



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 1803582/19 (V)**

**Held on 21 October 2020**

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**Employment Judge A Jones**

**Mr C Tosh**

**Claimant  
In Person**

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**JMHC Logistics Ltd**

**Respondent  
Represented by  
Ms L Ferguson,  
HR Manager**

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### **JUDGMENT**

The judgment of the Tribunal is that the claimant was a worker for the purposes of section 230 Employment Rights Act 1996 whilst engaged by the respondent.

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#### **Introduction**

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1. The claimant brought claims of unfair dismissal, unlawful deduction from wages and payment of holiday pay. A subsequent application was made to amend his claim to include a claim in terms of section 47B of the Employment Rights Act 1996, which remains outstanding.

2. Following a number of case management preliminary hearings, this case was set down for a preliminary hearing in order to determine the employment

ETZ4(WR)

status of the claimant during his employment with the respondent. The hearing took place on the Cloud Video Platform. The claimant appeared in person and the respondent was represented by a member of their HR team, Ms Ferguson.

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3. The claimant's position was that he was an employee, failing which he was a worker. The respondent's position was that the claimant was a self-employed contractor. In order for the Tribunal to have jurisdiction to consider the claims brought by the claimant, the Tribunal would have to be satisfied that the claimant was a worker. Although he had originally brought a claim of unfair dismissal, that claim had been dismissed on the basis that the claimant did not have sufficient qualifying service irrespective of his employment status. The claimant's claim of unfair dismissal was the only claim which required the claimant to be an employee for the purposes of the Employment Rights Act. The remaining claims required that the Tribunal be satisfied that the claimant was a worker.

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4. Therefore, the Tribunal was required to determine whether the claimant was a worker for the purposes of section 230 of the Employment Right Act 1996 ('ERA').

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5. Although parties had been advised by the Tribunal to co-operate and lodge all relevant documents in advance of the hearing in a digital format, this was not done. At the commencement of the hearing, it transpired that the claimant had lodged some documents with a clerk to the Tribunal the previous evening, but this was sent outwith the particular clerk's working hours and the documents had not been received by the Tribunal. There was therefore a short adjournment in order to locate the documents, which were not numbered. Ms Ferguson confirmed that she had received these documents the previous evening and that she had no objection to any of them being produced and did not intend to lodge any further documents.

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6. The Tribunal heard evidence from the claimant who was then cross examined by Ms Ferguson. The respondent did not lead any evidence.

**Findings in fact**

7. On the basis of the evidence heard and documents to which reference was made, the Tribunal made the following findings in fact:
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8. The claimant was engaged by the respondent in response to an online advert making reference to a requirement for self-employed contractors.
9. The claimant was engaged to deliver Amazon packages from Amazon's depot in Dundee.
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10. The claimant was required to undergo various background checks by the respondent including an alcohol test prior to being engaged.
11. The claimant was required to provide his own transport for delivering packages. He entered into an agreement with a company called 'Hall' to rent a vehicle. Hall is according to the language used by Ms Ferguson a 'sister' company to the respondent.
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12. The agreement between the claimant and Hall for the hire of a van made reference to the respondent on a number of occasions, including requiring the claimant to fill in an accident form and submit it to his on site JMHC representative in the event of being involved in an accident.
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13. The vehicle provided had the respondent's livery on it.
14. The claimant was provided with a high visibility vest with the respondent's logo to wear when carrying out his duties.
15. The claimant was required to have identification with him at all times when carrying out his duties, which had the respondent's logo.
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16. The claimant paid for fuel for the vehicle using a fuel card supplied to him by the respondent. The claimant was required to reimburse the respondent for any mileage which was for personal use.
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17. The respondent generally required parties to enter into an agreement with an LLP in order to be engaged. A standard form was used by the respondent in that regard. The claimant did not sign such a form. A signature on a document bearing to be the claimant's was made by someone other than the claimant.
18. The claimant used an app provided by the respondent to carry out his duties, which gave him details of the deliveries required.
19. The claimant was contacted by the respondent the evening before carrying out duties when he was assigned routes to be followed for deliveries.
20. The overall deliveries required to be carried out were managed by a 'Point of Contact' who was based at the Amazon depot.
21. The claimant generally worked six days a week and was paid a daily rate irrespective of the actual hours worked.
22. The claimant was offered the 'Point of contact' role with the respondent around January 2019 which he carried out for a short while and then returned to driving duties in April 2019.
23. The claimant had an email address 'craigtosh@jmhclogistics.co.uk'.
24. The claimant was paid by bank transfer and tax and national insurance was deducted from his pay.
25. The claimant was not paid for days on which he did not work. The claimant was not paid during any holidays he took or paid in lieu of annual leave.
26. The claimant could not provide a substitute to carry out his route if he was not able to work on a particular day. The work he would have otherwise carried out was allocated to other drivers by the Point of contact.

**Observations on the evidence**

27. The Tribunal found the claimant to a credible and reliable witness. While the claimant was (albeit briefly) cross examined by the respondent, he was not challenged on much of his evidence. In particular his evidence that his signature was forged on the 'Declaration' document which was said to be evidence that he entered into an LLP agreement as part of the engagement of his services by the respondent was not challenged. The claimant's evidence had been that it was clear that the signature on the LLP agreement was very different to the signature on his van hire agreement. He also pointed out that what was meant to be his address on the LLP was misspelt. The Tribunal accepted the claimant's evidence in both respects. The Tribunal concluded that the 'Declaration' document, which had originally been produced by the respondent had not been signed by the claimant. There was therefore no contractual documentation before the Tribunal in relation to the relationship between the claimant and respondent. As the respondent did not call any witnesses, the Tribunal relied on the claimant's largely unchallenged evidence in reaching its findings in fact.

