Claim numbers: 2601964/19
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2601970/19
2601973/19

# EMPLOYMENT TRIBUNALS

**Claimants:**

**(1) Mr Iain Forster**
**(2) Mr Joshua Huxley**
**(3) Mr Garry Huxley**
**(4) Mr Steven Thomas Rae**
**(5) Mr Richard Tomas**
**(6) Mr Alan Birch**
**(7) Mr Peter Russell Jones**
**(8) Mr Stephen Rea**

**Respondent:**

**(1) TSR Partnership Limited t/a TSR Recruitment**
**(2) Magnify Group Limited**

**Heard at:** **by CVP**

**On:** **27.11.2020**

**Before:** **Employment Judge Dyal (sitting alone)**

**Representation:**

**Claimants:** Mr Forster, one of the Claimants, acting in person for himself and lay representative for all other Claimants

**Respondent:** Mr J Brice, Director of TSR

# JUDGMENT

1. The Claimants were not employees or workers of either Respondent.

2. The claims are therefore dismissed.

# REASONS

## Introduction

1. The Claimants complain that the First Respondent ('TSR') alternatively the Second Respondent ('Magnify'), made unauthorised deductions from their wages contrary to s.13 Employment Rights Act 1996.

2. The matter came before the tribunal to determine the employment status of the Claimants. In relation to each of them the issues are:

    2.1. was the Claimant an employee within the meaning of s230(1) of the Employment Rights Act 1996 of either Respondent?
    2.2. was the Claimant a 'limb b' worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996 of either Respondent?

## The hearing

3. The hearing took place via CVP. The technology worked well and those present were well able to manage it.

4. The Claimants were represented by Mr Forster. TSR was represented by Mr Brice. Magnify Group Limited ('Magnify') did not attend and was not represented. It is in Creditors Voluntary Liquidation.

5. The case preparation was modest even allowing that the parties are litigants in person:

    5.1. The Claimants' bundle ran to just 13 pages and did not contain, for instance, any of the relevant express contractual documentation;
    5.2. The only Claimant who attended and gave evidence was Mr Forster. His statement was three pages long;
    5.3. TSR's bundle ran to 67 pages and included some of the relevant contractual documentation;
    5.4. The only witness for TSR was Mr Brice. His witness statement was 1 page long and was little more than an index to TSR's bundle.

6. The modest case preparation undoubtedly made my task much more difficult. Employment status is highly fact sensitive but the evidence before me was sparse. I did my best to surmount that problem by asking the two witnesses I did hear from (Mr Forster and Mr Brice) a good deal of open questions and, generally, 'squeezing the pips' of all of the evidence before me to accumulate the most detailed factual picture I could.

## Facts

7. I make these findings of fact on the balance of probabilities.

8. At the relevant times the Claimants were all working as skilled electricians and were all members of HMRC's Construction Industry Scheme (CIS). This is a scheme that is designed and intended for companies, partnerships and self-employed people in the construction trade.

9. The Claimants each worked at Deeside Industrial Park in Wales on a huge construction project – the building of a biogas plant. Their claims are for a couple of weeks wages in respect of work done in late May 2019. At the time, the Claimants were all providing services to LX Engineering (North) Limited ('LX'). LX was an 'end-user' with whom the Claimants had no contractual relations. At least some of the Claimants had provided their services at the biogas plant for other end-users via other intermediaries in the recent past but the detail of this was not in evidence.

10. The main contractor on the biogas plant project was Clugston. LX was a subcontractor of Clugston's and was responsible for a significant amount of the electrical work on the project. LX fell into financial problems and ultimately insolvency when, in May 2019, Clugston refused to pay it. This had various knock-on effects including that a relatively small amount of the Claimants' work went unpaid and in turn led to this claim.

