EMPLOYMENT TRIBUNALS

Claimant: Mr A Satsangi

Respondent: White Clark Group Ltd

Heard at: London Central Employment Tribunal

On: **22 September 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: Mr S Thakerar, counsel
For the respondent: Mr M Islam-Choudhury, counsel

RESERVED JUDGMENT

(1) The Claimant was not an employee of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996.
(2) The Claimant was not a "worker" within the meaning of section 230(3) of the Employment Rights Act 1996.
(3) The Claimant was not an employee within the meaning of section 83(2) of the Equality Act 2010
(4) The Claimant was a contract worker within the meaning of section 41 of the Equality Act 2010
(5) The Claimant was a disabled person at the times relevant in May/June 2019 within the definition of section 6 and Schedule 1 of the Equality Act 2010

REASONS

Introduction

1. At a preliminary hearing on 2 July 2020, Employment Judge Stout ordered that there should be a public hearing to decide the following preliminary issues.

2. The Claimant's employment status and in particular whether he was:
   2.1 An employee within the meaning of s 230(1) ERA 1996;
   2.2 A worker within the meaning of s 230(3) ERA 1996;
   2.3 In employment within the meaning of s 83(2) EA 2010; or
   2.4 A contract worker within the meaning of s 41 EA 2010 and,

3. Whether the Claimant had a disability at the relevant time (May/June - 2019) within the definition of s 6 of and Sch 1 to the EA 2010.

4. Due to concessions by the Respondent, two of those issues did not require decisions by me. The Respondent concedes that the Claimant:

   4.1 Is a contract worker within the meaning of section 41 of the Equality Act (on the assumption that it successfully refutes the assertion of a contract directly between the Claimant and the Respondent) and

   4.2 Is a disabled person within the meaning of the Equality Act at the relevant times. It does not concede that it had actual or constructive knowledge of the disability or of the alleged effects, and knowledge was not one of the issues for this hearing.

The Hearing and Evidence

5. The hearing took place remotely via video. I had an agreed bundle of 279 pages. There were 3 witnesses, each of whom had produced a written statement and answered questions from me and the other side: for the claimant, Mr Akhurst and Ms Stranger. Each side had produced a written skeleton and made oral submissions, including asking me to consider a range of authorities.

The Agreed Facts

6. The following were the agreed facts:

   6.1 The Claimant made an online application for the position of a Contract DevOps Engineer with the Respondent on 19 March 2019.

   6.2 The Claimant attended an interview with the Respondent on 2 April 2019. Following this interview, the Respondent offered the Claimant a contract developer role based on a 6 month term.

   6.3 The Claimant provided details of his umbrella company Gateway Outsource Solutions Limited (“Gateway") to the Respondent on 3 April 2019. Gateway notified the Respondent that the Claimant had provided details of his contract with the Respondent and that he wished to use Gateway as his umbrella company.

   6.4 The Respondent entered into a Consultancy Agreement with Gateway on 4 April 2019.

   6.5 The Respondent emailed the Claimant on 4 April 2019 with a copy of the Consultancy Agreement and a copy of the Respondent’s contractor handbook.

   6.6 The Claimant commenced his first day with the Respondent on 11 April 2019 as set out under the Consultancy Agreement.

   6.7 The Claimant’s wife emailed the Respondent on 7 May 2019 to confirm the Claimant had been involved in a car accident over the weekend. The

Claimant informed the Respondent on 14 May 2019 that he had been discharged from hospital.

6.8 The Claimant emailed the Respondent on 29 May 2019 to explain that 16 June 2019 was a realistic date for him to return. The Claimant emailed the Respondent on the same day to confirm he is ‘a contractor and have no credibility earned via working at a given workplace for a long time to fall back upon.’

6.9 On 12 June 2019, a telephone conversation took place between Andrew Akhurst and the Claimant. As a result of this conversation, the Claimant’s contract was terminated.

6.10 The content of what was discussed during this conversation is in dispute between the parties.

6.11 The Respondent wrote to the Claimant on 25 June 2019 setting out that the Claimant’s "contract will terminate as of 12 June 2019 by mutual consent”.

