Case Number: 3321490/2019

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**and**	**Respondents**
Mr M Motin		**TUI International Ltd**

JUDGMENT AND ORDER ON PRELIMINARY HEARING

HELD AT: London Central **ON: 17 December 2020**

BEFORE: Employment Judge A M Snelson (sitting alone)

On hearing the Claimant in person, Mr J Cook, counsel, on behalf of the Respondents, and Mr M Green, counsel, on behalf of the Home Office (Interested Party) the Tribunal adjudges and orders that:

JUDGMENT

(1) The complaint of unfair dismissal on 'whistle-blowing' grounds under the Employment Rights Act 1996 ('the 1996 Act'), s103A is dismissed on withdrawal.
(2) The Claimant was employed by the Respondents as a 'worker' but was not employed by them under a contract of employment.
(3) Accordingly, the complaint of unfair dismissal under the 1996 Act, s104 is dismissed for want of jurisdiction.
(4) The surviving claim for 'holiday pay' shall proceed to a hearing in accordance with the directions given in the Order below.

ORDER

(1) No later than 28 days after the date on which this Judgment and Order is sent to the parties, the Claimant shall deliver to the Respondents' representative and copy to the Tribunal a schedule containing a precise calculation of his holiday pay claim.

(2) No later than 14 days after receipt of the Claimant's schedule under para (1) above, the Respondents shall deliver to the Claimant and copy to the Tribunal a counter-schedule in response.

(3) No later than 14 days after delivery of the counter-schedule under para (2) above, the parties shall co-operate to agree a slim bundle of documents for use at the hearing of the holiday pay claim and the Respondents shall deliver copies electronically to the Claimant and the Tribunal.

(4) No later than the date of compliance with para (3) above, the parties shall deliver to the Tribunal a request, preferably in agreed terms, for a date for the hearing of the holiday pay claim and any other directions that may be necessary.

REASONS

Introduction

1 By his claim form presented at the Watford Tribunal office on 18 August 2020, the Claimant brought complaints of 'automatically' unfair dismissal and a claim for holiday pay.

2 In their response form, the Respondents resisted all claims. Their first line of defence was that the Claimant had never been employed by them, as an employee or as a 'worker'. Rather, they contended, he had supplied services to them as an independent contractor in business on his own account. Accordingly, it was said that the Tribunal had no jurisdiction to consider any of the claims.

3 The proceedings were transferred to the London Central Region because they appeared potentially to raise national security issues. At a case management hearing on 14 August 2020 I made an order under the 2013 Rules of Procedure, r94 and listed a preliminary hearing to determine whether, under the Employment Rights Act 1996 ('the 1996 Act'), the Claimant had been employed as an employee for the purposes of the s230(1), as a 'worker' for the purposes of s230(3)(b), or as a 'worker' for the purposes of s43K.

4 The Claimant subsequently withdrew his complaint of unfair dismissal on 'whistle-blowing' grounds, confining the dismissal-based claim to the 1996 Act, s104 (dismissal for asserting a statutory right). The result of this narrowing of the case was that the s43K issue fell away.

5 The preliminary hearing came before me on 17 December 2020, with one day allocated. The Claimant attended in person and the Respondents were represented by Mr Jonathan Cook, counsel. Mr Mark Green, counsel, also attended, instructed on behalf of the Home Office. He stressed that his client was entirely neutral on the matters in dispute between the parties and that he held a watching brief for the sole purpose of ensuring that national security interests were duly protected. It was agreed on all sides that the hearing should be in public. Given the sensitivity of the subject-matter the participants were asked to avoid referring to certain persons by name. Witnesses are referred to below by initials.

6 At the start of the hearing the Claimant asked me to postpone the hearing but after some discussion, in the course of which I made the point that if I was persuaded to postpone the hearing a question of costs *might* arise (I neither said nor suggested that an order for costs would be *likely*), he withdrew his application.

