

79. The definition of 'employee' in Section 230 (1) of the Employment Rights Act 1996 turns on the meaning of the phrase 'contract of service' in sub section 230(3). That phrase is not defined but it has been understood as incorporating common law concepts of 'master' and 'servant' and the distinction between a 'contract of service' and a 'contract for services'.

80. In ***Market Investigations Ltd v Minister of Social Security*** **1969 2 QB 173, QBD,** Mr Justice Cooke said:

> 'the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'

81. The approach of Cooke J was considered 'useful' but not 'fundamental' in ***Nethermere (St Neots) Ltd v Gardiner and anor*** **1984 ICR 612**, CA. The privy Council in ***Lee Ting Sang v Chung Chi-Keung and anor*** **1990 ICR 409, PC** accepted that there was no single test for the existence of a contract of employment but said that the matter had never been put better than by Cooke J.

82. In ***Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** **[1968] 2 QB 497** it was said by Mckenna J that

> *'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.'*

83. The approach of McKenna J has most recently been endorsed in the Supreme Court by Lord Clarke in ***Autoclenz Ltd v Belcher and ors*** **2011 ICR 1157, SC** where at paragraph 18 he described the passage above as the classic test for a contract of employment. He went on to add (at paragraph 19):

> *'Three further propositions are not I think contentious:*
>
> *i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service".*
>
> *ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693, per Peter Gibson LJ at p 699G.*
>
> *iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at p 697G.'*

84. In ***Carmichael v National Power plc*** **2000 IRLR 43** the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

85. The requirement that the work be performed personally by the putative employee is also a necessary precondition in the statutory definition of worker. It is not necessary that the work is done exclusively by the putative employee/worker a limited power to delegate will not necessarily defeat employee or worker status. The circumstances where a power to delegate might be fatal to employment or worker status were fully explored in ***Pimlico Plumbers Ltd v Smith*** both in the Court of Appeal **[2017] ICR 657** and in the Supreme Court **[2018] ICR 1511**. In both courts it was held that a limited right to delegate would not necessarily be inconsistent with the dominant purpose of the contract being the provision of services personally. There is a useful discussion of the boundaries of the right to delegate in the Court of Appeal

judgment of Etherton MR at paragraph 83 where, having reviewed the authorities, he said:

> *'In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'*

86. The requirement for control will not be met merely because the putative employer can terminate the contract something more is required. It is necessary to demonstrate that the employer can, under the contract of employment, direct the employee in what he did see ***Wright v Aegis Defence Services (BVI) Ltd and ors*** **EAT 0173/17**. That is distinct from showing that the employer controls the way that the employee does the work. Even a complete absence of day to day control is irrelevant if ultimately the employer retains the contractual power to direct what work should be done see ***White and Anor v Troutbeck*** **SA 2013 IRLR 949, CA**.

87. There can be no exhaustive list of the features of any agreement that inform the question of whether it is or is not a contract of employment. The following might be relevant:

87.1. Who bears the financial risk of the arrangement?

87.2. Whether the remuneration is fixed or varies depending on results?

87.3. Who provides the facilities tools and equipment necessary for the performance of the work.

87.4. Whether the agreement provides for benefits such as sick pay, holiday pay and pensions? With the caveat that the employer cannot rely upon his own breaches of statutory duty to avoid an employment relationship ***Forest Mere Lodges Ltd*** **EAT0426/06**

87.5. Who pays any income tax is a relevant but not determinative factor ***Apex Masonry Contractors Ltd v Everritt*** **EAT 0482/04**

87.6. The label the parties have put on their relationship is also relevant but not determinative but may be of increasing importance in a finely balanced case – **see *Massey v Crown Life Insurance Co* 1978 ICR 590, CA.** The fact that a party has adopted one label does not mean that they cannot later retreat from that position - ***Young and Woods Ltd v West* 1980 IRLR201, CA** and ***Smith v Goodmayes Insulations Ltd* EAT55/97 S**

87.7. What degree is the putative employee integrated into the business?

88. A checklist approach is not appropriate. In ***Hall (Inspector of Taxes) v Lorimer* 1994 ICR 218, CA**, the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

> *'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given 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… Not all details are of equal weight or importance in any given situation.'*

89. The assessment of the matters above requires an examination of what was or was not agreed in ***Autoclenz v Belcher* [2011] UKSC 41**, a was concerned with a complex written agreement the Supreme Court which the employees contended did not reflect the true agreement. Lord Clarke said:

> *'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.'*

Worker status

90. The position of workers in the hierarchy of employment status was described by Lady Hale in ***Bates von Winkelhof v Clyde & Co LLP* [2014] ICR 730 as follows:**

> *'…the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company*

offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act'

91. The first requirement to establish status as a worker is to show that the relationship is governed by a contract - ***Sharpe v Worcester Diocesan Board of Finance Ltd and anor*** **2015 ICR 1241, CA**. That requirement may be displaced where not to do so would infringe some fundamental right protected by the European Convention on Human Rights - ***Gilham v Ministry of Justice*** **2019 UKSC 44, SC**.