6.12 The Claimant contacted the Respondent on 25 June 2019 to explain he considered there had been a violation of his contract around a 4 week notice period. The Respondent replied and explained the Claimant's engagement had been terminated by mutual agreement but if this is not the case. the Respondent would be providing notice of one month as at 12 June 2019.

6.13 The Claimant confirmed on 26 June 2019 that he wished to attend work for 4 weeks' notice.

6.14 The Respondent confirmed to the Claimant in an email dated 26 June 2019 that the decision to terminate his engagement was mutually agreed due to the Claimant being unsure about his return to work. The Respondent confirmed that as per clause 3.4 of the Consultancy Agreement, Gateway had failed to provide a suitable substitute during the Claimant’s absence.

6.15 The Claimant emailed the Respondent on 26 June 2019 explaining that Gateway had confirmed all invoices should be with the Respondent to process. The Respondent confirmed that it had not yet received the invoices from Gateway.

6.16 The Claimant explained to the Respondent that Gateway had raised invoices on 16 and 26 June 2019. The Respondent confirmed on 5 July 2019 that the invoices had only been raised by Gateway on 4 July 2019 but that these would be settled as soon as possible.

6.17 Gateway informed the Claimant on 12 July 2019 that a payment had been processed to him in the sum of £4,546.41.

6.18 A consultancy agreement was signed between Accion Labs UK Limited and Gateway on 18 July 2019. Under this agreement, the Claimant is to provide services from 12 August 2019 — 12 August 2020 (renewable).

6.19 The Claimant completed a total of 13 complete days with the Respondent.

The findings of fact

7. Notwithstanding the wording of item 9 of the agreed facts, there is actually a dispute between the parties – which requires resolution by me - as to whether the Claimant had a contract with the Respondent. The Claimant's case is that he did, and the Respondent's case is that he did not.

8. The Claimant is an experienced IT professional. Between 2001 and 2007, he had a series of contracts which he regarded as employment contracts with different employers. On his CV he described each of these as "permanent". From 2008 through to the first part of 2019 he had a series of 6 contracts which he treated as contract work. In other words, he did not regard himself as an employee of the other party in those periods. On his CV, he described each of these as "contract". He only worked on one contract at a time.

9. In March 2019, the Claimant entered discussions with Gateway Outsource Solutions Ltd ("Gateway"). A written contract between the Claimant and Gateway was entered into. It is a 15 page document and was on standard terms drawn up by Gateway. The draft of the agreement was produced around 8 March 2019 and was signed by Gateway on 11 March 2019 and by the Claimant on 8 April 2019. For some reason, the address details of Gateway refer to a registered office in Malta. However, my finding is that the entity which entered into the contract with the Claimant is "Gateway Outsource Solutions Limited incorporated and registered in England and Wales with company number 09798679 whose registered office is at 1 Alliance Court, Eco Park Road, Ludlow, Shropshire, SY8 1FB (the "Consultant Company")" and that it is the same company which entered into a written agreement with the Respondent.

10. The Respondent did not introduce the Claimant to Gateway and did not encourage or pressure the Claimant to enter into an agreement with Gateway.

11. On 3 April 2019, the Respondent's Andrew Akhurst sent an email to the Claimant which started "Hi Abhishek. I can now offer you the contract. I'll call you later to discuss but can confirm six months and a day rate of £475". The email went on to request details of the Claimant's "umbrella company". During negotiations, it had been the intention of both the Respondent and the Claimant that there would be an intermediary between them, rather than a direct contract between them, and the request for details of "umbrella company" was a request for the details of the intermediary which both the Claimant and the Respondent had expected to be part of the written arrangements. The Respondent intended that the Claimant would understand that the offer of £475 per day was an offer to pay the umbrella company that sum, and the Claimant did, in fact, understand that that was the offer.

12. The Claimant read the agreement with Gateway carefully before signing it. He was aware that by signing the agreement and returning it to Gateway, he was agreeing to be bound by the terms of the written agreement. He knew that the agreement contained legal obligations and that either he or Gateway could bring a breach of contract claim against the other if there was a breach of the obligations that were set out in the written document.

