Case No: 2204995/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Abousalah**

Respondent: **Alghad TV Limited**

Heard at: **London Central** **On: 12, 13 & 14 December 2018**
28 & 31 January 2019

Before: **Employment Judge Professor A C Neal**

Representation

Claimant: Miss M Stanley (of Counsel)

Respondent: Ms L Prince (of Counsel)

JUDGMENT

The Claimant was not an employee of the Respondent. His claims alleging unfair dismissal and breach of contract are dismissed.

REASONS

Introduction

1 In this case the Claimant brings two claims: (1) alleging unfair dismissal and (2) claiming notice money said to be due on termination of employment.

2 In order to maintain either of those claims the Claimant needs to establish that he is an "employee" as defined in the respective legislation. The relevant statutory provisions are to be found by reference to Part XIV of the **Employment Rights Act 1996** and the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** (which relies upon the same definition).

3 The Respondent maintains that the Claimant is not an "employee".

4 The eventual outcome of this litigation turns entirely upon what is the employment status of the Claimant. This is because the Respondent concedes that, if the Claimant is an "employee", the dismissal was procedurally unfair and the claim would succeed. It would also follow that, in the normal course of events, the remedy for such an unfair dismissal would include compensation in relation to the period for which the present claim seeks notice money.

Conduct of the Hearing

5 The case has been heard over four days. A fifth day was scheduled at short notice for oral judgment on the basis of an agreement that Counsel would take a full note of the decision and reasons.

6 The Tribunal has heard from a number of witnesses giving live oral evidence on the basis of witness statements and referring to documentation set out in a Bundle prepared for the hearing.

7 The Claimant gave evidence in his own behalf on the basis of a prepared witness statement.

8 The Tribunal then heard from four witnesses for the Respondent, again giving their evidence on the basis of prepared witness statements. Mr Alostas was the first of these, followed on Day 4 by Mr Alawam, Mr Al Zwedi, and, finally, Mr Adila (the Finance Director). All of those witnesses were subjected to cross-examination and, from time to time, some additional questioning from the Employment Judge.

9 During the latter part of Day 4 submissions were made, both in written outline and orally, by Counsel for the respective parties. There was a discussion not only of specific submissions by reference to the evidence but also of the state of the law in this area on the basis of the relevant authorities presented to the Tribunal by agreement.

Primary Findings of Fact

10 The Respondent is a United Kingdom based Arabic language TV channel. It has its directing headquarters in Cairo, with what appears to have been a slightly reducing function and presence in London.

11 The Claimant entered into an agreement with the Respondent on the basis of a document entitled a "Consultancy Agreement" [Bundle p.5 onwards]. This was dated 30 October 2014, and the document was signed by the Claimant.

12 The Consultancy Agreement sets out that there was to be an engagement from 15 October 2014 onwards, with an open provision "until termination".

13 Clause 9 of the Consultancy Agreement spells out the termination arrangements, in terms that:

> **The Client** (which is how the Respondent is described) **may at any time terminate your engagement with immediate effect with no liability to make any further payment to you (other than in respect of any accrued fees or expenses at the date of termination).**

That might be triggered if – as was the case in the present circumstances:

> **… (c) your services are no longer required by the Client.**

14 That right has to be seen in conjunction with Clause 3 of the Consultancy Agreement, which is headed "Fees and Expenses". This provides that:

> **The Client will pay you a fee of £120 per 9 hour shift inclusive of VAT.**

and goes on to provide:

> **You shall submit invoices to the Client on a monthly basis setting out the hours that you have worked for the Client during the preceding month and any VAT payable if applicable. The Client will pay such invoices in accordance with its usual payment terms. We are entitled to deduct from any sums payable to you any sums that you may owe the Client or any other company in its group at any time.**

The Tribunal heard detailed evidence from one of the Respondent's witnesses – Mr Alida, who was the Finance Director – as to how that arrangement operated in practice.