11. TSR is a recruitment business. In general terms its operating model so far as it is in evidence is as follows:

    11.1. TSR has clients, such as LX, that require skilled labour, usually in construction and logistics. It is in the business of providing skilled labour to such clients pursuant to contracts it has with them (neither the contract between TSR nor any other sample contract between TSR and its clients was in evidence);
    11.2. TSR recruits skilled tradespeople who are, or agree to become, registered to the CIS whether as self-employed people or via limited companies;
    11.3. TSR does not itself ostensibly contract with the tradespeople/their umbrella companies. Rather, having in an informal sense recruited them, it gets them to contract with Magnify. The agreement with Magnify is executed online. It involves filling out some online documents and entering an agreement.
    11.4. TSR then contracts with Magnify for Magnify to provide it with labour that TSR uses to fulfil its contracts with clients. The contract(s) between TSR and Magnify were not in evidence.
    11.5. TSR has an active role in managing the assignments that Magnify's tradespeople/their umbrella companies undertake for TSR's clients. So for instance it notifies the tradespeople where the assignment is, who the client (end-user) is, the rate of pay, the site hours and the date and time of the site induction.

12. There was almost no evidence before me about Magnify other than the agreements it entered with the Claimants. It is clear from the documents that Magnify entered express contracts with the tradespeople that TSR put its way and that Magnify is responsible for paying them. The terms of Magnify's agreement with tradespeople varies slightly depending upon whether the tradesperson wishes to contract directly or via an umbrella company.

13. For those who contract personally, there is an online questionnaire to fill out. A sample is appended at appendix 1. The questions are obviously designed to illicit answers that show the tradesperson is and understands themselves to be an independent contractor. The tradesperson is also required to agree Magnify's standard terms ('the Standard Terms'). A copy of the Standard Terms is appended at appendix 2.

14. For those who contract through a limited company, there is a 'Self-Billing' agreement and a short contract ('the Short Contract'). A sample appears at appendix 3. The Short Contract includes a term as follows: *I understand that I will undertake all work on be half of Magnify Group Ltd on, and subject to, their standard Terms and Conditions which will be sent to me from time to time.* Making such sense as I can of the Respondent's bundle, I find that this is a reference to the self-same Standard Terms referred to

immediately above. Thus the Standard Terms are incorporated into the terms which are agreed by those contracting through umbrella companies.

15. The Standard Terms are quite lengthy so for economy, rather than quoting the terms I will summarise the key clauses here:

    15.1. The "*Subcontractor*" [that is the tradesman or as the case may be the umbrella company] *agrees to "supply the expertise necessary*" to complete the Works detailed in the Project Confirmation (Clause 2.1).
    15.2. Project Confirmation is a defined term (clause 1.1.9): "*Project Confirmation' means the form so titled and employed for the purpose by the Subcontractor from time to time*".
    15.3. Magnify does not have any control over the way in which work is performed (clause 2.5);
    15.4. the tradespeople do not need Magnify's permission to leave site (clause 2.6);
    15.5. the tradespeople are responsible for buying and maintaining handtools and providing their own safety equipment (clause 2.9 – 2.10);
    15.6. there is an ultra-broad right to send a substitute (clause 3);
    15.7. there is no exclusivity: the tradespeople are free to work for others before, during and after assignments with Magnify (clause 3.5)
    15.8. the tradespeople are liable for their own defective work and the defective work of any assistant they hire (clause 4);
    15.9. there are no obligations at all in respect of further work – on either side (clause 5);
    15.10. the tradespeople acknowledge they have a public liability risk and would benefit from insurance in respect of the same which Magnify arranges automatically on their behalf for each project (clause 6);
    15.11. where the CIS applies both parties must conduct their businesses in accordance with it. Beyond the deductions made pursuant to that scheme, the tradespeople are responsible for their own tax and national insurance (clause 8);
    15.12. the tradespeople warrant that they are in business on their own account (clause 9.1);
    15.13. the tradespeople must represent themselves as independent contractors and not on any account represent themselves as an agent/servant/employee of Magnify (clause 9.5);
    15.14. the tradespeople agree that they are not workers and are not entitled to holiday pay (clause 9.6);
    15.15. Magnify can terminate the agreement at will (clause 9.6);
    15.16. The tradesperson cannot terminate the agreement during the course of a 'Project' but can otherwise terminate the agreement on notice (clause 12.3). There is no notice period and the only requirement is for the notice to be given in writing. There are some deeming provisions for when a written notice is taken as given that are unremarkable (clause 11).
    15.17. 'Project' is a defined term and means "the overall undertaking within which the specific Works to be provided by the Subcontractor are to be provided" (clause 1.1.8).
    15.18. There is no grievance procedure.