13. The written agreement stated that the Claimant was to be an employee of Gateway. In his evidence, the Claimant said that it was a "play on words" for Gateway to be described as his employer and that he believes that the Respondent – not Gateway - actually did most of the things that an employer would do. He did not say in his evidence that the actual intention of the parties was that the Respondent would be his employer, or that the written document was produced with the deliberate intention of misleading any third party, such as HMRC or anyone else. My finding is that the Claimant knew that the agreement said that he would be an employee of Gateway and he understood what the term meant. He also knew that by the nature of the agreement with Gateway (and the nature of the agreement that he was aware that Gateway would sign with the Respondent) was to avoid an inference being made that he was an employee of the Respondent. He signed the agreement with the intention of becoming an employee of Gateway.

14. The agreement also set out the terms for remuneration of the Claimant by Gateway, and the Claimant understood that he was entering into an agreement which meant that he would have PAYE deducted by Gateway on the (relevant parts) of that remuneration. He was aware that both he and Gateway would be representing to HMRC that the written contract genuinely represented the true factual and legal situation, including that he was indeed an employee of Gateway.

15. The written agreement defined the following terms (amongst others):

    15.1 Assignment: the arrangement under which work is available for you to perform your professional services at the Charge Rate, the temporary location, and nature and/or duration of availability, of such work being as referred to in a relevant Contract, the arrangement being subject to the terms of this agreement Client: a third party, comprising either an employment business or other business and who is the party with whom we contract.

    15.2 Commencement Date: the date for commencement of the first Contract entered into by us under the arrangements set out herein after the date of this agreement

    15.3 Contract: an agreement between us and a Client for our supply of your professional Services

    15.4 Contract Site: the site to which the Client, End User or Hirer wishes you to report or provide your services, being the temporary workplace specified in an Assignment, or such other site as may be agreed from time to time

    15.5 Hirer: the person who you have found (either direct or through a third party) to be your client or customer under whose supervision and direction and for whose benefit your Services are performed

    15.6 Request: an oral or written request by you for us to enter into a proposed Contract

    15.7 Services: your services in carrying on your Profession specified in an Assignment being in respect of work that falls within the work which would be undertaken by persons within the Profession

16. Clause 5 dealt with the Claimant's obligations during an Assignment and Clause 7 with his obligations in between Assignments. The agreement as a whole and, in particular, Clause 8 makes clear that Gateway does not agree to find work for the Claimant, and that he has a contractual responsibility to Gateway to try to find work, albeit Gateway is not obliged to agree to enter into the "Contracts" (as defined) which the Claimant does find. Clause 10(c) provides that the Claimant can decide to terminate a "Contract" and that the Hirer/Client can terminate a "Contract" by informing the Claimant. The agreement as a whole, and particularly Clause 11, states that the Claimant has a contractual obligation (owed to Gateway) to do work for the Hirer/Client, and to do so to the best of his ability, and to act in accordance with instructions given to him by the Hirer/Client. Clause 21(b) required the Claimant to inform both Gateway and the Hirer/Client if unable to work due to illness.

17. The reasons that the Respondent entered into the contract with Gateway is that the Claimant asked them to. If the Claimant had asked the Respondent to enter into a contract with a different company, other than Gateway, in connection with the work that the Claimant was to perform, then the Respondent would have done so. Likewise, if the Claimant had not been the person selected by the Respondent to do the work, then the Respondent would not have entered into a contract with Gateway (unless, by coincidence, the successful individual had also chosen Gateway as an intermediary).

18. Gateway contacted the Respondent on 3 April 2019 (at the request of the Claimant) and offered to enter into a contract with the Respondent on Gateway's standard terms (which were attached), or else to discuss entering into a contract with the Respondent on the Respondent's standard terms. The contract that was eventually entered into was on the Respondent's standard terms. It was signed on behalf of Gateway by a director of Gateway, and not, on behalf of Gateway, by the Claimant.