15 It is also relevant to note that Clause 4 of the Consultancy Agreement provides that the Claimant was free to work for somebody other than the Respondent, while at the same time continuing under the terms of that Consultancy Agreement. This paragraph reads:

> **You may be engaged, employed or concerned in any business, trade, profession or other activities which does not place you in a conflict of interest with the Client.**

There is then a further provision clarifying that:

> **However, you may not be involved in any capacity with a business which does or could compete with the business of the Client without the prior written consent of your line manager.**

16 Clause 2 of the Consultancy Agreement sets out what are described as "The Duties", which are said to be those:

> **…providing services as a journalist BA**

and it is then provided in Clause 2.4 that:

> **With our prior written approval you may appoint a suitably qualified substitute to perform the services on your behalf.**

a provision which goes on to stipulate:

> **…provided that the substitute shall be required to enter into direct undertakings with the Client including with regard to confidentiality.**

(and there are provisions on confidentiality in respect of the Claimant later in the Agreement).

17 The Consultancy Agreement also provides that:

> **We will continue to pay you your fee as provided in clause 3.1 below and you shall be responsible for the remuneration of (and any expenses incurred by) the substitute. For the avoidance of doubt you will not be paid for any period during which neither you nor any substitute provides the services.**

This is coupled with a general expression in the next sub-paragraph to the effect that:

> **You shall ensure that you are available at all times on reasonable notice to provide such assistance or information as the Client may require.**

and that can be read together with the obligation to provide "the services" set out in Clause 2.1 of the Consultancy Agreement.

18 The provisions on data protection and intellectual property are agreed not directly to be of relevance to the issue of whether the Claimant is an "employee", but the Tribunal has had particular attention drawn to Clause 11 of the Consultancy Agreement, headed "Status", which provides (Paragraph 11.1) that:

> **You will be an independent contractor and nothing in this agreement shall render you an employee, worker, agent or partner of the client and you shall not hold yourself out as such.**

19 Finally, Clause 11.2 contains indemnity provisions in relation to taxation and employment-related claims or claims based on "worker" status.

The Law

20 The issue for the Tribunal in these proceedings is: "Is the Claimant an employee?".

21 Section 230(1) of the **Employment Rights Act 1996** contains a definition of "employee" in terms that:

> **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.**

Section 230(2) then provides that:

> **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.**

That definition is relevant for all of the claims concerned with this case.

22 The question for the Tribunal therefore eventually ends up as being: "Was the Claimant employed under a contract of service?". In other words, we are concerned with the old Common Law test under the law of master and servant.

23 The authorities in this area are long-standing – some of them well over 100 years old. There is also a series of authorities from more recent years which are concerned both with the question of "employee" status and the notion of what is defined in the statute as a "worker" – often in the context of seeking the enjoyment of rights conferred by provisions deriving from the European Union. Those authorities have developed since the introduction of a statutory definition for the "employee" in Section 8 of the **Contracts of Employment 1963** and Section 25 of the **Redundancy Payments Act 1965**, the emergence of the "employee" and "worker" dichotomy from the time of Section 167 of the **Industrial Relations Act 1971** onwards (drawing for the latter upon terminology to be found in Section 10 of the **Employers and Workmen Act 1875**), and the various consolidations of the definitions then set out in Section 30(1) of the **Trade Union and Labour Relations Act 1974**.

24 A number of authorities were provided with the hearing Bundle, and the Tribunal is grateful to Counsel for their assistance in producing those. A brief comment should be made at the outset about those authorities, responding to a point raised by Ms Prince in her submissions. This is that the majority of the authorities are concerned with cases where the status of "worker" was the focus of concern for the relevant court.

25 After discussion of a number of the older cases, including, in particular, ***Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*, [1968] 2 Q.B. 497**, the Tribunal invited comment on the importance and continuing significance of the case of ***Carmichael v. National Power plc*, [1999] ICR 1226** – which was referred to in the submissions made on behalf of the Claimant – as being the case which brought together at the level of the House of Lords (as the final instance then was) the main principles in relation to the "employee test" deriving from the Common Law authorities.

26 In the course of that discussion Miss Stanley draw the attention of the Tribunal to the historical presentation contained in the case of ***Cotswold Developments Construction Limited v. Williams*, [2006] IRLR 181** – in the

judgment handed down by a former President of the Employment Appeal Tribunal, Langstaff J. (who, it was noted, had appeared as Counsel for the losing parties in the ***Carmichael*** case some six years previously).