16. Mr Forster's and Mr Birch's initial relations with the Respondents came about through a direct approach from Ms Tayla Bush of TSR. Ms Bush was described by Mr Brice as a 17 year old apprentice recruitment consultant. Mr Forster and Mr Brice had hitherto been working on the biogas project for a different contractor. Ms Bush somehow got their details in around January 2019 and recruited them. There is no evidence before me about how the other Claimants came to have relations with the Respondents.

17. All of the Claimants entered express written agreements with Magnify of the kind described above. None of the Claimants entered express agreements (written or oral) with TSR. All of the Claimants except for Mr Russell-Jones contracted with Magnify Group Limited personally. Mr Russell-Jones contracted through a service company. Mr Forster initially contracted personally in January 2019, but in April 2019 entered a fresh agreement with Magnify through his umbrella company. He did this because he perceived it to be in his financial interests to do so.

18. Turning to the Claimants' work on site, I make the following findings:

    18.1. The Claimants had a supervisor on site who was the Chief Electrical Engineer. He was responsible for telling the Claimants the scope of their work and checking the quality of the work that they had done. He did not however supervise them doing the work and they went about it as they saw fit.
    18.2. The Claimants were expected to work the site's operating hours. This equated to a ten hour day.
    18.3. If the Claimants wanted to take time off they could do so but they were to notify LX of the same. At some point Ms Bush also asked to be notified (see below).
    18.4. There were some site rules that the Claimants had to comply with:
        18.4.1. there was a health and safety induction;
        18.4.2. it was necessary to clock in and out of the site using a fingerprint scanner.
    18.5. The fingerprint scanner was also the method by which working hours were recorded. The information from it was used to populate timesheets which in turn were signed off by the supervisor and sent to TSR.
    18.6. The Claimants were expected to use their own hand tools for completing their work. However, if plant machinery was required this was provided by LX.
    18.7. The Claimants were expected to provide their own PPE, such as work boots. However, there was also a stock of things like safety gloves on site which they could use.

19. The Claimants were paid weekly by Magnify. None of them were on PAYE. They were all paid in accordance with the terms of the CIS which meant that prescribed deductions were made at source. Beyond that the Claimants were responsible for their own tax and national insurance affairs. The Claimants were never paid by TSR.

20. According to the written contracts there was no exclusivity between the Claimants and Magnify. In other words the Claimants were free to work for whoever they wanted. I am satisfied that this was also the reality of the situation. The only constraint on the Claimant's freedom to work for others was the practical one of there being only so many working hours in the day.

21. I would characterise the labour market in which the Claimants operated, as described by Mr Forster, as a free market in which labour was extremely flexible and transient. This was a market in which skilled tradespeople frequently moved around at very short notice between projects, between end-users and between intermediaries (such as recruitment agencies) in accordance with their own financial interests. This is not intended to be a criticism at all: it's just the reality of the business. If and when a better more lucrative piece of work arose then the culture was that the tradesperson simply moved on if he/she wanted to. The ties between the tradespeople and the end-users and agencies were very weak and very loose indeed. So it was clear, for instance, that on this particular biogas plant project that, while there was months of work available, that would not have stopped the Claimants from accepting work elsewhere and changing project, end-user or agency if better paid work came up elsewhere. This was the accepted reality of the situation.

22. The Standard Terms provide very broad rights of substitution. They were clearly drafted in a way that was intended to negative any requirement of personal service. They include the following clause:

> *3. Delegations and Limitation*
>
> *3.1. The Subcontractor [i.e., the claimant] may at his absolute discretion, send a substitute or delegate to perform the Works. The right to send a substitute or delegate is unfettered and unlimited and agreement of the Contractor [i.e., Magnify] is not required in any circumstances, nor does notice of sending a substitute or delegate need to be given to the Contractor so long as the substitute or delegate has the appropriate written agreement of the Client or the appropriate agency acting.*

23. I was keen to try and understand whether this reflected the reality of the situation. Mr Forster's evidence was that he had never attempted to send a substitute and it was not something that he would ever do, not least because he does not have anybody to send. I asked what he thought would have happened had tried to send a substitute. He did not rule out the possibility that it was something he could have done but he was sceptical about it. His point of scepticism was that he thought it was unlikely that this was something that the end user, LX, would want. His view was that if he was unable to attend then the end user would simply look to a recruitment agency to provide replacement labour because that would be a more reliable source of labour. He also noted that a practical issue with sending a substitute was the need to comply with the formalities of the site, like having a site induction. He did not, however, suggest that was necessarily a complete barrier.