19. The agreement between Gateway and the Respondent required Gateway to ensure that the Claimant made a personal declaration to the Respondent (as per Schedule 3) and gave undertakings in relation to data protection, confidentiality and intellectual property (Schedule 2). The Respondent's consideration for the latter was the fact that the Respondent was entering into the contract with Gateway and that the Claimant was the person who would be doing the work set out in the contract between Gateway and the Respondent.

20. Gateway was defined as the "Consultant Company". The agreement provided, at Clause 3.4, that it would be the "Consultant Company" which chose staff, and that the "Consultant Company" could choose to make substitutions (subject to the Respondent being satisfied as to suitability). In fact, neither party to the contract regarded this clause as reflecting their actual intentions: the Respondent had selected the Claimant specifically to do the work, and had not selected Gateway or any of Gateway's other staff; Gateway and the Claimant had agreed that it was the Claimant's responsibility to find the Assignments and then to carry them out.

21. The agreement between Gateway and the Respondent stated that the agreement would terminate on 30 September 2019 unless terminated sooner than that by one month's notice, or in accordance with the other terms of the contract. Clause 11.1

contains a list of specific reasons that the Respondent could use to terminate with immediate effect, and Clause 11.2 effectively allows the Respondent to terminate immediately in other circumstances in the event of a repudiatory breach.

22. Overall, the written agreement was that Gateway would supply one or more persons (defined as "Consultant Individual" and "Consultant Personnel") to do the work set out in Schedule 1, and Gateway would receive £475 plus VAT per day. Both Gateway and the Respondent intended that the only person who would do the work was the Claimant. The Respondent was not obliged to make payments on any day on which the Consultant Individual did not attend work (for any reason).

23. No payment was made to Gateway other than for days on which the Claimant attended work at the Respondent's premises. When the Claimant notified the Respondent that he was too ill to attend, discussions about his availability took place directly between the Claimant and the Respondent; Gateway was not involved. Gateway did not provide a substitute and neither the Claimant nor the Respondent asked it to, or expected it to, or believed that Gateway had any right or obligation to do so. The contract stated that it was Gateway's responsibility to inform the Respondent if the Consultant Individual was to be unavailable.

24. The agreement between Gateway and the Respondent was to the effect that the Respondent could supply equipment for the Consultant Individual to use, but that the Consultant Individual could potentially use his/her own equipment. During his time doing work for the Respondent, the Claimant used the Respondent's equipment.

25. The Respondent sent a letter dated 25 June 2019 (page 118 of the bundle). The first line of the address referred to Gateway, the second line was "FAO" the Claimant, and the remainder of the address was Gateway's postal address. The remainder of the letter was intended as a direct communication to the Claimant, including "Dear Abhishek" and instructions to him personally as to handover, return of equipment, and so on. The letter asserted the Respondent's position was that "your contract will terminate" (sic) "as of 12 June 2019 by mutual consent". The word "your" refers to the Claimant, and not to Gateway. The letter is signed, on behalf of the Respondent, by a Senior HR Business Partner. The evidence shows that the letter was sent by email to the Claimant by Mr Akhurst at 14:45 (and the Claimant agrees that he received it). No evidence was presented to me to show that it was posted or hand-delivered or emailed to Gateway, and therefore no evidence was presented that the Respondent served the notice validly in accordance with Clause 14 of the Gateway/Respondent contract. Clause 23(d) of the Gateway/Claimant contract brings the "Assignment" to an end as far as that contract is concerned, when the Hirer/End User informs the Claimant that his services are no longer required, even if Gateway is not also informed, and Clause 10(e) obliged the Claimant to inform Gateway of such an event.

26. None of the specific circumstances in Clause 11.1 of the Gateway/Respondent contract had arisen, and the Respondent did not suggest – in its 25 June letter, or at all – that they had. Nor did the Respondent suggest that Gateway was in repudiatory breach of contract.