27 It was agreed by both Counsel during the course of submissions that this is, perhaps, rather a rather "old-fashioned" case, compared with the rather more exotic issues and arguments raised in recent cases such as ***Pimlico Plumbers Ltd v. Smith*, [2018] UKSC 29**, ***Uber BV v. Aslam*, [2018] EWCA Civ 2748**, and their successors. In other words, the tests for "employee" in the context of the present proceedings are tests which go to the question: "Is there a contract of service?" ("apprenticeship", the other possibility under the statutory definition, not being relevant in the present case) – i.e. that part of the definition in section 230(1) which is amplified by subsection (2).

28 The ***Carmichael*** case makes it clear that there are two primary requisites: One is "control" and the other is "mutual obligation". The so-called "control test" goes back many years to ***Yewens v. Noakes,* (1880) 6 QBD 530**, where, using the language of "master and servant" Bramwell LJ stated that:

> **A servant is a person subject to the command of his master as to the manner in which he shall do his work.**

and that "control" element is to be found in all of the cases right the way up to, and including, ***Ready Mixed Concrete***.

29 Along the way there have been various developments – the emergence of so-called 'tests" for employee status. Thus, what is sometimes described as the "organizational" or "integration" test was set out by Denning LJ (as he was then) in the Court of Appeal case of ***Stevenson, Jordan & Harrison Ltd v. MacDonald & Evans,* [1952] 1 TLR 101**. However, it is arguably the ***Ready Mixed Concrete*** case in 1968 which stamped the modern approach – of a "multi-factorial" approach, or what is often described as "the multiple test" – and that was agreed by both Counsel as being the approach which this Tribunal should adopt here.

30 MacKenna J. in ***Ready Mixed Concrete*** had considered the various approaches from "control" onwards and made the observation with which many might agree while throwing their hands up in horror:

> **This raises more questions than I know how to answer. What is meant by being "part and parcel" of an organisation? Are all persons who answer this description "servants"? If only some are servants, what distinguishes them from the others if it is not their submission to orders?**

He then went on to make the following statement, to which both Counsel have specifically referred me, and which I take to be the basis for the approach here:

> **A contract of service exists if these three conditions are fulfilled: (1) 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; (2) 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; and (3) the other provisions of the contract are consistent with its being a contract of service.**

31 Now, of course, that third condition does not really take us very far – it is merely asking whether there is anything that speaks against the "contract of service" notion. Meanwhile, the second element still leaves us with the question of what is "control in a sufficient degree to make that other master"? That notwithstanding, however, after looking at approaches that might be taken to (in particular) the "control test", the learned judge went on to say this:

> **An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service it will be some other kind of contract and the person doing the work will not be a servant. The judge's task is to classify the contract – a task like that of distinguishing a contract of sale from one of work and labour. He may, in performing it, take into account other matters besides control.**

32 Thus we find a proposition in those comments that "control" is important, but it is not alone, or necessarily, definitive. Indeed, there have been other approaches developed since the ***Ready Mixed Concrete*** case – in particular, the notion of what is often described as the "business on one's own account" test (is somebody taking the risk, e.g. financial or otherwise, of the business?) – and even the suggestion that the definitional exercise might be akin to the somewhat less forensic "elephant test" (very difficult to define, but you know one when you see one).

33 For present purposes, it thus seems clear from the authorities – and from their submissions today it is clear that both Counsel are in agreement with this – that the appropriate approach is to start with the question of whether there is any written documentation; then to look at the conduct of the parties, and determine whether the two by and large line up; and then to form a view about whether the required elements (notably, "control" and "mutual obligation") are present in the sense required by the ***Carmichael*** decision.

Submissions by the Parties and Discussion

34 On the face of the Consultancy Agreement, what is clear from the wording and from the terminology used is that this is set up to reflect an "independent contractor" status in accordance with paragraph 11. There is a provision for payment, which is on an invoiced basis for hours worked and expenses incurred; there is freedom to work, or serve, or be involved with other businesses, subject to the non-compete provision or conflict of interest; and there is provision for appointing "a suitably qualified substitute" to perform the services which the Claimant was undertaking to deliver.