24. Mr Brice's evidence was that it was not common for a substitute to be sent but that it did happen. I asked how it would work in practice given the need for a site induction. His answer was that the contractor "*would agree to the induction*". I asked him what the process would be if a tradesperson in the Claimants' position wanted to send a substitute. His answer was that the tradesperson would need to tell TSR who the substitute was, the substitute would need to be appropriately qualified and then it would be a matter for TSR whether it accepted that substitute or not.

25. Having considered all of the evidence, I am driven to the conclusion that the reality of the situation does not reflect the picture painted by clause 3.1 above. It is true that Magnify have no role in determining whether or not a substitute can be sent. But that does not mean the Claimants in reality had a broad right to send a substitute. On the contrary, in reality they did not. In order to send a substitute a number of things beyond the Claimants' control would have needed to fall into place:

    25.1. Whoever was responsible for site inductions (be it the main contractor or the end-user) would have needed to agree to induct the substitute. Common sense tells me that they may or may not do so, but generally would. This was a large site on which it would clearly have been necessary to frequently run inductions;
    25.2. The end-user would have needed to agree to accept one of the Claimant's substitutes and it may or may not have done so;
    25.3. Most importantly, TSR would have needed to accept the particular substitute the Claimant in question offered. This would have involved not only an assessment of qualifications, but the application of TSR's discretion as to whether or not to accept a person who was qualified.

26. Thus, while it might sometimes have been possible to send a substitute there were multiple barriers to doing so. The picture painted by clause 3.1 above, in so far as it implies that the Claimants could send qualified substitutes essentially at will, does not reflect the reality of the situation.

27. The reason that the Claimants believe that their relations were with TSR rather than with Magnify Group Limited, despite the terms of the express contracts they each entered with Magnify, is because of the following facts (which I find):

    27.1. All human contact was from TSR. It was Ms Bush who dealt with the Claimants and gathered things like, proof of qualifications, CVs, proof of identity and the like. She did this always in her capacity as an employee of TSR, represented herself as such, and used her TSR email account. Further, at least in the cases of Mr Forster and Mr Birch they were recruited by Ms Bush who made first contact with them.

    27.2. The details of the assignment were provided by Ms Bush using her TSR email account.

    27.3. Ms Bush described Magnify as TSR's payroll company. Magnify also sent text messages to the Claimants with messages stating *"Hello. We have received your details from TSR regarding the new assignment you have started. We are the payroll company for them, so we will be contacting you today in order to register you ready for your payments. Regards Magnify Group."*

    27.4. Ms Bush telephoned or texted the Claimants on a weekly basis. Based on Mr Forster's account however this was a very informal communication call in which Ms Bush essentially just checked if the claimants were happy on the assignment and whether they would be continuing the following week. This is corroborated by a text message in the Claimants' bundle to one of the Claimants (Mr Forster was not sure which) that reads: *"Hey, it's Tayla at TSR. Just doing the weekly check in to make sure all is well and that you're still continuing".*

    27.5. At some point Ms Bush told Mr Forster that if he could not go in to work then he should notify TSR because "he worked for TSR". However, as it was described to me, I considered this to be a matter of notification rather than a matter of seeking permission for time off.

    27.6. The Claimants' timesheets were TSR branded.

    27.7. When LX engineering ran into financial problems it was TSR that told the Claimants to leave the site. The Claimants' concerns and demands in respect of pay were made to TSR and responded to by TSR. The Claimants, of course, were ultimately not paid by anyone.

**Submissions**

28. Both parties made very brief submissions. Mr Brice essentially relied upon the terms of the express agreement which characterised the Claimants as self-employed and not as workers or employees. Mr Forster said the documents showed a chain of command with TSR not Magnify at the top. He considered that the point of working via an agency was that you got paid in the event of insolvency. He also considered that since Mr Brice had settled a comparable claim in other litigation that was an admission of liability here.