27. In March/April 2019, the Respondent had some vacancies for employees and the Claimant knew this. Both parties understood that if the Claimant applied for, and was appointed to, one of these vacancies he would have an employment contract which would potentially provide him with benefits such as paid sick leave and paid holiday. Both parties were aware that for the work which the Respondent was advertising as work for non-employees, then there would be no such benefits and that the remuneration would be calculated differently, ie based on a day rate rather than an annual salary.

28. In March/April 2019, if the Claimant had not been selected by the Respondent, but had been selected by a different organisation to do work for them, then he would still have been likely to have entered into the contract with Gateway, on the same terms, and asked Gateway and the other organisation to enter into a contract between themselves which stated that Gateway would supply him to that other organisation.

29. The Claimant's reasons for entering into the contract with Gateway were that he thought that it was to his own advantage to do so. He knew that the contract with Gateway meant that he was agreeing to be an employee of Gateway and he wanted to be an employee of Gateway and to be taxed as such. He knew that there were other arrangements that he could seek with organisations such as the Respondent; he knew that he could apply to be an employee of organisations such as the Respondent and he knew that he could potentially seek to enter into direct contracts with such organisations without an intermediary. He did not want either of these latter options because he believed that being an employee of Gateway was more advantageous to him.

30. The Respondent's reasons for entering into the contract with Gateway were that (after it had selected the Claimant as a person who would be performing work which it wanted to have performed) the Claimant asked them to. The Respondent did not regard Gateway as the type of business which might offer it (the Respondent) a range of possible agency workers, for it to choose from. The Respondent regarded Gateway as an intermediary and it (the Respondent) preferred to have an intermediary because it did not want to enter into a contract with the Claimant directly. The Respondent knew that, when negotiating a day rate with the Claimant, it was negotiating a rate that would be paid to an organisation such as Gateway, which would retain a portion for itself, and pay a portion to the Claimant in accordance with whatever arrangements the Claimant and (say) Gateway had agreed between themselves. It did not regard itself as having any role in determining how much Gateway should keep and how much should be paid to the Claimant, or how the total remuneration which the Claimant received from Gateway should be categorised.

31. Both the Respondent and the Claimant regarded the arrangements involving themselves and Gateway as entirely lawful and entirely in keeping with what they each (the Respondent and the Claimant) regarded as standard practice in their industry.

32. After the Claimant and Gateway entered into the written contract on 8 April 2019, the Claimant and Gateway did not expressly agree to vary the terms of their agreement at any time relevant to this dispute. After the Respondent and Gateway

entered into the written contract on 4 April 2019, the Respondent and Gateway did not expressly agree to vary the terms of their agreement prior to its termination.

The Law

33. Outside the field of employment law, the ability of courts to look behind the written terms of a signed contract is limited to situations where (there is a mistake that requires rectification; something which is not argued by either side in this case or where) the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract. Ie where the contract is a "sham" in the sense described in Snook v London and West Riding Investment Ltd 1967 2 QB 786, CA. ("Snook")

34. In the field of employment law, a claimant does not necessarily have to demonstrate a common intention to mislead in the Snook sense (although, if the Claimant can show the written contract is a "sham" in the Snook sense, the tribunal can determine the true agreement). In the field of employment law, potentially there might have been unequal bargaining power between the claimant and the alleged employer and that it might be the latter who decided upon all of the terms of the written document(s). This is a principle addressed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC ("Autoclenz") having been set out previously by lower courts in earlier cases, including by the Court of Appeal in Protectacoat Firthglow Ltd v Szilagyi 2009 ICR 835, CA ("Szilagyi"). A tribunal faced with an allegation that a written document is a "sham" must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. Determining the true intentions of the parties does not mean that a tribunal should base its decision on what one (or each) party thought privately to itself; rather it requires the tribunal to determine what was actually mutually agreed – in reality – between the parties.