92. Thereafter the putative worker needs to show that that contract requires them to provide 'personally any work or services'. In common with employment status worker status will not be defeated by some limited right to delegate see ***Pimlico Plumbers Ltd v Smith***. The fact that there was no delegation in practice does not determine the question of whether there is a contractual obligation to perform services personally ***Redrow Homes (Yorkshire) Ltd v Wright*** **2004 ICR 1126, CA**

93. Where the express terms of an agreement for services are silent as to who might perform the services whether a term that the services will be performed personally can be implied will depend on the context and all of the surrounding circumstances. It may simply be a matter of common sense that that is what the parties would have agreed had it been expressly mentioned **-** ***Byrne Brothers (Formwork) Ltd v Baird and others*** **2002 [ICR] 667**

94. Defending on the circumstances it may be necessary to look beyond any apparent agreement to discern the actual agreement see ***Autoclenz Ltd v Belcher*** and ***Uber BV and ors v Aslam and ors*** **2019 ICR 845**, CA where it is suggested that it was necessary to take a 'realistic and worldly wise' approach to an apparent agreement.

95. As the definition makes clear, an individual undertaking to do or perform work or services to clients or customers in the context of a profession or business undertaking carried on by the individual will not a be a worker. Some guidance was given in the case of ***Byrne Brothers (Formwork) Ltd v. Baird & Ors*** **[2002] ICR 667** where Underhill P (as he was) said:

'The structure of limb (b) is that the definition prima facie extends to all contracts to perform personally any work or services but is then made subject to the clumsily-worded exception beginning with the words "whose status is not …". The question is whether the contract between the Applicants and Byrne Brothers falls within the scope of that exception.

We were referred to no authority giving guidance on that question; and we accordingly spell out our approach to it in a little detail, as follows:

(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the Applicants do not carry on a "profession" in the ordinary sense of the word; nor are Byrne Brothers their "clients".

(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" tout court; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.

(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.

(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened

in practice may shed light on the contractual position: see Carmichael (above), esp. per Lord Hoffmann at pp 1234-5.

(7) We should add for completeness that, although the Regulations are of course based on the Working Time Directive, we were referred to no provision of the Directive nor any case-law of the E.C.J. which sheds any light on the present issue. The Directive does not contain any definition of the term "worker".'

96. In ***Pimlico Plumbers Ltd v Smith*** **[2018] UKSC 29**, the Supreme Court considered, among other issues, whether Pimlico should be regarded as a client or customer of Mr Smith. The Court referred to two authorities which may be of some assistance in the conduct of the inquiry: ***Cotswold Development Construction Ltd v Williams*** **[2006**] IRLR 181 where it was said by Langstaff P:

"… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls"

and ***Hashwani v Jivraj*** **[2011] UKSC 40** where Lord Clarke stated, at paragraph 34:

"… whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services"

97. While the question of subordination is clearly important in distinguishing a worker from those genuinely in business on their own account, Tribunals must be aware that a small business may be genuinely an independent business but be completely dependent upon subordinate to the demands of a key customer. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker; see paragraph 30 of ***Bates von Winkelhof v Clyde & Co LLP*****.**

The test under Section 83 of the Equality Act 2010

98. It was suggested in ***Windle v Secretary of State for Justice*** **2015 ICR 156** that the meaning of worker status is the same as the definition of employee found in the Equality Act 2010. There might be some debate as to whether the test is actually the same for rights derived from EU law but for the present purposes ***Windle*** is binding upon me.

Discussion and Conclusions

Was the Claimant working under a contract of employment?

99. I need to address the three questions identified in ***Ready-Mixed Concrete***. The first of these is the question of whether the Claimant agreed to provide his services personally. Mr Lockey sought to persuade me that he did not. He says that the matter was never discussed and that the Respondent would have been indifferent to the Claimant sending a substitute. I cannot accept this argument. The agreement between the Claimant and Respondent is evidenced by the letter of 2 February 2011, the job description and the conduct of the parties. The Respondent had sought to recruit an individual and had interviewed for that purpose. The Claimant was selected on the basis of his qualifications and skills and it was only at that stage that there was a discussion about employment status. As a matter of fact, the Claimant never sought to supply a substitute. From this I believe that the only proper inference was that the parties agreed through their conduct that the Claimant and nobody else would be providing the services.