35 Given what appears on the face of the Consultancy Agreement, the starting position of the Respondent is: That's the contract; that's the agreement; it's absolutely clear; what's the argument about?

36 However, Miss Stanley, on behalf of the Claimant, maintains that this is not sufficient, because, in her submission, if we look at "the reality", we do not necessarily find that what is spelled out in legalistic terms in that Consultancy Agreement truly amounts to a situation where an "independent contractor" is

independently carrying out these services in something other than an "employee status" relationship. Miss Stanley says that what we have to do is to look behind that agreement for two reasons. First, to displace the labels – "Consultancy Agreement", "independent contractor". Second, to establish that, in her submission, what was actually taking place was something very different from what she described as this rather dry, "arms' length", relationship – instead reflecting a much more integrated role for the Claimant in the Respondent's activities and business.

37 As Miss Stanley has pointed out, drawing upon observations made in the decision of the Supreme Court in ***Autoclenz v. Belcher*** (another "employee"/"worker" status case), it may be that "the old approach" to interpreting contracts could be subject to some reconsideration in the context of the employment relationship. While recognizing that one should hesitate to read too much out of this, the point is made that the Supreme Court was prepared to revisit the old contract rule in the case of ***L'Estrange v. Graucob*, [1934] 2 KB 394**, to the effect that, if you entered into a written contract which you sign, you are taken to have agreed to all the terms, even if you have not read, or bothered to read, or understood, the terms in that written contract.

38 In ***Autoclenz*** the Supreme Court was prepared, it is said, to accept an argument that the written contract (which helpfully was set out as an Annex to the judgment handed down by the Supreme Court) did not reflect the reality of what was actually done by the parties. Thus, it might be that, if a written agreement fails appropriately or properly to reflect the reality of the situation, then the rule in ***L'Estrange v. Graucob*** could be displaced. While it is accepted that there has not been anything like "a flood of cases" in which that direct approach of the Supreme Court in ***Autoclenz*** has been brought to bear, it is suggested that, in a number of subsequent cases involving "worker" status, the Supreme Court and other lower instances have been prepared – for example, it is maintained, as in ***Pimlico Plumbers*** – to look behind the terminology on the face of a written agreement and to ask: "Do these accurately reflect the true position?".

39 Miss Stanley submits that the task for the Tribunal is to determine what was actually agreed, by examining all of the relevant evidence. She concedes that the relevant evidence includes, of course, the written Consultancy Agreement, but she says it should also include evidence of how the parties conducted themselves in practice. It is therefore important, at this stage, to understand the reason why one might look at the practice or the conduct of the parties as they put the Consultancy Agreement into effect. The purpose, it is suggested, is to place the Tribunal in a position to ask whether there is sufficient to suggest that the written contract – the Consultancy Agreement – does not reflect the true agreement between the parties. With that in mind, it is necessary to look at some of the specific elements of the agreement.

40 Miss Stanley starts off by looking at the "irreducible minimum of obligation" (by reference to the propositions in ***Carmichael***). Many of the authorities to which she has referred the Tribunal – particularly the ***Cotswold Development Construction*** case (the judgment of Langstaff J.) – tell us how we should approach that. There has to be some "irreducible minimum" (the notion of the exchange) in order to establish that there is what is often described as the "work/wage bargain".

41 One particular question that was raised was the issue of whether the Claimant was obliged always to turn up for work when told to do so. He said in his witness statement that, if he did not do that, he was in no doubt that he would be disciplined – so he put it very high.

42 We were taken to examples of how the work was allocated by the Respondent, and evidence was given by a number of witnesses as to how a rota was established for distributing work tasks. Indeed, on Day 4 the Tribunal was presented with the most beautiful example of a rota, drafted in multi-colours, reflecting what was clearly a substantial amount of work in preparation for this information to be dispersed to the members of staff involved.

43 The Tribunal finds, distilling the evidence from the witnesses taken together, that, roughly a fortnight before work was to be undertaken, a rota was drawn up. Latterly, this seems to have been on an "early, mid- and late shift" basis, reflecting the notion of a 24/7 operation. Once people's names were on the list, it was generally expected that they would do the work involved in the particular rota shift.

44 However, it was suggested that there could be some "chopping and changing", some swopping of shifts. That was not denied by the Respondent, and the Claimant pointed to a couple of examples where he had exchanged his rostered shift with another member of the staff of the Respondent.

45 During cross-examination, a number of questions were put in terms of "what was the status of the people with whom the Claimant was exchanging shifts?". This was because, on a number of occasions, the witnesses for the Respondent spoke in terms of a division between what they called "staff" and "freelancers". The expression "staff" extended to full-time staff and permanent staff, with a number of variations on that theme. In essence, however, the Tribunal was satisfied that the distinction being made was between what might be described as "established" members of staff and "freelancers". In that context, the Claimant was consistently described by the Respondent's witnesses as being in the "freelancer" category.

46 The Claimant, by contrast, sought in his evidence to establish that there was no such meaningful distinction to be drawn. His position was that he was just the same as nearly everybody else in the organization – he did the same tasks, shared the same obligations, and was in many respects "part of the same team" producing a seamless product for the TV media sector.

47 Notwithstanding that a number of cross-examination questions were put in terms that tended to pre-empt an answer on "status", and in spite of the tendency in the Claimant's witness statement to offer what were effectively pleadings as to his claimed "employment status", the Tribunal has sought as best it can to go behind some of those propositions and has attempted to form a view on the available evidence about "the reality" of the situation. In that endeavor, the focus has been upon the extent to which the provisions in the Consultancy Agreement of 30 October 2014 reflected the evidenced practice as between the parties.

48 In respect of what can be derived from the evidence relating to the work rota, it is clear and the Tribunal finds that there was a certain amount of "swopping of shifts". However, it did not seem to matter very much with whom any particular swap was being made, because these were all internal members of the Respondent's workforce, and there was a relatively limited amount of exchange going on in that context.

49 What the Tribunal found to be much more revealing, however, was consideration of evidence about availability to be on the rota at all. In particular, there were examples in the Bundle where the Claimant had notified his non-availability to be included on a rota which was about to be drawn up (i.e. before being finalized). One instance related to a family holiday, and another concerned being abroad for other reasons. This evidence served to shift the focus of the question to whether it was open to the Claimant, as a matter of practice (the "reality" of the situation) to say freely, at his own choice: "I am, or I am not, available to be put on the rota".

50 The Respondent's submission in the light of the rota evidence was that, if it is the case (as they say it was) that the Claimant was free to indicate whether he would or would not be available for inclusion in the rota, that evidenced the degree of independence which he enjoyed and confirmed the lack of "control" (in the legal sense) enjoyed by the Respondent over his position. That being the case, this should lead to a conclusion that the Claimant was truly an "independent contractor", and not subject to sufficient "control" having regard to the observations in the leading cases.

51 The Tribunal notes that, in the course of considering the instances when the Claimant had indicated his non-availability to be included in the rota, there were a number of linguistic difficulties – shared by all of the participants to the proceedings – because the translations of the written communications relating to those instances were provided in Arabic, and there was more than one version of a possible English-language translation for those statements. Fortunately, at the end of the day, it was clear that there was a degree of agreement between all parties as to where reliance should be placed. Furthermore, nothing specifically turned on the potential differences of language which caused the Tribunal to form a view one way or the other.

52 Having considered all of the evidence in this regard, the Tribunal finds that it was clearly open to the Claimant to indicate in advance of the rota being drawn up that he would not be available for certain periods (e.g. a week). The Tribunal finds that the Claimant availed himself on more than one occasion of that opportunity. It is also clear from the evidence of two witnesses who were involved in drawing up the rotas, and the Tribunal further finds, that this declaration of non-availability was then taken into account when the rota was eventually finalized.

53 A related issue concerns whether there was any "sanction" or consequence if the Claimant were to make himself unavailable for a particular rota period? The answer to this is that there was a tangible consequence – in that the Claimant was only paid for the hours that he actually worked. This follows from the terms of the Consultation Agreement itself – and it was confirmed by Mr Alida (the Finance Officer) that this was how the practice in fact operated. Thus, invoices

were put in only for the hours worked (the shifts worked) and a computation was then undertaken by multiplying the number of shifts by the agreed figure in the Consultation Agreement (£120 plus VAT). This produced the totals to be seen in various invoices which were submitted and have been produced for the benefit of the Tribunal in the hearing Bundle.