Employment Status – Principles

7 The Employment Rights Act 1996, s230 includes:

> **(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 a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly.**

8 In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 McKenna J offered this celebrated definition of employment, albeit in language that jars somewhat today:

> **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.**

9 An essential characteristic of any contract of employment or 'worker' contract is mutuality of obligation. This may be expressed as an obligation on the employer to provide work and a corresponding obligation on the employee or worker to accept and perform it. In *Carmichael v National Power Plc* [1999] ICR 1226 HL the claimant was engaged as a guide on a "casual as required" basis and was entirely free to accept or reject any offer of an assignment which was forthcoming. The contract between the parties set out the terms on which she would work but imposed no obligation on her to work at all. It was held not to amount to a contract of employment because of the absence of mutuality of obligation between assignments. Allowing that it was entirely possible that when working her status was that of an employee, the House of Lords was clear that during the gaps there was no employment contract.

10 Personal service is an essential feature of any employment relationship – whether employer/employee or employer/'worker'. A right in the putative employee or worker to appoint a substitute to perform the contract (or part of it) in his or her stead is generally fatal to that party's claim to hold employee or 'worker' status.

11 In *Byrne Brothers (Formwork) Ltd v Baird & others* [2002] ICR 667 the EAT addressed the definition of a 'worker' contract [1] under the 1996 Act, s230(3)(b). Giving judgment, Mr Recorder Underhill QC, as he then was, commented (at para 17):

> **(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the Applicants do not carry on a "profession" in the ordinary sense of the word; nor are Byrne Brothers their "clients".**
>
> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. …**
>
> **(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.**

[1] For clarity I will use below the expression 'limb (b) worker', which seems to have been coined by Mr Recorder Underhill.

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

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

(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see Carmichael (above), esp. per Lord Hoffmann at pp 1234-5.

12 In *Clyde & Co LLP v Bates van Winkelhof* [2014] ICR 730 SC, Lady Hale discussed the concept of a 'worker'. Her judgment includes these passages:

31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self- employed but do not fall within the second class. …

…

34. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J suggested, at para 53, that

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

35. In *James v Redcats (Brands) Ltd* [2007] ICR 1006, Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the

putative worker did not market her services at all (para 50). He also accepted, at para 48, that

> **". . . in a general sense the degree of dependence is in large part what one is seeking to identify – if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached – but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the selfemployed worker, particularly if it is a key or the only customer."**

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145, he concluded, at para 59:

> **". . . the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? . . . Its purpose is to distinguish between the concept of worker and the independent contractor who is on business in his own account, even if only in a small way."**

37. The issue came before the Court of Appeal in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2013] ICR 415 … The Hospital Medical Group argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers, the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and the Hospital Medical Group for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to the Hospital Medical Group.

38. Maurice Kay LJ pointed out (at para 18) that neither the *Cotswold* "integration" test nor the *Redcats* "dominant purpose" test purported to lay down a test of general application. In his view they were wise "not to lay down a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the EAT had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach …

39. I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case …

13 The Supreme Court decision in *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC re-stated the well-established proposition that the Tribunal must have regard to the true relationship between the parties. Where there is a contract in writing, it is usually not necessary to look any further. But if the written terms do not reflect the reality, they must be disregarded and the obligations on each side must be divined from other sources.

14 In *Secretary of State for Justice v Windle & another* [2017] ICR 83 CA, the Court of appeal was concerned with whether the absence of an umbrella contract was a factor relevant to the assessment of the putative employee's status when working. Underhill LJ commented (para 23):

> **I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.**

15 On the other hand, in *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 CA, the same judge, having referred to his own remarks in *Windle*, added this (para 145):

> **But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work.[2]**

Oral Evidence and Documents

16 I heard oral evidence from the Claimant and his supporting witness, AAA, and, on behalf of the Respondents, VJ, AM and SR. All gave evidence by means of witness statements and were cross-examined.

17 In addition to the testimony of witnesses I read the documents to which I was referred in the single-volume bundle of documents.

18 I also had the benefit of a skeleton argument produced by Mr Cook.

The Facts

Services offered by the Respondents

24. The Respondents are a company which, at all relevant times, provided[3] 'interventions' in support of a multi-agency programme run (or at least overseen) by the Home Office, designed to combat terrorism by supporting individuals judged to

[2] The decision of the Court of Appeal was later upheld by the Supreme Court.

[3] I use the past tense in this narrative only because I am concerned with the period of the Claimant's association with the Respondents.

be vulnerable to radicalisation. These 'interventions' took the form of regular confidential meetings between 'Mentors' supplied by them and the individuals concerned. Many meetings were, of necessity, held at prisons.