100. The next question identified in ***Ready-Mixed Concrete*** is the issue of whether the Respondent had sufficient control that this could be a relationship of master and servant. Like many skilled people the Claimant was not directed on how he should perform the tasks he was given. Many of those tasks such as record keeping and payroll were routine and could be completed with little guidance or instruction. That said correspondence shows that the Claimant was asked to perform various tasks on an ad hoc basis such as report writing and meeting with the accountants. There was an element of control in that the work was at a place and for a duration dictated by the terms of the agreement.

101. I have regard to the fact that the Respondent had expected the role of finance officer to involve employing somebody (and agreeing standard terms of employment). It was only later that an agreement was reached to depart from this. Had that subsequent agreement not been reached it is unarguably the position that the person engaged could and would have been an employee. I conclude that there was sufficient control of the scope and time that the Claimant carried out his work that this could be a contract of employment.

102. I turn then to the third question in ***Ready-Mixed Concrete***. Ms Hart argued that I should adopt the Claimant's position and find that the arrangement whereby the Claimant invoiced the Respondent was a matter that had been imposed upon him and that I should find that the Claimant always expected that to be temporary and not affect the fact that he was an employee. She has referred me to ***Autoclenz Ltd v Belcher*** and ***Uber BV and ors v Aslam*** and asks me to accept that I can go behind terms imposed by the stronger of two parties where those terms do not reflect the reality of the situation. Whether I should accede to that argument turns on my findings of fact. I have rejected the Claimant's account of how he came to be treated as 'freelance'. The Claimant is an accountant and is well aware of the differences in tax treatment between the employed and self employed. Even on the limited accounts that have been supplied the Claimant was claiming tax relief on more that £2,000 of professional expenses. I have found that the Claimant had a pre-existing, although failing, business and that it was he who raised the possibility of being treated as self-employed. I have no doubt that that agreement was freely entered into. One particular term, the right to be paid fortnightly, was very clearly negotiated for the Claimant's benefit. It is clear that he later saw disadvantages in the arrangement but that does not change what was agreed.

103. I consider that the following matters (terms) point towards the existence of a contract of employment:

103.1. the Claimant was given and used the title 'Finance Officer'; and

103.2. the Claimant worked for fixed hours on regular days; and

103.3. he worked at the Respondent's premises using its furniture, stationary and facilities; and

103.4. he worked for an hourly rate that was set by the Respondent and not by him; and

103.5. he received some instruction about what to do and when from Olivene Howell or the board; and

103.6. The Claimant bore no financial risk but only in the sense that he would be paid whether or not he completed any particular amount of work.

104. The Claimant was not given the standard terms and conditions applicable to employees. These include benefits such as sick pay and paid annual leave. Later on the Claimant was not enrolled in the NEST pension scheme. There are burdens in that standard agreement including some limited restrictions on 'outside work'. In particular, an obligation to disclose any outside work that 'might involve the Arcade'. I have found above that the reason that the Claimant was not treated in the same manner as the others who worked regularly for the Respondent was that an agreement had been reached that he was to be a freelancer. The absence of the ordinary benefits of employment is explicable by that understanding and I do not find that this is a case where the Respondent is seeking to rely upon its own failure to comply with its legal obligations to avoid an employment contract coming in to existence. The Respondent would have employed the Claimant had he not raised the question of being self-employed.

105. The Claimant was responsible for the payment of his own tax and national insurance. This came with the benefit to the Claimant that he could obtain tax relief on professional expenses. I do not know whether or not any of the Claimant's claimed expenditure related to the work that he did for the Respondent.

106. I have found that the Claimant used a copy of Quickbooks that he had purchased to undertake work for the Respondent. That is the only 'equipment' that he ever provided.

107. I consider that to an extent the Claimant was integrated into the Respondent's business. His use of a job title is consistent with that. He worked in its offices carrying out its book-keeping and accountancy. It worked alongside its staff and, on rare occasions, pitched in to help. In other respects, the Claimant was not integrated. His work was distinct. He was a one-man team. He was not on any roster for out of hours work and he was not a keyholder. His was the sort of roll that could easily have been outsourced as book-keeping and payroll duties sometimes are. The Respondent was

essentially a facilities provider. The Claimant's work was not core to that. It was ancillary.

108. The Claimant was free to use the time that he was not working for the Respondent to work for anybody else he chose. I accept the Claimant's argument that that is generally true whether a person is employed or not. Many people have more that one job and it is perfectly possible to be employed in one role and self employed in another

109. I do not find that this is such a case. The Claimant had for some time been a self-employed accountant/bookkeeper. He had registered that status with HMRC and had established a bank account and prepared headed invoices to conduct that business. I accept the Claimant's evidence that, by the end of 2010, he was not earning enough to live off. I have found that he still had some people he regarded as 'clients'. I have found that he suggested that he was engaged as a freelancer. He would then be in a position of being able to continue with his business. As a matter of fact he was able to obtain further work.