35. The principles set out in Autoclenz do not apply just to analysis of written contracts between alleged employer and alleged employee. For example, in Szilagyi, there was what purported to be a written partnership agreement between the Claimant and a third party, which also fell to be analysed in a manner which took account of the role of the alleged employer, and its bargaining power. In Szilagyi, if the Claimant's case was correct, then there would really be no "third party" at all; the partnership would not exist, and the other member of the partnership would also (potentially) be a worker or employee. In in Uber BV and ors v Aslam and ors 2019 ICR 845, CA, ("Uber"), the majority in the Court of Appeal held that contracts with any third parties might be examined using the Autoclenz principles if the contracts were drawn up by the alleged employer. In Uber, the third parties were customers/passengers, and not persons alleged to be part of any employer/worker relationship. The Supreme Court is due to rule on the appeal in due course.

36. In Dynasystems for Trade and General Consulting Ltd and ors v Moseley EAT 0091/17, the issue was the true employer. The claimant had started work in 2011 and had been issued with a contract that expressly stated that he was employed by DTGC Ltd, a Jordanian company. However, at the same time, the Claimant

also received a letter of authority signed by D Ltd. Throughout the following years, the claimant did no work for DTGC Ltd and dealt only with D Ltd. All of his instructions came from directors and employees of D Ltd, and he was held out to third parties as being an employee of D Ltd. Salary payments were made to him by DTGC Ltd. The tribunal decided that the express terms of the contract did not reflect the actual agreement between the parties, and that in reality the UK company was the employer. The EAT held that the tribunal had correctly applied Autoclenz and had taken an appropriate approach to evidence about the subsequent course of dealing between the parties when analysing what the 2011 agreement had been.

37. There can be situations where:

37.1 there is an actual tripartite relationship, between A, B and C, and where C does work for A, but with no express contract (written or otherwise) between A and C.

37.2 A and B have a contract such that B agrees to supply an individual (C) to do work for A which is supervised by A, and A agrees to pay B for this;

37.3 B and C have a contract such that C agrees with B that C will do work for A which is supervised by A, and B agrees to pay C for this.

38. In a situation such as this one, the test for whether there is an implied contract directly between A and C is as set out in James v Greenwich which in turn referred to the test explained in The Aramis [1989] 1 Lloyd's Rep 213 ("Aramis"). In order to imply a contract, the question is whether it is *necessary* to imply a contract between the worker and the end user "*in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."*

39. As per Aramis, the fact that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract it is insufficient to imply a contract between them. Furthermore, if A and C would (or might) have acted exactly as they did in the absence of a direct contract between them, then that is fatal to the argument that it is necessary to imply a contract between them.

40. This test of necessity is the correct test to apply even in situations where there is a lengthy and/or complex chain of organisations involved in the supply of C to A, and even in situations where the claimant raises a human rights argument to suggest that proper protection of C's rights requires that s/he have the same rights that would be afforded to a worker or employee of A's.

41. As per Dacas v. Brook Street Bureau (UK) Ltd [2004] ICR 1437, the existence of an implied contract between the individual and the end user is a possible finding that a court or tribunal might make in an appropriate case, if such a decision is justified on the facts, and if the necessity test is met.

42. As discussed by the Court of Appeal in Tilson v Alstom Transport, [2010] EWCA Civ 1308, 2010 WL 4642142:

42.1 The mere fact alone that C might be integrated in A's business does not make it necessary to imply a contract between A and C, because it is equally consistent with someone supplied to work as an agency worker. The court added, at paragraph 41, "*The degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service. But it is a factor of little, if any, weight when considering whether there is a contract in place at all.*"

42.2 A simple divergence between what one of the written contracts says and the actual practice does not – in itself – make it necessary to imply a contract between A and C. It could be the case, for example, that one of the parties is in breach of the contract between A and B, or in breach of the contract between B and C, without the fact of that breach existing (and – perhaps – being ignored or waived) making it necessary to imply a contract between A and C. On the facts of that case, as per paragraph 47, "*The contract between Morson and Alstom under which Morson undertook to provide his services fully explained why he was working for Alstom, and there was no evidence before the Employment Tribunal that in their dealings with the appellant, Alstom acted inconsistently with the terms of that contract*."

42.3 The mere fact alone that C might have to give advance notice to A of absence (or even the fact that A might have the right to veto C's voluntary absence) is not, in itself, enough to require that a contract between A and C needs to be implied to explain the business reality.