**20 Relevant law**

28. Section 230 of the Employment Rights Act 1996 provides a statutory definition of employees and workers.
29. Section 230(1) provides that an employee means 'an individual who has entered into or works under (or where the employment ceased, worked under) a contract of employment.
30. Section 230(2) defines a contract of employment as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
31. Section 230(3) defines a worker as 'an individual who has entered into or works under (or, where the employment has ceased, worked under)

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status not by virtue of the contract is that of a client or customer of any profession or business undertaking carried on by the individual;

### Discussion and decision

32. The question of employment status has been considered by the Supreme Court on a number of occasions in recent years. In particular in the case of *Autocleanz Limited v Belcher* [2011] I.C.R. 1157, the Supreme Court found that car valeters were workers for the purposes of the National Minimum Wage Regulations 1999 reg.2(1) and the Working Time Regulations 1998 reg.2(1) and in *Pimlico Plumbers and another v Smith* [2018] UKSC 29, that an apparently self employed operative providing plumbing services to customers of Pimlico Plumbing, was a worker for the purposes of section 230(3) of the Employment Rights Act 1996.

33. The question of employment status is considered by adopting a multi factor approach. The specific facts of a particular case are likely to be crucial in determining whether employee or worker status is established by a claimant.

34. The provisions of section 230(3) are commonly referred to as limb A and limb B, limb A being an employee and limb B being a worker.

35. In the cases referred to above, there were written agreements between the parties which set out the rights and obligations. However, a common theme in employment status cases has been that on occasion the terms of the written agreement do not reflect the reality of the relationship. As the Supreme Court in *Autoclenz* stated:

5 “17. It is common ground that the issues are (1) whether the ET was correct to find that the claimants were at all material times working under contracts of employment and were therefore workers within limb (a) of the definition and (2) whether in any event the ET was correct to find that they were at all material times within limb (b). This involves consideration of whether and in what circumstances the ET may disregard terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.

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Therefore, it is necessary to consider the intention and expectations of the parties in addition to considering any contractual document said to set out the terms of the relationship.

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36. One of the fundamental questions to be considered when determining the employment status of an individual is the question of personal performance; that is whether a substitute can be provided by the individual engaged to carry out work. The ability to provide a substitute can be set out in the contractual arrangements between the parties, or may be a matter of practice. In the case of Pimlico, for instance, although Mr Smith, the claimant was contractually permitted to provide a substitute to carry out work on his behalf, that substitute had to come from the ranks of his colleagues who were engaged by Pimlico on similar terms. In that case, therefore, the provision of a substitute did not prevent Mr Smith being a worker for the purposes of section 230(3)(b) of the Employment Rights Act 1996.

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37. A further important consideration, which was also relevant in the Pimlico case, is whether a putative worker is providing services to a customer or client rather than engaged in a contract for service.

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38. In the present circumstances, there was no contractual documentation before the Tribunal. There was a model agreement, which required the claimant to become a member of an LLP. It appeared to the Tribunal that this

arrangement was created to suggest that the claimant was part of a separate company which provided services to the respondent. It did not reflect the reality of the situation. In any event, the claimant had not signed the agreement. While it may be well be the case that the claimant's pay was channelled through this LLP by the respondent, the claimant was completely  
5 unaware of the arrangements. It was clear that the reality of the situation, and the expectation of the parties, was that the claimant would provide services directly to the respondent.

10 39. While that model agreement made reference to the provision of a substitute, this did not reflect the reality of the situation. Even if the claimant was bound by the terms of this agreement, any substitute would be required to have gone through the same vetting procedure as the claimant. Instead it was similar to the Pimlico Plumbers case where any substitute would be more in  
15 the form of swapping shifts with colleagues.

40. The Tribunal therefore had no hesitation in finding that the claimant was required to provide personal service in carrying out his duties which was consistent with an employment relationship.

20 41. The Tribunal's decision in this regard would have been same had the claimant signed the 'declaration' agreement.

42. The Tribunal then went on to consider the extent to which the respondent  
25 exercised control over the way in which the claimant carried out his duties.

43. The Tribunal did hear that there was a manual which was provided to the claimant, although it did not have sight of a copy of that document. The claimant gave evidence that this manual set out standards that the claimant  
30 and his colleagues were required to adhere to in carrying out their duties. His evidence was that if the standards were not met, then no further work would be offered.

44. There was no dispute that the claimant was advised of his duties the evening  
35 before he was due to carry them out and advised of the route he was required to take. The claimant was paid a daily rate for carrying out his duties



and while he was not obliged to accept the work, it was clear that there was sufficient mutuality of obligations between the parties to at the very least create an umbrella contract which governed the claimant's work for the respondent.

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45. The Tribunal also considered the financial reality of the relationship. The claimant was paid a daily rate and while he was required to provide his own transport, it was clear that the provision of that transport was inextricably related to the respondent. There was a cost associated with the use of the transport by the claimant, but in the Tribunal's view, the claimant could not make a profit by carrying out his work more effectively or at different time. Again, it seemed to the Tribunal that the financial reality of the relationship was consistent with that of an employment relationship.

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15 46. Having considered the facts of this case, the limited documentation available and the authorities referred to above, and applied a multi factor approach when analysis the circumstances, the Tribunal concluded that the claimant was employed by the respondent under a contract of service with the respondent, and was therefore a worker of the respondent for the purposes of section 230(3)(b) of the Employment Rights Act 1996.

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47. The case should now be listed for a further Preliminary Hearing to determine what further steps are required in order to list the case for a final hearing and in particular consider the claimant's outstanding application for amendment to his claim.

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**Employment Judge:**  
**Date of Judgment:**  
35 **Date sent to parties:**

**Amanda Jones**  
**29 October 2020**  
**30 October 2020**