Engagement and induction

25. The process by which the Claimant was recruited to the role of Mentor, which followed the Respondents' standard procedure, included an interview, a police check and a Home Office check. The interview, with a director of the Respondents, took place in February 2018.

26. Between February and April 2018 the Claimant underwent some preliminary training, supplied by the Respondents. He undertook his first mentoring assignment in April 2018.

Written terms

27. The parties are agreed on the 'pleadings' that the Claimant's engagement commenced in January 2018. The copy agreement in the bundle before me ('the Agreement'), which bears the 'commencement date' 26 July 2018, is not signed but the Claimant did not assert that he was offered or accepted appointment on terms materially different from those it recites.

28. By clause 2.2 the engagement is deemed to have commenced on the 'commencement date' and continues until terminated by either party giving to the other not less than two weeks' written notice.

29. Clause 3 states that the engagement is contingent upon the 'Consultant' having met certain requirements, including obtaining Home Office approval and undergoing training to a level deemed by the Respondents as 'competent'.

30. Clause 4 is concerned with the duties of the 'Consultant'. By clause 4.1 the 'Consultant' is required, unless prevented by ill-health or accident, to devote at least four hours a week to each community-based case and one hour per week to each prison-based case. Clause 4.4 states:

> **If the Consultant is unable to provide the Services for any reason for a period of two weeks or more, the Client [ie. the Respondents], at its sole discretion, may reassign the cases to another consultant.**

By clause 4.5 it is stipulated that:

> **The Consultant shall use reasonable endeavours to ensure that he is available at all times on reasonable notice to provide such assistance or information as the Client may require.**

Clause 4.6 reads:

> **On acceptance of a case, the Consultant will provide two weeks' notice to the Client, should the Consultant be unable to continue with the case, due to any change in circumstance.**

By clause 4.7 the 'Consultant' agrees to undertake such travel as may be required for the proper performance of his duties and to accept for doing so pay at the rate of £5 per hour "inclusive of VAT where applicable."

31. Clause 5 covers reward. It prescribes (clause 5.1) an hourly rate of pay of £30 together with a flat rate of £30 for each report submitted following a meeting. Clauses 5.2 and 5.3 make provision for the delivery of weekly invoices to be delivered by the 'Consultant' detailing hours worked and any expenses claimed.

32. Clause 7, headed 'Other Activities', includes:

> **Nothing in this agreement shall prevent the Consultant from being engaged, concerned or having any financial interest in any Capacity in any other business, trade, profession or occupation during the Engagement provided that:**
>
> **(a) Such activity does not cause a breach of any of the Consultant's obligations under this agreement;**
> **(b) the Consultant shall not engage in any such activity if it relates to a business which is similar to or in any way competitive with the Business of the Client or any Group Company without the prior written consent of the Client; and**
> **(c) the Consultant shall give priority to the provision of the Services to the Client over any other business activities undertaken by the Consultant during the course of the Engagement.**

33. Clause 11 places responsibility for income tax and national insurance arrangements on the 'Consultant', declares the Agreement to be a contract for the provision of services and not a contract of employment, requires the 'Consultant' to indemnify the 'Client' for any income tax or national insurance contribution for which it may be liable and empowers the 'Client' to satisfy such indemnity by making deductions from any payment due to the 'Consultant'.

34. Clause 12 provides:

> **Whilst acting as a consultant for the Client under this agreement, the Consultant will be an independent contractor and as such will not be entitled to any pension, bonus, holiday, sickness or other fringe benefits from the Company or any Group Company. Nothing in the terms of this agreement will render the Consultant an agent, officer or employee, worker or partner of the Company or any Group Company and the Consultant will not hold himself out as such.**

35. Clause 14 extends to the Respondents the right to terminate the Agreement summarily without penalty in the event of specified serious breaches by the 'Consultant' or where certain other specified conditions are met.