43. Section 230(1) of the Employment Rights Act 1996 defines "employee" as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*". In other words, for someone to be an employee, there must be a finding first that they have a contract of some description with the alleged employer. If there is any contract, then it is necessary to go on to decide if that contract is a contract of employment. On the other hand, if there is no contract at all between the parties, then it follows that there is no "contract of employment" and that the individual is not an employee.

44. Section 230(3) provides two limbs by which a person can be found to be a "worker" for the purposes of the Employment Rights Act 1996. Limb (a) is that they have a contract of employment with the alleged employer. Limb (b) is that they have "any other contract" which fulfils the remaining part of the definition in section 230(3)(b). The words "any other contract" mean both: that a person with an employment contract does not fall within limb (b) and also that there must be a contract of some description. If there is no contract at all between the parties, then it follows that the individual is not within limb (b).

45. Section 83(2)(a) of the Equality Act 2010 states that: "Employment" means "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

46. Again, there must be a contract (whether oral or written, express or implied) of some description between the parties. If there is no contract at all, then the relationship cannot be one which falls within Section 83(2)(a).

Analysis and Conclusions

47. It was not submitted by the Claimant that there was an express contract (see paragraph 6 of Mr Thakerar's skeleton). Further, my finding of fact was that the Claimant and Mr Akhurst had pre-contractual discussions on the basis that there would be an intermediary (an "umbrella company" was the phrase used) rather than a direct contract between the Claimant and the Respondent.

48. I will first consider whether or not the written agreements between the Claimant and Gateway on the one hand, and the Respondent and Gateway on the other hand, do explain the interactions of the Claimant and the Respondent or whether it would be necessary (based on the tests set out above) to imply a contract between the Claimant and the Respondent.

    48.1 The fact that the Claimant turned up for work at the Respondent's premises (in April/May 2019) and followed the Respondent's instructions is explained by the fact that the Claimant had entered into a written agreement with Gateway by which he agreed to be an employee of Gateway's and to work for "Clients" such as the Respondent, and to follow the Client's instructions.

    48.2 The fact that the Respondent gave work to the Claimant for him to do, and instructions about where and when to do it is explained by the fact that the Respondent had entered into a writtten agreement with Gateway by which Gateway agreed to supply someone who would do work for the Respondent and follow the Respondent's instructions.

    48.3 The fact that the Claimant used the Respondent's equipment while working was consistent with the terms of each of the agreements with Gateway.

49. The fact that there direct discussions between the Claimant and the Respondent, which led to the Respondent's deciding that it wanted the Claimant to do the work, and to the Respondent deciding the sum that it was willing to pay for the work to be done, does not make it necessary to imply a contract between the Claimant and the Respondent. It would potentially be possible for the Claimant and Mr Akhurst to be having discussions which were "subject to contract" with the expectation of both of them being that the contracts (if any) that would be entered into later did not include a contract directly between the Claimant and the Respondent, but might lead only to one contract between the Claimant and Gateway and another contract between the Respondent and Gateway). In fact, the business reality is that each of the Respondent and the Claimant and Gateway was deliberately seeking to avoid a situation whereby a contract directly between the Respondent and the Claimant was formed.

50. The fact that the Claimant was required to sign a side letter in relation to confidentiality, data protection and intellectual property does not make it necessary to imply a contract between the Claimant and the Respondent requiring the Claimant to work for the Respondent. The obligations are consistent with the Claimant's being expected to come into possession of the Respondent's information as an employee of Gateway.

51. In summary, in April 2019, the 3 parties deliberately and successfully created two express written agreements (one between the Respondent and Gateway, and one between the Claimant and Gateway) that fully explained the relationship between the Claimant and the Respondent without the necessity to imply a contract between those two parties to explain anything that was done.

52. When the Claimant was absent, he (or a family member) informed the Respondent. Gateway did not do so. The Claimant informing the Respondent directly was consistent with his obligation to Gateway. The fact that Gateway failed to inform the Respondent arguably put Gateway in breach of its agreement with the Respondent and if the Claimant failed to inform Gateway, then he was in breach of his agreement with Gateway. However, this state of affairs does not imply that either of the agreements had been formally varied.