110. I accept that a number of the Claimant's clients were introduced to him by Olivene Howell. I do not see how that could affect the position. The Claimant was not obliged to take on the additional clients – he chose to do so. The Claimant also marketed his services. He used a G.A Group e-mail address and his invoices actively marketed his services.

111. I do not consider that the fact that the Claimant later complained about the fact that he was paid less than his predecessor or that he was not given annual leave does anything to change the nature of the arrangement. It may be that the Claimant considered that the grass was greener on the other side of the fence but it was a fence that he had elected to erect.

112. The label placed on the relationship was 'freelance'. The Respondent was unwilling to resile from that agreement. In my view the role is one which could have been fulfilled either by an employee or by a person who was properly self employed. In those circumstances the label placed on the arrangements by the parties is something which I should have regard. I am entirely satisfied that the Claimant never entirely abandoned his previous business and that he resurrected it when he obtained work from the Respondent. He was at all times 'in business on his own account' in the sense used by Cooke J in ***Market Investigations Ltd v Minister of Social Security***.

113. Standing back from my findings of fact and looking at the entire picture I am satisfied that the contract in this case was inconsistent with the existence of a contract of employment. I find that the Claimant worked for the Respondent under a contract for services.

Was the Claimant a worker?

114. I have found above that the Claimant did work for the Respondent under a contract to provide his services personally. It follows that he will satisfy the definition of being a worker unless I find that the Respondent' '*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'.

115. From my findings above I have concluded that the Claimant did carry on a profession or business offering bookkeeping and accountancy services. The question is whether the Respondent was one of his customers or not.

116. I accept that it does not necessarily follow from the fact that a person has a business or profession that every person for whom they carry out work is a client or customer. *Hospital Medical Group Ltd v Westwood* provides a good example of this.

117. The first matter which causes me to question whether the Respondent was a customer of the Claimant's business was the fact that I have accepted that that business was not viable at the point that the Claimant sought work with the Respondent. It was the offer of work that allowed the Claimant to carry on. Ultimately, I do not think that that is determinative. The Claimant resurrected his business. Thereafter he took on other clients. His business simply carried on as before albeit with a regular source of work from the Respondent.

118. I have then considered whether the regularity of the arrangement, in contrast with the ad-hoc work done for some other clients (the one per year statutory accounts of the companies mentioned above for example) means that the Respondent was not a client. Many self-employed businesses will have a 'best client'. Mere regularity of work does not necessarily change the status from being a customer but is a factor to be considered.

119. A matter which is significant is that the Claimant was given and used the title 'Finance Officer'. That is a matter that does not sit well with the suggestion that the Respondent is his client or customer. It is resonant with the suggestion that the Claimant was a cog in the wheel of the Respondent's business.

120. I accept the Respondent's argument that bookkeeping and accountancy services are just the sort of professional services that can be offered on a business/client basis. I have considered whether the fact that the services were provided at the Respondent's premises with (mainly) their equipment makes any difference. I consider that is something that I should have regard to alongside everything else.

121. A matter which I consider significant is that the rate of remuneration proposed by the Respondent was not the subject of any negotiation. Ordinarily a business would fix its prices and ask its clients to pay that rate – there may then be negotiations. This was very much the other way around. The Respondent had decided what it would pay and the Claimant agreed.

122. I have been greatly assisted by the guidance in ***Byrne Brothers (Formwork) Ltd v. Baird & Ors*** and the suggestion that I have regard to many of the features of an employment contract but 'lower the pass mark'. Overall, I conclude that there were material differences in the manner in which the Claimant provided his services to the

Respondent and the terms and manner in which he provided services to others. Those others are in my view very clearly clients or customers. I find when I have regard to the degree of integration, coupled with the absence of any negotiation in respect of pay or hours, the Respondent was not one of the Claimant's customers or clients. The Respondent provided the opportunity for the Claimant to market his services to others but it should not be regarded as being a customer or client of his business.

123. Accordingly, I find that the Claimant was a worker. He will therefore also be 'in employment' for the purposes of his claims under the Equality Act 2010. For completeness I note that the Respondent had anticipated an argument that, if the Claimant was not a worker for the purposes of Section 230(3)(b) he might advance a case that he should be treated as a worker for the purposes of Section 43K of the Employment Rights Act 1996. In the event, that was not argued and is academic in the light of my findings above.

Employment Judge John Crosfill
Date: 31 March 2020