**Law**

29. Section 230 of the ERA provides as follows so far as is relevant:

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

30. In ***Autoclenz Limited v Belcher*** [2011] IRLR 820, Lord Clarke said at [29]:

> *"The question in every case is…what was the true agreement between the parties." He went on at paragraph 35 to say: "So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

31. In ***Uber BV v Aslam*** (CA) [2019] ICR 845 the majority described the approach as follows:

> *As discussed above, Autoclenz shows that, in the context of alleged employment (whether as employee or worker), (taking into account the relative bargaining power of the parties) the written documentation may not reflect the reality of the relationship. The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996 , the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldly-wise", "sensible and robust" approach to the determination of what the true position is.*

32. The principles of ***Autoclenz*** apply not only to identifying the terms of a contract but also to the identification of the parties to the contract: ***Dynastems for Trade & General Consulting & Others v Mosley***, unreported EAT, UKEAT/0091/17/BA, Langstaff J.

33. The classic test for the existence of a contract of service is that of MacKenna J in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 2 QB 497:

> *A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's*

*control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*
*I need say little about (i) and (ii).*
*As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.*
*As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.*

34. Nolan LJ in ***Hall (HM Inspector of Taxes) v Lorimer*** [1994] IRLR 171 observed:

> *In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another*. (para.11)

35. In ***White & Anor v Troutbeck SA*** **[2013] IRLR 949** the Court of Appeal agreed with the EAT that the mere fact that the individual has day to day control over how to do his/her work does not preclude an employment relationship. In that case there was a contractual right of control and that, together, with the other features of the relationship pointed to employment.

36. The Supreme Court in ***Pimlico Plumbers Ltd v Smith*** [2018] UKSC 29, [2018] IRLR 872 approved the analysis of the Court of Appeal in that case [2017] IRLR 323. Etherton MR at paragraph 84 said:

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

37. The test for worker is similar to the test for employee and the same factors will be relevant but with a 'lower pass-mark' as Mr Recorder Underhill QC (as he was) put it in ***Byrne Brothers (Formwork) Ltd v Bair*** [2002] IRLR 96:

> [17]…(5) *Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.*

38. In ***Pimlico Plumbers v Smith*** [2018] IRLR 872, the observation of Maurice Kay LJ in ***Hospital Medical Group v Westwood*** [2012] IRLR 834 was cited with approval by Lord Wilson: "*there is no single key with which to unlock the words of the statue in every case*" [44].

39. In ***Cotswolds v Williams*** [2006] IRLR 181, Langstaff J gave some guidance to assist in distinguishing between those who are workers and those who are not in cases in which there *is* a requirement of personal service. He said this at [53]:

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

40. In ***Hospital Medical Group v Westwood*** [2012] IRLR 834 a doctor was held to be a worker essentially because of the twin features of his case: the level of integration into the other parties' business and the requirement that he provide such services to them exclusively [10 – 18]. In an otherwise similar case the lack of exclusivity and the freedom to work elsewhere meant that the doctor in question was not a worker: ***Suhail v Barking Havering & Redbridge University*** Appeal No. UKEAT/0536/13/RN [26 - 27].

41. In ***James v Redcats*** [2007] IRLR 296 the EAT said this:

> *67 An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not if, for example, the dominant feature of the contract is a particular outcome or objective and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.*

42. In the cases of ***Jivraj v Hashwani*** [2011] IRLR 827 and ***Halawi v WDFG UK Ltd*** [2015] IRLR 50 the requirements of personal service and subordination were emphasised (I acknowledge that they were Equality Act 2010 cases).

43. In ***Bacica v Muir*** [2006] IRLR 35 factors such as the preparation of one's own accounts, being free to work for others and not being paid when not working were all considered relevant factors.

44. There is no rule of law that a person who provides services via a company cannot be an employee: ***Catamaran Cruisers Ltd v Williams*** [1994] IRLR 386. If the true relationship is that of employer and employee, it cannot be changed by putting a different label on it. Whether or not the contract in question is one of service, or one for services, is a question of fact. The formation of a company may be strong evidence of a change in status, but that fact has to be evaluated in the context of all the other facts found.