36. Clause 15 (obligations on termination) includes two subparagraphs (a). The second, which immediately follows a full stop, states:

> **the Consultant shall not engage in any activity if it relates to a business which is similar to or in any way competitive with the Business of the Client or any Group Company without the prior written consent of the Client for a period of 2 years post termination or resignation (sic) …**

37. The Agreement does not provide for any form of disciplinary or grievance procedure.

Operation of the Agreement

38. The Claimant worked for the Respondents continuously throughout the period of his engagement. That was in keeping with the expectation of the parties that, once he had taken on his first mentee, he would continue to mentor him and the others assigned to him (except, no doubt when mentor or mentee was absent through sickness or on holiday) for so long as the Agreement remained on foot (although, as noted above, he was always free under clause 4.6 on two weeks' notice to cease to handle any particular case).

39. The Claimant arranged his own timetable, making his appointments directly with his mentees. He did not work uniform hours.

40. Despite the Agreement stipulating that he must hold two two-hour sessions weekly with community-based mentees, the Claimant favoured a single, four-hour session and, once Probation Service and Home Office approval was given, the Respondents permitted him to switch to that pattern.

41. The Agreement made no express stipulation as to total weekly hours. Nor did it classify the Claimant as 'full-time' or 'part-time', or attach any comparable label to him. Nonetheless, he complained before me that there came a time when he was put under pressure by the Respondents to undertake more work than he wished. I accept that there were certainly exchanges in July 2018 in which tensions over his working hours were explored. He clearly resented being asked to maintain (or return to) a full-time working week. The Respondents' Managing Director was not sympathetic, arguing that he had from the outset signalled a willingness to work full-time and the company had spent (it was said) £50,000 on 'fast-track' security checks for him. In these exchanges, she made a *moral* case for him to take on more work.[4] But she never said, or even suggested, that he had any *contractual* obligation to do so and his resistance to her pressure was consistent with his understanding, shared by her, that he was *not* subject to any such obligation.

[4] She even appealed to his conscience as a Muslim.

42. For the avoidance of doubt, I am satisfied that the parties never entered into any oral agreement purporting to vary or qualify the Agreement – in relation to working hours or any other matter.

Integration

43. The Claimant was held out as a member of the Respondents' organisation. He told me in evidence that he would introduce himself to new mentees as a 'TUI Mentor' and explain the ethos of the company to them. I am satisfied that this behaviour was inculcated in him through the Respondents' training programme.

44. Following his appointment and initial training, the Claimant was advised of the need to attend 'obligatory' training sessions on Sundays. He complied to start with but after some time chose to cease attending the sessions. He was not the only mentor to do so. None suffered any ill-effects as a consequence.

Personal service and substitution

45. As noted above, the Agreement required the Claimant to deliver mentoring services personally. It made no provision for substitution. In his evidence the Claimant told me that he never arranged for any duty of his to be passed to anyone else but that his understanding was that substitution was possible subject to (a) any replacement being selected from the cohort of mentors on the Respondents' books and (b) the arrangement being approved by the Respondents' management. I find that mentoring duties were occasionally rearranged on this basis. There was no 'right' of substitution and no perception among the mentors that such a right existed. There was only a practice, resorted to occasionally, of swapping duties consensually (as between the two mentors), subject to the approval of the Respondents' management, where circumstances made it necessary to do so.

Direction and control

46. Except in so far as training amounted to instruction, the Respondents did not instruct the Claimant as to how to perform his duties. They did press him to fulfil his obligations under the Agreement, particularly the requirement to prepare and deliver his report promptly after each meeting, which he frequently infringed.

47. The Respondents did not at any point subject the Claimant to any form of discipline, or propose or threaten to do so.

Appraisal and assessment

48. There was no system of appraisal or assessment. There was no performance management system.

Equipment

49. The Claimant used his own car to attend mentoring sessions. He was required by the Agreement to maintain appropriate insurance. He was promised, but never received, a company phone. The Agreement required him to have a dedicated phone for work purposes but he was free to provide his own and was not compelled to accept one issued by the Respondents. A business email address was allocated to him. He used his own computer to write his reports and send emails.

Pay and expenses

50. In accordance with the Agreement, the Claimant was paid against invoices presented and was reimbursed his claimable expenses.

51. For income tax and NI purposes, the Claimant was treated by the Respondents as, and, presented himself to HMRC as, self-employed.