54 That being the case, the consequence of being unavailable for inclusion in the rota (there being no payment) appears to be entirely in line with the terms of the Consultation Agreement and suggests an employment status of "independent contractor" rather than that of dependent "employee".

55 The specific example of the Claimant's non-availability by reference to going on a family holiday raised another issue during the course of cross-examination – namely, what might be the consequences of such an absence (non-availability) in terms of holiday entitlement. A number of questions were raised in this context: Was there provision for holiday entitlement? Was there any entitlement to holiday pay? Was holiday taken? Was "holiday pay" provided? If so, how was this done?

56 The Tribunal finds that the evidence indicates that there was no provision for holiday pay in the arrangements between the Claimant and the Respondent. There is no such provision in the Consultancy Agreement itself, and there is no suggestion that holiday pay was paid on any occasion for a time when a rota was not being worked by the Claimant. The Tribunal also notes that no reference was made at any stage in the proceedings to the statutory obligations arising for employers in this context under the **Working Time Regulations 1998**.

57 Consideration of the position in relation to holiday entitlement therefore leads the Tribunal to the view that this, once again, is an indication that the relationship between the Claimant and the Respondent was not one involving "employee status" as discussed above.

58 The Tribunal is of the view that the evidence shows the true position as one in which the Claimant was free to indicate when he was (and, more significantly, when he was not) going to make himself available for work – and the final versions of the shift rota clearly reflected that.

59 For completeness, it should be recorded that, in one instance, there was a suggestion that a request for "time off" was made by the Claimant which had to be formalized – but, on closer examination in the light of cross-examination, it emerged that the true position was not quite what it had appeared at first glance. The clarification of that specific situation was not assisted by the translation "ambiguity" problem to which reference has already been made. However, having regard to the oral exchanges in cross-examination, the Tribunal finds that the Claimant has failed to establish, on a balance of probabilities, that there was a "requirement" to seek permission and have that permission granted in order to take holiday leave. Rather, such evidence as there is serves to suggest that there was no such requirement.

60 Turning to the arrangements for payment and invoices, the Tribunal reminds itself that the "old fashioned" approach of seeking to discover whether there was "employee status" tended to place weight upon the answer to the

question: “Who was responsible for paying tax?” – and a related question might concern who was responsible for paying National Insurance contributions (and of what Class)? In some of the older cases, these might be decisive of the matter.

61 Given that it has been indicated by both Counsel and is accepted by the Tribunal that the approach in this case should be what has been described as “multi-factorial”, it does not follow that an answer one way or the other on questions such as who might bear responsibility for payment of tax and National Insurance contributions will, in itself, be definitive.

62 That said, it should be noted that payments to the Claimant were made on the basis of invoices rendered for fees and expenses. These were paid gross without deduction of tax. Furthermore, there is an indemnity clause in the Consultancy Agreement itself, providing for indemnity were there to be taxation liabilities raised in respect of the Client. The Tribunal was told by Mr Alida, the Respondent’s Finance Director, that there was not a PAYE system in place for the Claimant, that he was paid gross (as already mentioned), and that the Claimant was therefore responsible for his own tax and other liability obligations.

63 It is also noted in passing – since the provision was never triggered, the “reality” remains a matter of conjecture – that the Consultancy Agreement provides for the opportunity to appoint a substitute (subject to various conditions). The agreement also provides for the mechanism to give remuneration for services provided through such a substitute. It is also noted that the provision for such payment of remuneration continued to be directly to the Claimant – he then being expected to remunerate, in such way as may have been agreed by him, the substitute so appointed.

64 The Tribunal now turns to another important question, which goes to “control”.

65 It was suggested by the Claimant that he was charged with various managerial duties or obligations. He offered examples where he had ostensibly given an instruction, or followed up some event with a query. For example, there had been a failure at one stage of a camera crew to do something, and the Claimant was following up a query as to why that should have been. In his witness statement the Claimant set out what he said he had been employed to do and what he actually undertook, and in paragraph 8 of his witness statement he made the proposition that “I line managed other staff”. Miss Stanley submitted that these examples, when put together, served to show that there was some degree of “managerial obligation” assumed on the part of the Claimant.

66 The Claimant, in support of his claim that he was “part and parcel” of the Respondent organization, maintained that he had a “line manager”, in the person of Mr Alostas. Evidence was given to the Tribunal by Mr Alostas, in which he made it very clear that he did not see himself in that light. There was therefore a clear difference of view on this proposition.

67 The Claimant then went on to say – and this sets out what is, in effect, a legal pleading in the witness statement:

> **I was seen as an integral part of the Respondent's organization by other members of staff who considered me an employee.**

– and the Claimant made reference to various e-mails where this is said to be evidenced.

68 From the evidence before the Tribunal it clearly is the case that the Claimant appeared to have been considered by other members of staff as an integral part of the organization. However, when the Claimant's propositions about being charged with various managerial duties or obligations were tested under cross-examination, and when the Tribunal heard evidence from the Respondent's witnesses about the circumstances in which the Claimant's propositions were made, the Tribunal found it difficult to see how one could put the Claimant's activities and involvement in the operations of the Respondent organization as high as "line managing other staff".

69 Certainly, there is a reference – if one talks in terms of a managerial hierarchy – to a line manager for the Claimant. The Tribunal also accepts that Mr Alostas was seen by the Claimant as performing a "line manager" task (he was certainly somebody to whom the Claimant appeared to report in various respects). However, this did not constitute part of any formal managerial line in the sense that appears to be pleaded on behalf of the Claimant.

70 Looking at the situation in the round, the Tribunal finds that the Claimant did have a degree of responsibility in terms of reporting to Mr Alostas, just as there was an obligation to report to the Finance Officer (Mr Adila) in respect of the invoices. To that extent, therefore, it could be said that there were "line" obligations. However, the Tribunal does not find that the Claimant has established to any extent that he "line managed other staff" – as he puts it in paragraph 8 of his witness statement.

71 An additional issue was also raised in the Claimant's witness statement as to whether he had been subject to the Respondent's disciplinary and grievance policy in the same terms as any other "employee". An example was given of a grievance that the Claimant had raised concerning a disagreement over hours of work.

72 The response to this suggestion was provided by two of the Respondent's witnesses, who explained that various issues had been raised in relation to the Claimant which the managerial team felt should not be pursued because the Claimant was not an "employee", and therefore was not subject to the Respondent's policies.

73 The problem here is that the Tribunal felt a certain amount of ex post facto rationalization was taking place over what might have given rise to any decision not to trigger the formal procedures. Having considered both sets of arguments, the Tribunal is not persuaded that there is sufficient evidence (as opposed to opinion) on a balance of probabilities to go one way or another. The Tribunal therefore remains agnostic on the particular point – although it is satisfied that determination of this matter does not affect the overall evaluation of the evidence in determining the proceedings as a whole.

74 Finally, one additional issue needs to be mentioned in passing. This was a matter raised in relation to Mr Alida (the Finance Officer) and the invoices – although the Tribunal is of the view that the issue does not take it one way or the other in relation to determining the proceedings as whole.

75 First, it was shown on the face of documents included in the Bundle for the hearing that, at the outset, various invoices were submitted in the name of the Claimant [see Bundle p.167 – one of several examples, being a very simple invoice]. Subsequently, invoices were submitted in the name of a company.

76 There was some discussion about whether this indicated anything as regards the Claimant "being in business on one's own account" or anything of the like kind. However, there then emerged a fairly innocuous explanation for this, in that one of the colleagues on the staff had experienced a problem in being able to receive payments through a BACS arrangement (which Mr Adila told the Tribunal was the normal situation). In order to overcome this problem, payment transactions were made to the Claimant, and he then moved equivalent sums on to the intended recipient.

77 The evidence became somewhat muddied at one stage during the cross-examination of Mr Adila in relation to the treatment of the invoices. However, this, it subsequently become clear, was primarily because it emerged that Mr Adila had not been directly involved with this procedure, and was not really aware of what the background circumstances were.

78 The Tribunal finds that it is certainly the case that there was a number of invoices set up in a corporate name, rather than in a personal name. However, the Tribunal cannot find anything in the evidence that enables it to say that this indicates, one way or the other, "dependent" status or "in business on one's own account" status.

79 Consequently, as a matter of completeness, the Tribunal places on record that it does not find that the circumstances relating to the processing of these invoices supports any proposition – if one is being made by the Respondent – that this is evidence of the Claimant being "in business on his own account".

Conclusion

80 Put shortly, this is a case in which the issue for the Tribunal is: "Was the Claimant an employee or not?".

81 He has to be an "employee" in order to maintain his claim of unfair dismissal under the **Employment Rights Act 1996**, and he has to be an "employee" in order to maintain his claim under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** for the notice monies that he says are due.

82 The test is the "old established" one. The Tribunal is not in the realms of some of the rather fancy propositions considered in the more recent cases involving ***Uber***, ***Pimlico Plumbers***, and the like. Rather, the Tribunal retains the view – and the Tribunal is grateful that Counsel thought the same – that this is a case that goes to the line of authorities culminating in the House of Lords decision in ***Carmichael***, and clearly expounded as a variation of the "multi-factorial approach" outlined in the judgment of MacKenna J. in ***Ready Mixed Concrete***.

83 The Tribunal has done its best to canvass a wide spectrum of evidence on the various factors which might be said to play a part in determination of this issue. The primary role of the Tribunal has been to consider a variety of factors which might assist in indicating the existence of a "contract of service" or not; to evaluate those; and to weigh them with a view to forming a picture of the Claimant's employment status in the round.

84 The starting point has to be the written Consultancy Agreement of 30 October 2014. Had that been placed before the Tribunal without any other evidence relating to "everyday practice" or the like, the Tribunal is unequivocally of the view that, on its face, that Consultancy Agreement would clearly have indicated an absence of "employee" status. It says so. It is clearly designed to achieve that end. It contains a number of features that are clearly inimical to "employee" status.

85 A challenge has been made on behalf of the Claimant as to whether "the reality" is properly reflected in that agreement. It is suggested that there are a number of areas where there was rather less "independence" in reality for the Claimant than is maintained by the Respondent.

86 In looking at the evidence, the Tribunal has found highly significant the manner in which the shift rota was drawn up. That, in the view of the Tribunal, is a strong factor pointing towards this Consultancy Agreement indeed reflecting "the reality" – that the Claimant did not enjoy "employee" status.

87 Furthermore, it seems clear that the manner of payment – the invoicing, the absence of holiday pay, and the way in which the invoicing was done – again points in the direction of "non-employee" status.

88 The substitution clause makes very clear that it was the clear intention that the liabilities should all remain with the Claimant. While the operation of that clause in practice remains a matter of conjecture, some idea of the intentions of the parties can be drawn from the terms set out in the Consultancy Agreement.

89 Finally, the Tribunal finds that it was "the reality" that the termination clause – which, after all, is what triggered this litigation – is absolutely clear that, where the Claimant's services are no longer required by the Client [sub-paragraph (c)] then the Client may at any time terminate the engagement with immediate effect, with no liability to make any further payment. And that is exactly what happened in this case.

90 Consequently, taking all of the factors in the round, the Tribunal is driven to the inevitable conclusion on the facts – and all of these cases are fact-sensitive –

having regard to the approach set out in the ***Ready Mixed Concrete*** case, and approved by ***Carmichael***, as rehearsed by Langstaff J. in the ***Cotswold Developments Construction*** case, and as clearly commonly utilized even in the 'worker" cases from ***Autoclenz v. Belcher*** onwards, that this is an engagement giving rise to an employment status which is not that of an "employee".

91 It follows, therefore, that the Claimant is not an employee.

Disposal

92 In consequence, since "employee" status is required in order to maintain the claim of unfair dismissal, that claim is dismissed.

93 Further, because "employee" status is required to maintain the claim of breach of contract (notice money) that claim is also dismissed.

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Employment Judge Neal

Date 20 May 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 May 2020

FOR THE TRIBUNAL OFFICE