45. The labels the parties themselves use is not determinative but it is a relevant part of overall factual picture. .

**Discussion and conclusion**

46. Dealing first with the fact that TSR settled other litigation raising comparable issues. In my judgment this sheds no light on the issues and does not assist these Claimants. My task is to identify what agreements there were between which parties and decide what type(s) of agreements they were.

*Who did the Claimants each contract with?*

47. The starting point has to be the express agreements that were entered. These were with, and only with, Magnify.

48. However, it is true there are a number of details about how things worked in practice that bring into question whether, in reality, the work the Claimants did for LX was pursuant to an agreement with Magnify or whether it was in reality pursuant to an agreement with TSR:

    49.1. It was TSR that recruited at the least Mr Forster and Mr Birch.
    49.2. It was TSR that got the Claimants to enter agreements with Magnify.
    49.3. The assignment with LX was arranged by TSR and not by Magnify and in a way that was not entirely consistent with what the Standard Terms envisaged. The Standard Terms envisaged a Project Confirmation being agreed between the Claimants and Magnify. This did not happen.
    49.4. Magnify was described as TSR's payroll in text messages it sent and was also described that way by Ms Bush.
    49.5. The timesheets were TSR branded.
    49.6. Ms Bush referred to Mr Forster as 'working for TSR' and the Claimants were to tell TSR if they could not attend work.
    49.7. TSR dealt with the pay problems upon LX's financial problems.
    49.8. Thus the Claimants' relationship with LX was, to the limited extent it was managed at all, managed by TSR.

49. In light of the above I certainly agree that there was some mixed messaging and some respects in which things operated in practice differently to the way the contract envisaged. That does indeed bring into question who the agreement was really with. However, on balance I am not persuaded that those matters provide a sufficient basis for me to conclude that the true agreement, in relation to the work done for LX, was between the Claimants and TSR rather than the Claimants and Magnify. Nor, for the avoidance of doubt, do I think it renders it necessary to imply a contract between the Claimants and TSR.

50. Firstly, TSR's involvement in providing assignments to the Claimants is adequately explained by the following matters. It had an agreement with LX that it would provide it with labour. It had an agreement with Magnify that it would use tradespeople contracted to Magnify to fulfil its agreement with LX (and other clients). Although I have not seen those agreements I accept they exist. TSR therefore had commercial interests in doing what it in fact did quite apart from any contract the Claimants. This is part of the reality of the situation.

51. Secondly, the very core essence of the written agreement between each Claimant and Magnify was that in each case Magnify would pay the Claimant for work that he did for end users making such CIS deductions as were required. The reality of the situation was that this is exactly what happened: it was indeed Magnify who paid the Claimants for the work they did for LX (up until late May when LX stopped being paid by Clugston). That is a very weighty factor showing that the reality of the situation was consistent with the core essence of the contract.

52. Thus while I have not found this an easy issue, I am satisfied that the true agreement was indeed between, and only between, each of the Claimants and Magnify.

*Were there mutual obligations and if so what sort?*

53. By clause 2 of the Standard Terms, each Claimant agreed *to "supply the expertise necessary to complete the Works detailed in the Project Confirmation (Clause 2.1).* Magnify agreed to pay the sum set out in the Project Confirmation (clause 7).

54. The Project Confirmation was defined as follows:

> *1.1.7 'the Works' means the work to be undertaken by the Contractor for a Client of the Subcontractor as detailed in the Project Specification"*
> *1.1.9. 'Project Confirmation' means the form so titled and employed for the purpose by the Subcontractor from time to time;*
> *1 .1 .1 0. 'Project Specification' means the detail of the Works to be undertaken by the Subcontractor as set out in the Project Confirmation;*

55. As noted above this is not in fact how work was assigned and there was no Project Confirmation. The evidence before me was simply that Ms Bush would email the Claimants telling them where to be, who the end-user was, when to arrive and how much they would be paid (an hourly rate).