Other benefits

52. The Claimant received no paid leave or sick pay. He was not enrolled on any pension scheme or offered the chance to participate in such a scheme. He was not accorded any other benefit of the sort normally accorded to persons employed under contracts of employment.

Analysis and Conclusions

53. In cases such as this, Tribunals are often faced with two separate questions: first, whether there was an 'umbrella contract' covering the entire period of the engagement and secondly, what the nature of the relationship was during individual assignments. Although the Agreement admitted of the possibility of periods of working being interrupted by breaks during which the 'consultant' had no cases and so was performing no work, that state of affairs did not arise in the Claimant's case. He worked under a single, continuous engagement, although it seems that the number of cases assigned to him fluctuated from time to time. Accordingly, there is no question of his status changing during the period covered by the Agreement.

54. I find that, in its essentials, the Agreement (despite its poor drafting, excessive length and inclusion of many irrelevancies) broadly reflects the bargain between the parties as to how they intended to co-operate in furtherance of their mutual interests. I further find that, in their day-to-day working relationship, they routinely performed the core terms of the Agreement and acknowledged their shared obligation to do so.

55. Generally, the Claimant sought before me to rely on the Agreement where it suited him to do so and to denounce it as a sham (my word, not his) where its terms were inconvenient to his case. Not surprisingly, Mr Cook maintained that the Agreement was a faithful record of the true bargain between the parties and studiously ignored features of their relationship which argued to the contrary. In my judgment the parties are both wrong on the issue for decision. The Claimant was not employed under a contract of employment and did not work as an independent

contractor in business on his own account. Rather, he fell into the intermediate category of a limb (b) worker.

56. The Claimant was not an employee because the association between the parties was far too loose for that to be an appropriate characterisation of their relationship. I have had regard to all the material put before me but the following factors in particular seem to be inconsistent with, or at least militate against, a finding that he worked under a contract of employment.

(1) He was free to accept or refuse work offered to him.
(2) He was free to arrange his own schedules and did so.
(3) He had no set hours.
(4) He was required to render invoices, against which he was paid.
(5) He was not subject to any appraisal or performance management system.
(6) He was not subject to any grievance or disciplinary procedure.
(7) He was not entitled to sick pay or paid leave.
(8) The parties were agreed in classifying him as self-employed.
(9) He knowingly took the benefit of the contractual income tax and NI arrangements and held himself out to HMRC as self-employed.

57. The Claimant was not in business on his own account because the association between him and the Respondents amounted to a dependant work relationship (see *James*) or, to put it another way, was of a kind entitling him to the limited protection of limb (b) status (see *Byrne Bros)*. The main factors persuading me of this view are the following.

(1) The contract was for personal service with no right of substitution. (The fact that, with managerial approval, mentors occasionally swapped duties is not legally significant.)
(2) The Respondents held mentors out as members of their organisation and required them to act as representatives of the company.
(3) Mentors were paid by the hour, rather than on a task-based measure.
(4) Mentors were entitled to recover their travel and other expenses from the Respondents.
(5) The Agreement included an exclusiveness stipulation (cl 7(b)) (release from which required the Respondents' written permission) and an obligation on mentors to give priority to work for the Respondents over other activities (clause 7(c)).
(6) The Agreement included a post-engagement restrictive covenant (cl 15(a)).
(7) The Respondents presented ongoing training as compulsory (although they were not entirely successful in compelling attendance).
(8) In accordance with the expectations of the parties, the Claimant worked continuously (albeit, it seems, at varying levels of intensity) throughout the period of his engagement (see the extract from the judgment of Underhill LJ in *Pimlico Plumbers*, cited above).

Outcome and Further Conduct

58. For the reasons stated, I am satisfied to a high standard that the Claimant was at all material times employed by the Respondents as a limb (b) worker. It follows that his complaint of unfair dismissal must be dismissed for want of jurisdiction.

59. The parties would now do well to engage with one another to see whether they can achieve a settlement of the modest holiday pay claim which survives. Calculating its value should be a matter of simple arithmetic. Failing settlement, they must comply with the directions in my order above.

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EMPLOYMENT JUDGE SNELSON
24/03/2021

Judgment entered in the Register and copies sent to the parties on 24 March 21.

For Office of the Tribunals