53. There is a dispute between the Claimant and the Respondent about what ended the relationship. On the Respondent's case, the Claimant and the Respondent directly agreed that the Claimant would no longer do work for them on 12 June 2019; on the Claimant's case, he did not agree to termination and the decision was made unilaterally by the Respondent. However, neither side alleges that the Respondent sought Gateway's agreement to a mutual termination of the Gateway-Respondent contract. Neither the conversation on 12 June 2019 (regardless of precise details) nor the letter addressed to Gateway dated 25 June (regardless of whether validly served on Gateway) make it necessary to imply a contract between the Claimant and the Respondent. Potentially the events of June 2019 could lead to a conclusion that the Respondent failed to comply with the requirements of its contract with Gateway. If that is true (and I am not making a decision to that effect which is intended to bind any other judge or court; I am only discussing the possibility on the assumption that it is true) then it would potentially mean that the Respondent had failed to validly terminate its contract with Gateway on 12 June, on 25 June and perhaps even by one month after 25 June 2019. However, even if the Respondent was acting as if the agreement with Gateway was validly terminated without having followed the appropriate procedure set out in the written Gateway-Respondent contract, that does not make it necessary to imply a contract between the Respondent and the Claimant. It might mean that Gateway would have some remedy against the Respondent, but that would not make it necessary to imply that the Claimant should also have enforceable contractual rights against the Respondent.

54. In summary, based on the written agreements, it is not necessary to imply a contract between the Respondent and the Claimant in April 2019, or May 2019 or in June 2019, either to give effect to the business reality of the situation or to create additional enforceable rights.

55. I will now consider whether any of the written documents are shams and, if so, what the true actual agreements were. The analysis will consider whether – based on such actual agreements, rather than simply the written documents – it is necessary to imply a contract between the Claimant and the Respondent.

56. Each of Gateway, the Claimant and the Respondent had some bargaining power. Each of them knew what they wanted from the situation. They each wanted there to be two contracts (Claimant-Gateway and Respondent-Gateway respectively).

They each wanted to avoid a third contract existing (or being deemed to exist) between the Claimant and the Respondent.

57. In the case of the Claimant and Gateway, they each wanted to create a contract which was a contract of employment with the Claimant the employee and Gateway the employer. They each wanted to avoid the Claimant becoming, or being treated as, an employee of the Respondent. The Claimant was under no pressure from Gateway or from the Respondent to sign the written document as drafted, and he could have asked for changes if he wanted changes. He did not want changes. The written document accurately reflected the agreement which the Claimant and Gateway actually reached.

58. In the case of the Respondent and Gateway, they each wanted to create a contract which was a contract of for the supply of the Claimant's services, by Gateway, and with the Claimant being obliged to follow instructions given to him by the Respondent. As per my findings of fact, neither expected the substitution clause to be used and they each knew that the other party was not expecting the substitution clause to be used. Applying Autoclenz, the true agreement was that Gateway would supply the Claimant, and only the Claimant, and that Gateway would be paid if and only if the Claimant attended work and performed the work that the Respondent required him to do. Subject to that, the written document accurately reflected the agreement which the two parties actually reached.

59. The lack of a valid substitution clause in the Respondent-Gateway agreement affects only that agreement. It does not mean that it is necessary to imply a contract between the Claimant and the Respondent. The Respondent could require (because of its contract with Gateway) that Gateway require the Claimant to do the work, and Gateway could require (because of its contract with the Claimant) that the Claimant do the work. The non-availability of the Claimant because of (say) illness, would mean that the work would not be done at all and that Gateway would not be in breach of contract for failing to supply a substitute. The course of dealing between the Claimant and the Respondent after 11 April 2019 neither shows that there was a variation in the agreements or that the agreements were (other than the substitution clause issue) shams.

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Employment Judge Quill

Date:30 September 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30/09/2020.

FOR EMPLOYMENT TRIBUNALS