56. When it comes to mutuality of obligation, the true agreement in my view is as follows.

57. There is not the slightest suggestion in the evidence that Magnify (nor TSR) had any obligation to offer the Claimants any work and accordingly I find that there were no such obligations. There is also not the slightest evidence that the Claimants were obliged to accept work if they were offered it and I find that there was no such obligation.

58. However, there *were* some mutual obligations. If any of the Claimants chose to accept a piece of work I think the reality is that they were obliged to complete it. And if they completed it they had to be paid for it. In my view the Claimant's commitment was at most a week by week one for the following reasons:

    58.1. There was many months' worth of electrical work to do at the biogas project but in reality there is no suggestion at all that anyone regarded the Claimants as in any way bound to continue working at the plant until the completion of the electrical work there.

58.2. On the contrary, it is clear that everyone recognised that the Claimants were very free agents who may find better paid work elsewhere at any time and not return the following week.
58.3. Work was effectively assigned on a week by week basis. The Claimants were paid weekly and there was a weekly check by Ms Bush to see if they would be continuing the following week.
58.4. The reality of the situation was that the maximum obligation the Claimants had was to complete a weeks' work if they had agreed the preceding week to do so. Everyone understood that the Claimants' work at the site could come to an end at any time and this is one of the reasons why there were weekly checks as to whether the Claimants would continue.

59. In summary then, I find that there were mutual obligations but they were very limited and lightweight: the Claimants were obliged to complete a week's work if they indicated that they would be staying on the project in the weekly contact. The obligation was owed to Magnify. Magnify in turn had an obligation to pay the Claimants for the work that they had done.

60. Clause 5 of the Standard Terms reflects the true position in that there was no obligation on anyone in respect of any other or future work, whether to offer it or to do it if offered.

61. The mutuality of obligation requirement is therefore met for the duration of assignments, which is sufficient for the Claimant's purposes given that they are only claiming wages for work that they in fact completed.

*Personal service*

62. In my judgment the true agreements between the Claimants and Magnify was one of personal service. The reality of the situation was materially different to the Standard Terms (clause 3, especially 3.1 as set out above).

63. In reality, if the Claimants accepted an assignment (such as the assignment with LX) they were expected, and with limited exception, required to complete the assignment with their own personal labour. Sending a substitute might have been possible on occasion but was subject, among other things, to TSR's discretion as to whether or not to accept or reject the substitute proposed. Mr Brice's own evidence was that it was a matter for TSR to decide whether or not to accept even a qualified substitute. Applying the *Pimlico* guidance, the true agreement was thus one of personal service.

64. The personal service requirement is therefore met.

*No-exclusivity or integration*

65. The Claimants were not required to give exclusive service to anyone. In principle and in practice they were free to work for others. The number of hours in the day may have made this challenging since they worked around 10 hours per day for LX; but if the Claimants wanted to work anywhere else they were always free to do so. They could have worked for other clients, whether through TSR, Magnify or other agencies, or directly, in the evenings or at weekends, or in preference to agreeing to work in any given week for LX.

66. There is no evidence that the Claimants were integrated into either of the Respondents' businesses at all. Nor is there any evidence that they were integrated in LX's business. There were only the loosest of ties between the Claimants and the Respondents and the Claimants and LX.

67. The picture Mr Forster presented was one in which the Claimants were very free agents who moved between assignments, between end-users and between intermediaries (if they chose to use them) as suited their business/financial interests.

68. It is not clear on the evidence whether or not the Claimants actually actively marketed their services to the world in order to facilitate this flexible/mobile way of working. However, if they did not do so in my view that can only be because they did not need to in order to pick up work. The Claimants operated with just the mobility and flexibility of businesses that do actively market their services as independent contractors.

69. I consider the matters discussed under this heading to be very weighty factors pointing towards independent contractor status.

*Control*

70. There is no evidence that Magnify had any control over the Claimants, whether under the terms of the contract, or in practice.

71. TSR had almost zero control over the Claimants. Ms Bush telephoned or texted the Claimants weekly and did once tell Mr Forster that if he was due to be absent he had to tell TSR because he "worked for them". That was an odd choice of words but overall my view is that Ms Bush's weekly telephone call to the Claimants was a customer service call. It was TSR managing the relationships between the Claimants and its client LX with a view to prolonging them and, failing that, getting as much notice as possible that the Claimants were moving on. The Claimants were mobile and in reality there was a risk that they could leave at any time taking their labour elsewhere. Likewise (and this explains in my view the requirement to notify TSR of absence) if the Claimants were going to be absent, then TSR had an interest in providing its client with alternative labour.

72. LX exerted some control over the Claimants. The Claimants were given tasks to do by the chief electrical engineer. However, how they went about completing those tasks on a day to day basis was up to them. Their work was checked for quality by the chief electrical engineer at the end, and if it was not good enough it had to be rectified. They were expected to work to particular hours – the site's hours. They were also required to say if they were not going to attend the workplace: they had to tell both LX and, latterly, TSR. They were required to comply with site rules, including in respect of clocking in and out.

73. In my view, when set in its proper context, this was a very low level of control. This was a massive building project with many tradespeople of many disciplines on site. In order for any project of that sort to be run safely it had to be orderly and there had to be rules that applied to tradespeople on site, whatever their employment status. It was also obviously necessary for there to be quality controls of the work done, again that was true whatever the employment status of the tradespeople doing the work. There were also obviously efficiency considerations that needed to be taken into account on such a project, such as, the subcontractor's and the contractor's deadlines/targets/budgets. That explains why LX needed to know, for instance, if a tradesman was going to be in work or not.

74. Overall, the control over the Claimants, which was by the end-user not either Respondent, was approximately the minimum it possibly could be on a major building project.

75. I should emphasise that I do not think that the Claimants required anyone's permission to be absent from the site. They had to *notify* LX and, latterly, TSR of the same but that is not same thing as having to ask for time off.

76. The overall picture in respect of control is one that points more towards independent contractor status than employment/worker status.

*Equipment*

77. The Claimants provided their own handtools. If big plant was needed it was provided for them on site. There was some spare PPE available for use but the basic requirement was for the Claimants to provide their own.

78. I find this overall more consistent with independent contractor status than employment/worker status. The Claimants were in business on their own account but they were each small businesses working for a bigger businesses so it is not surprising that if big plant was needed it was provided. Equally it was no doubt expedient for safety and efficiency for there to be some PPE available on site for general use.

*Pay*

79. The Claimants were paid by the hour rather than by the job. If anything this is a weak indicator of worker/employment status. Hourly pay is more closely associated with worker/employment status than independent contractor status, but it is obviously the case that many true independent contractors charge by the hour and that doing so is no bar to such status.

80. None of the Claimants were put on PAYE. All were paid in accordance with the CIS scheme. That did involve deductions being made but at the rates fixed by the CIS scheme, not the PAYE rates. The Claimants were otherwise responsible themselves for accounting to HMRC. I think this is significant factor such that overall the picture in respect of pay points towards non-worker status.

*Other*

81. The following factors point towards non-worker status:

    81.1. The Claimants were not entitled to holiday pay according to the express agreements and in practice there was no suggestion of entitlement to holiday pay.
    81.2. There was no grievance procedure.
    81.3. The labels used by the parties.
    81.4. The Claimants were liable themselves for defective work.

**Summary and Conclusion**

82. Standing back and looking at the picture in the rounds, in my view the Claimants in this case as best I can discern from the evidence were neither workers nor employees. They were independent contractors each running their own small business. In my view the lack of exclusivity, lack of integration, the looseness of the ties between the Claimants and end-users / intermediaries and the flexibility/mobility with which the Claimants worked were particularly weighty factors.

83. It follows that, since the Claimants were neither employees nor workers, they do not have standing to bring claims for unauthorised deductions from wages in the employment tribunal. Their claims must therefore be dismissed.

84. I do sympathise with the Claimants for being left unpaid for work they have done, but for the reasons I have given, their remedy, if any, is not in the Employment Tribunal.

85. Finally, I should make clear that if, contrary to my finding, the Claimants had contracts with TSR, my view nonetheless would be that those were not contracts of employment nor were the Claimants workers. The same analysis as set out above would apply even if there were contracts with TSR rather than with Magnify, or contracts with TSR in addition to the contracts with Magnify.

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Employment Judge Dyal

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Date 18.12.2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS