# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr A Cebotari**

**Respondent:** **Flexwood Windows Limited**

**Heard at:** **East London Hearing Centre**

**On** **20th January and 25th March 2021**

**Before:** **Employment Judge McLaren**

**Representation**
Claimant: In person
Respondent: Ms A Farah, Consultant

# JUDGMENT

**The judgment of the tribunal is that**

1. **The claimant is an employee and therefore can pursue a claim of unfair dismissal.**

# REASONS

Procedure

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by CVP. A face-to-face hearing was not held because it was not practicable. Both parties were able to take an active part in the proceedings and had a full opportunity to put their case.

2. I was provided with a bundle of 850 pages and heard evidence from the claimant and Mr B Green, Managing Director of the respondent. I was assisted by helpful submissions from both parties and in reaching my decision I took into account these submissions, the evidence I heard and the documents to which I was referred. I summarise my findings of facts below.

Issues

3. The claimant had brought a claim of unfair dismissal after his relationship with the respondent was ended without warning or advance notice on 31st of May 2019. He is claiming notice pay, holiday pay, arrears of pay and a redundancy payment as well as compensation for unfair dismissal

4. The issues had been agreed at a preliminary hearing as these:

   a. Was the claimant an employee of the respondent within the meaning of s230 of the Employment Rights Act 1996.

   b. Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996.

   c. Was the claimant a self-employed contractor.

   d. in addition, should the claimant be found to be an employee I would also have to consider the fairness of any dismissal.

5. This hearing was a preliminary hearing to determine the issue of status only.

Finding of facts

Background

6. The respondent is a window fitting/replacement company which is a subcontractor to other contractors within the construction industry. Its projects are mainly with the Camden Council in London and its suburbs.

7. Mr Green explained the company structure. He and his wife are the directors and there are four individuals who are directly employed by the respondent, these are his three children and one other individual who is a full-time estimator. Everybody else who provided their services to the respondent did so either as a contractor, subcontractor or as a limited company.

8. Mr Greene explained that the use of subcontractors was standard thoughout the industry. The volume of work fluctuated and so the respondent needed to flex its labour force up and down.He repeated a number of times throughout his evidence that the use of subcontractors was well known to everyone within the industry and it simply was not economic for it to operate in any other way. There was never any intention on the respondent's part to create employment relationships and Mr Greene was adamant that the claimant was fully aware of this and nothing had ever been done by the respondent that would suggest that he was there employee. I accept that Mr Greene has not knowingly entered into any worker or employment relationship with the claimant. I accept that it is the respondent's intention not to engage employees directly.

9. Mr Greene's role was to find the contracts,which were always with main contractors rather than with the property owners, get the windows made by a manufacturing sub contractor, provide the labour to fit the windows

and to manage the costs and timing of the projects. In his statement Mr Greene said that the respondent provides everything necessary, materials, plant and labour to fulfil the subcontract works. His evidence in cross-examination was slightly different. There he confirmed that in fact the plant was generally provided by the main contractor, the labour was provided by the respondent via NPS or ATL, but the respondent provided the necessary materials, that is the windows.

10. No evidence was given as to why the respondent had chosen to work with NPS, nor was any evidence given as to why they chose to end the relationship. Mr Greene did give evidence as to his reason for choosing to work with ATL. He explained that he did so because they were a reliable company who can provide the resources they needed and that he was confident they would pay their workers. ATL is also able to be confident that the respondent would pay its invoices. Mr Greene's focus was on the provision of labour and security of payment for that labour.

11. Mr Greene was a joiner by background and therefore he engaged quantity surveyors and contract managers to assist him with the details of the contracts and the oversight of the work. He explained that he had verbal agreements with both Mr Francois Swanopoel, who provided his services through FS Site Services Ltd as contracts manager, and Mr Paulius Zdanys, who provided his services through PZ Construction Design Limited, in some form of supervisory role. As these were verbal contracts there were of course no copies of any consultancy arrangements between the respondent and these individuals in the bundle. The respondent had also not provided copies of any invoices or any other evidence that these individuals were self-employed.

12. Nonetheless, I accept Mr Greene's position that he engaged both these individuals through their own limited companies and that he did not regard them or treat them as employees of the respondent. I find that throughout their interactions with the claimant they were, however, acting with the authority and on behalf of the respondent.

Use of NPS Services Ltd

13. The claimant explained that early in 2016 he was invited by one of his friends, Mr Postolachi,to join him as a site supervisor for the respondent. He explained that Mr Postolachi provided all the labour for the respondent. He believed that this individual was employed by the respondent and further the respondent employed NPS services Ltd, an accountancy firm run by his friend's wife, to run its payroll. Mr Green's evidence was to the contrary, Mr Postolachi was not directly employed. He ran NPS services and was engaged via NPS to provide labour to the respondent.

14. I find that the claimant's working relationship with the respondent was because of the introduction by his friend rather than being approached directly by the respondent.

The NPS contract

15. The claimant accepted that he signed a contract with NPS Services Ltd("NPS") on 27 January 2016 and this contract remained in place until 28th of October 2018. He was taken to a number of the clauses in the contract and accepted what they said. The introduction makes it clear that the contract is a self-employed contract. The contract specifies that the claimant was free to work for other employers if he wished to do so. It specified that there was no employment relationship. There was an express right of substitution.

16. The claimant said, however that, whatever the contract said, that was not the reality. It was his position that NPS were nothing more than a payroll company for the respondent. He explained that he had no choice but to sign the contract. While he accepted that there was no question of duress, he explained that self-employment is the common way in which the construction industry is organised. He would have had to sign a similar contract where ever he worked, so to that extent he had no choice but to accept the NPS arrangement if he wanted to work for the respondent. He understood that NPS collected the timesheets from the respondent and NPS simply dealt with the payments.

17. The claimant accepted that the contract did not have any mutuality of obligation within it. His evidence was that he had not looked for work with anybody else, why would he? There was sufficient work for him from the respondent. Similarly, his evidence was that the respondent wished him to work for them. There were no occasions when he had to turn down work from the respondent. He did not think he had a choice of going elsewhere because the respondent wanted to keep him.

18. The claimant was clear that he had never sent a substitute as he had never needed to. He was not interested in sending a substitute as he was happy to do the work himself He did not, however, think it was his obligation to provide a substitute and that the respondent would simply find somebody else if he did turn down work. He accepted that it was likely the respondent would find that other person also from NPS.

19. On its face I find that the document is designed to evidence a relationship of self-employment. There is no express contractual arrangement between the end-user, the respondent and the claimant. There is an express contractual arrangement between the claimant and NPS. I also find that as a matter of fact the claimant had never asked to send a substitute and had never turned down work or sought to be engaged by anybody else.

The use of ATL

20. Mr Greene told me that from 28 October 2018 the respondent's contract with NPS came to an end and they moved over to using ATL to provide it with resources to undertake projects. At page 215 of the bundle there was a text from "Fransua Flexwood" which was sent to the claimant. That appears to deal with the ending of the relationship with NPS and the new relationship with ATL. It specifies that there is work right now for everyone to continue with as before and "we will pay everyone that continues to

work". It makes reference to Mr Postolachi and confirmed that he will be treated fairly as the company has always done " for more than the 16 years he has been with us". The text again made reference to there being plenty of work to do right now so if you want to continue working then please do and we will pay you.

21. Paulius then joins the text chain and tells the claimant that somebody soon from ATL should contact the claimant regarding registration and "payments from Flexwood". Paulius then repeats this and asked the claimant to provide contact details and said that in a couple of hours time somebody would contact him regarding direct payments from Flexwood.

22. I was also referred to page 848 – 850 of the bundle which is an email from Paulius to ATL sending ATL the contact details of the claimant and four other individuals who are to be contacted for registration. I find that the claimant was asked by the respondent to engage with ATL and that the respondent did wish to retain his services.While Mr Greene's evidence was that the respondent had no interest in whether the claimant provided his services or not, any other individual could have been provided by ATL and that would have been acceptable, I find that the two individuals who were acting for the respondent and who are directly engaged in communicating with the claimant did seek to persuade the claimant to continue to work with them. I find that the respondent did therefore, specifically want to retain access to the claimant's labour.

<u>The ATL contract</u>

23. The bundle contained a client contract with standard terms and conditions of business between the respondent and ATL. This was not signed until 17th of January 2019, but I was told by Mr Greene that this was not unusual in this type of business.

24. Mr Greene explained that ATL were a subcontractor who undertook projects in their entirety and provided the necessary resources to complete those projects. The respondent was not involved in negotiating or agreeing the terms or the rates of operatives' pay because projects were agreed with ATL on a price basis. It was also their responsibility to rectify any issues if work was substandard.

25. The contract specified that the respondent was not obliged to offer work to ATL or accept any work offered by ATL from time to time. ATL were entitled to supply services to any third party during the term of the contract provided it did not compromise the provision of the specified services it was engaged to provide to the respondent under the terms of the contract.

26. Clause 4.3 of the document provided that the respondent agreed to substitution of individual operatives. Clause 5.2 dealt with fees and stated that subject to receipt of the invoice from ATL the respondent would pay the company "in accordance with the fees documented in the works order or as otherwise agreed between the parties plus expenses and VAT where appropriate" The contract also provided at clause 4.10 that the respondent would be responsible for health and safety training for all the operatives provided by ATL.

27. The claimant signed this self-employed contract with ATL on 30 October 2018. The claimant accepted that the contract specified that he was a self-employed contractor with no claim to any employment rights or worker rights. There was no obligation for the respondent to provide the claimant with work. There was therefore no mutuality of obligation. There was a right to provide a substitute.

28. ATL invoiced the respondent for the claimant's labour in accordance with the contractual terms. The claimant questioned how ATL were able to raise these invoices as he did not provide them with any information about the hours that he worked. He provided this information only to the respondent. He had never authorised an invoice. He accepted, however, that the contract that he signed provided the right for ATL to submit invoices on his behalf.

29. Again, he reiterated that he didn't ever have a need to send a substitute and would not do so as he was able and willing to do the work himself. The respondent wanted him to do that work and provided work for him.Again, I find that on the face of the document this is a self-employed contract.

<u>The initial assessment</u>

30. The claimant was sent some paperwork by ATL when he first joined the organisation. This included a number of documents. One of these was a form with a series of questions which was designed to determine the individual status. This is page 845. The claimant recollected that he had completed some of this documentation but thought that he had not confirmed that he was responsible for paying the substitute, incurring overheads or rectifying faulty work in his own cost. He could not have remember which parts of this form he had or had not completed. He believed that he had sent this form to ATL who had issued him with confirmation that he was not self-employed, at page 159.

31. The claimant's evidence was that ATL had then telephoned him to tell him that he was required to complete all the boxes as the respondent would not accept anybody who was not self-employed. They had done this to give themselves legal protection. If he did not do so he would not get paid. No reference to this phone call was made in his witness statement.

32. The bundle then contained at page 368, a series of text messages sent by ATL to the claimant which he was asked to confirm that nothing had changed.The claimant only responded to 1 of these when he confirms that nothing has changed. He explained that he had understood this question was about his circumstances and not his status. He has never met anybody at ATL, never had any contact with them beyond having sent them the form and the signed contract. He would not know who to contact. He raised any questions with an individual in the respondent's office.

33. Page 841 of the bundle contained a letter written on behalf of ATL dated 11 March 2020. This stated that the notification sent to the claimant on 30 October which specified that he was not self-employed was auto generated because the claimant failed to complete any part of the

questionnaire. The letter specifies that according to ATL's records they spoke to the claimant that same day to tell him the questionnaire had been left blank and from their records the claimant then completed the questionnaire and provided the information necessary for the assessment to be carried out. From the information provided to it, ATL then determined that the claimant wished to contract with their firm on a self-employed basis and the services provided and working practice was such that they could engage and pay him on a self-employed basis.

34. This account does not identify who spoke to the claimant on 30 October or what they said. The claimant is more likely to recollect what occurred then any other individual and I accept his accont of the conversation. I also accept his account that he completed the assessment form, not on the basis that it reflected what he believed to be the reality of the relationship or the working practices, but because he was of the view he would not be provided with work by the respondent unless he did so.

The claimant's application for financial assistance/tax returns

35. The claimant confirmed that he had completed two applications for a grant for self-employed individuals whose businesses were impacted by the effect of the pandemic. He confirmed that in doing so he had confirmed to HMRC that he had been self-employed for the year 2018/2019. He explained that this was not inconsistent with his current position today that he was in fact an employee. He was waiting for the outcome of this tribunal.

36. I was also taken to his tax returns which until the year 18/19 raise no question as to his status. Again the claimant explained that his 18/19 tax return was a provisional one. He would file an amended one given the outcome of this tribunal and he accepted that he may have to pay additional tax to HMRC. This was not inconsistent with his position before this tribunal.

37. I accept the claimant's position on this. I find that while he has completed tax returns and applications on the basis of being self-employed, that does not mean that he believed that to be the reality the situation, but it reflected the paperwork that he had and the way the relationship had been described to him.It is not a bar to him establishing a worker or employment realtionship.

The reality of the relationships

38. The claimant contested that, whatever the contract between himself and NPS and then ATL said, these contractual terms did not reflect the reality of the working relationship he had with the respondent. Mr Greene was equally adamant that there was no employment relationship. Such a thing was not possible, was not industry-standard and the economics made that an untenable position. It was his evidence that third parties provided the labour to the respondent under the contract, either with NPS originally and then ATL.

Personal service/mutuality of obligation.

39. It was not disputed that the claimant had never sent a substitute or sought to provide his services elswehere. Both the contract with NPS and that with ATL contained a conditional right to send a substitute, subject to the assistant having the necessary skill to perform the services in the case of NPS and for ATL they must be suitably trained.

40. I was directed by the claimant to a number of documents in the bundle that relate to a high-value contract between the respondent and the main contractor, Wates. In the planned right safety health environmental and quality document provided to Wates, (page 375) the claimant is referred to by name as the individual managing the operatives. It also references the fact that he has been with the respondent since 2016 and is the standout manager for this particular project. The Wates documentation started as a draft in July 2018 when the NPS contract was in place, but continues to January 2019 when the ATL contract in place when again the claimant is named personally in the documentation to be submitted to the end client. I have also found that the respondent was keen to retain the claimant's personal services when they switched providers from NPS to ATL.

41. I find, therefore that despite the wording on the contracts, the evidence of the documentation in the bundle shows that this was a relationship where the claimant's personal services were required by the respondent. I prefer the evidence of these documents to the assertions made by Mr Greene in his cross examination that any individual could have replaced the claimant

42. Mr Greene's witness statement said that there was no mutuality of obligation and that any time off the claimant required was dealt with through NPS and ATL and he was not obliged to inform the company that he was taking time off. The bundle contained at page 227 a text from the claimant to Francois informing him of two days holiday he had taken. There was no evidence in the bundle of holiday requests being sent to either NPS or ATL. I find therefore that the claimant did have to notify the respondent of any leave requests.

43. I find that the claimant, having signed the paperwork with NPS and then ATL was in fact expected to be available to the respondent who relied on him as a named individual in its own contracts with contractors. They provided him with work and he was expected to attend to carry out that work. There was mutuality of obligation directly between the respondent and the claimant.

Control

44. The claimant considered that he was given authority by the respondent to act on its behalf to protect it is interests and take decisions on its behalf to complete various works. He said that he was always supervised, directed and controlled by individuals who were part of the respondent's management team. He did not exercise control over the way in which he did the work, he was told what to do. He was also instructed on what material to use for installing and finishing the windows by individuals

acting for the respondent. He did not receive any instructions directly from either NPS or ATL, they came from the respondent.

45. Clause 4.4 and 4.5 of the ATL contract specify that the operatives will not be subject to any control by anyone as to the manner in which the services are provided and the respondent will not exercise supervision, directional control over the manner in which the operatives who are engaged in a self-employed capacity… carry out the services as specified in the works order.

46. Despite this contractual wording, it was accepted that the nature of the contracts meant that the respondent had to some extent tell the claimant what to do and when,but Mr Greene's evidence was the claimant was not controlled as to how to undertake those works and could choose, for example,the type of saw or hammer that he wished.There is therefore no dispute that some control was exercised by the respondent, the difference is the degree. I find that, accepting Mr Greene's evidence, it was limited to very small choices. I also find that the choice of which tool to use is on a par with an individual choosing to hand write or type notes – it does not amount to the individual having control over the fundamental aspects of the tasks .

47. It was Mr Greene's evidence that the nature of the business meant that there were always going to be communications/instructions given directly to ATL and NPS operatives to enable an assignment to be completed on time. A certain amount of day-to-day direction was therefore required. This did not, on his account amount to control by the respondent of the claimant's work.

48. The bundle contained numerous emails which the claimant relied upon to show that he gave updates and asked for instructions from individuals acting for the respondent, either Paulius or Francois. Pages 67 – 87 are examples of these. These date from 2016. On some occasions Mr Postolachi is copied into the emails in addition to a Flexwood representative and on some occasions he is not. Mr Greene gave evidence that these emails show the claimant reporting to NPS and simply informing the respondent because they also needed to know what was going on, but they did not represent taking instructions from the respondent. The email at page 106 does show Paulius giving instructions to the claimant and again at page 122 Francois gives instructions to the claimant.

49. The document at page 124 – 127, a method statement for a job with Keepmote, which is undated but appears to be in July 2017, shows Mr Postolachi as a Flexwood site manager. There is nothing in the emails referred to above which indicates whether the claimant is sending the information that is copied to Mr Postolachi because he is NPS, the organisation who has engaged him accorded the contract, or whether he sent it to him as a site manager. There is no written protocol that instructs the claimant how he is to report to NPS. On the balance of probabilities, I find that when the claimant copies in Mr Postolachi, he is doing so because he is giving information to the site manager for the respondent and is not seeking instructions from NPS.

50. After October 2018 when the contract with ATL is in place there are no emails about what is going on at the site directed to ATL. The claimant's evidence was that he wouldn't know who to speak to at ATL and had no contact with them once the pay system was set up. Mr Greene's oral evidence was vague on the point. He suggested that there would be many emails going to ATL but none were disclosed in the bundle. His written witness statement said that the times and programs for each project would be communicated through NPS and ATL and for example the respondent would tell NPS or ATL the need to get the windows by the next date and then they would organise people to go and do it. There was no confirmation that this was the case. Mr Greene said that the instructions were verbal only but there was nobody from either of these companies or indeed any other witnesses from the respondent to confirm the position.

51. Mr Greene in his oral evidence also suggested that instructions given to the claimant were in effect instructions given to ATL. There was no evidence from the claimant that he ever understood that or did pass any such instructions back to ATL to verify that he should be carrying them out. To the contrary, his evidence was that he received instructions from those authorised by the respondent and carried those out.

52. I was directed to page 150, being minutes of the meeting on 16 October 2018. The claimant was not present and it is said by Mr Greene that all the actions were for SP, that is Mr Postolachi as the contractor to action. The claimant was then invited to a further meeting to be told as a subcontractor what he needs to do on site. The meeting minutes, however, also make reference to François and Paulius taking actions. It is unclear in what capacity SP is attending. This document is followed in the bundle by an email at pages 155 to 156. This give direct instructions from François to the claimant.

53. I find that it would be customary in any organisation for there to be a hierarchical management chain. Not all individuals will always be invited to all meetings.The fact that the claimant is not at a meeting and that SP is, is not conclusive of the subcontracting relationship. I find that the claimant's work was very significantly directed by the respondent while the NPS contract was in place, and was entirely directed by the respondent when the ATL contract was in place. On the balance of probabilities I find that the respondent exercised day-to-day control over the appellant's tasks and the method with which he was to carry them out. No control was exercised to a significant extent by NPS or to any extent by ATL.

Pay rates and Payment

54. The claimant accepted that he was paid directly either by NPS or by ATL. However, it was his evidence that rate of pay was set by the respondent. I was referred to pages 199, 270, 271, 275, 276, 295, 31, 302 and 308 these are exchanges between the claimant and either Paulius or Francois in which the latter two identify the daily rates that individuals will be paid. There is no reference in these exchanges to the rates being set either by NPS or ATL. Mr Greene's witness statement says that rates of pay were determined by NPS or APL and the respondent was not privy to the details of how they engage or pay their labour. He said that the respondent was

not involved and did not negotiate payment terms for NPS labour resource. I prefer the claimant's evidence as shown in the documentation to that of Mr Greene on this point. I find that the respondent did in fact negotiate the day rates.

55. The bundle contained examples of daywork sheets describing what the claimant had done.These were completed on Flexwood headed documentation and submitted by the claimant to the respondent. See pages 415 – 420. Mr Greene explained that the respondent needed to have details of what work had been carried out and that these documents reflected that. He gave evidence that this information was sent by the respondent to either NPS or ATL at the relevant time and it was this information that those companies used to generate the invoices which were themselves sent back to the respondent for payment.

56. Mr Greene's evidence in his witness statement was that ATL were a subcontractor who undertook projects in their entirety and provided the necessary resources to complete the projects. Projects were agreed with ATL on a price basis.

57. Mr Greene told me that in fact ATL would send an invoice every week and once they had approved it, they would pay it every week. The bundle contained a number of invoices from ATL, for example page 319. These make reference to the weeks e.g. week 34 which align with the description of weeks given on the invoices ATL generated for the claimant. It appears from these invoices that ATL effectively sent the weekly pay bill to the respondent and it was paid by them. The claimant's self generating invoices also show that he was paid a sum equivalent to the administration fee that was levied by ATL. Mr Greene said the reimbursement of this admin fee could be an error, the respondent paid whatever sum was shown on the invoices.

58. There was no evidence in the bundle of the way in which the worksheet information was sent to either NPS or ATL. I conclude that not only was the information provided to the respondent for it to understand what had happened in the project, it was also provided to it because only the respondent could check that the various operatives had worked the hours they said they had done. Neither of the subcontractors NPS or ATL were in a position to verify this as they had no controls in place on site. The documentary evidence suggests that they simply took the information about the hours worked and sent that on as an overarching invoice to the respondent who in effect paid a sum equivalent to the operatives wages. This was then distributed by either NPS or ATL. To that extent the contract between the claimant and either NPS or ATL was performed in that the sums were directed to his account by these entities rather than directly from the respondent.This is how a payroll company would function.

Engaging Staff

59. Mr Greene said that either NPS or ATL were responsible for providing the labour. There was some specialist tasks that they did not have the resource to provide, such as a forklift truck driver, and on those occasions

the respondent would source these individuals themselves from other agencies.

60. The bundle contained at page 424 an invoice from apex resources which shows the respondent paying directly for the services of a handyman and six labourers. Mr Greene was unable to explain why nonspecialist labour was sourced directly by the respondent from another agency. The fact the respondent did source labour itself and not rely entirely on either NPS or ATL is also confirmed by pages 270, 271, 273 and 275 in which the respondent is asked about pay rates and to provide agency workers to the claimant and take decisions on, for example the terms of engagement of a forklift driver. I find these are consistent with the respondent in reality engaging labour itself and then directing those it wished to engage to ATL.

Integration

61. The claimant considered that he was integrated into the respondent's business, he was provided with a laptop and a company email address and his signature was site manager on behalf the respondent. See page 169. He was reimbursed travel costs directly by the respondent ,page 235.This was not disputed.

62. Mr Greene's explanation as to why the claimant was given a company email address in his witness statement was this was for GDPR reasons as they did not want information being sent regarding jobs to generic personal email address. In answer to cross examination questions he agreed that in fact this was not the reason at all, and the real reason for providing the email address was that the claimant was working on a reasonably sized site and for that reason he was given a respondent email address. I find that the claimant was in fact treated by the respondent as integrated into its business and he was authorised to use an email address and the respondent designated job title by the respondent.

63. Not only did the respondent pay for training (as specified in its contract with ATL),but Mr Greene confirmed that the respondent also paid a days wages for attendance at these courses as it was important to the respondent that labour had up to date safety training. This does not appear to be specified in the contract. I find that on a daily basis, whatever Mr Greene's intention was, the claimant was treated de facto as if he were directly engaged by the respondent. He was also held out to others in that way.

64. The claimant said that at the respondent's instruction he organised an office Christmas party for the labourers on site and this was paid for by the respondent. Mr Greene disputed this and said he had not authorised the claimant to arrange a party. This was something he had done on his own initiative. Mr Greene confirmed that he had picked up the tab, he said as a nice festive gesture. I accept Mr Greene's evidence on this point. He was very clear that he did not accept or ever intended to be the employer and I find that while he picked up the cost, he did not do so because he considered that the operatives were his responsibility.

Provision of Equipment and insurance

65. It was not disputed that the claimant was not required to obtain his own public liability insurance and activity was covered by the respondent's policy ,see p365. Mr Greene suggested that he had selected both NPS and then ATL because they had all the right insurances in place. In fact the contract between the respondent and ATL specified that it was the respondent's obligation to take out adequate insurance for all of the operatives to cover appropriate employers liability, public liability, professional indemnity and accident insurance policies.

66. It was the claimant's account that he did not provide any tools or materials, they were all provided by the respondent. Mr Greene's account was the opposite and he said that the respondent did not provide tools unless they were site specific. From time to time tools were provided at site by the end client and he gave as an example page 124 – 127 a method statement which provides that equipment, tools and plant would be supplied on site.

67. The claimant throughout his evidence has been consistent and, as he worked on site, has detailed knowledge of what actually occurred. Mr Greene, while vociferous throughout that this was not an employment relationship, was not as consistent. I prefer the claimant's account and find that, whatever the contract said, he did not provide any tools or equipment and these are provided either by the end contractor or by the respondent. This is contrary to the terms of the contract signed by the claimant and ATL which specified that the claimant would provide the equipment.

Opportunity to Profit/Loss

68. While the contract between the respondent and ATL provided that it was ATL's responsibility to rectify any substandard work Mr Greene said that this had not ever in fact occurred. There was evidence in the bundle, however, at page 109 which showed that there were events on site which caused the respondent cost. It was the claimant's evidence, supported by this email, that he did not have to make good any defective work at his own cost. When for example glass in windows was broken the respondent dealt with that.I find that he claimant did not bear any financial risk for his work. He was paid a daily rate consistently. This is contrary to the express contractual term between himself and ATL which specified that he would be required to carry out remedial work if the respondent identified that remedial work was necessary.

The respondent's description of the claimant

69. The claimant also gave evidence about the respondent's own view of his employment by reference to a number of documents.I was referred to a method statement at page 512. This was a document put together in order for the respondent to obtain a contract of some considerable value. It described the claimant as a supervisor who would manage all operatives and attend progress meetings, it explained that he had worked as a site manager/supervisor for the respondent for over four years. It referred to him having been with respondent since 2016. This confirmed at clause 3.2

that all operatives work directly for Flexwood. It states at clause 3.1 that no works are sublet by the respondent on this project.

70. Mr Greene in his evidence stated that the document at page 503 onwards, the method statement, was completed by Mr Swanapoel. While he was copied in, he was copied after the document had been sent, it should not have been completed in this way.It did not reflect the fact that there was a contract for services in place between the claimant and ATL. His evidence was this document made no difference to the contractual documents between either NPS or ATL and the claimant.

71. The claimant also referred me to a document at page 392, supervisor interview induction record, carried out by a third party company in relation to the Bourne estate contract. This identified the claimant as an employee of the respondent.

72. Despite what the method statement and this document said, Mr Greene was adamant tshat the end contractors absolutely understood that the operatives were not directly employed by the respondent but were subcontractors and this was extremely clear to everybody involved. He was unable to point to any evidence that would demonstrate this and that would contradict the documents in the bundle which present the opposite picture to the main contractors. Mr Greene in answer to cross-examination question said that everybody realised that the only competitive way to carry out the work was to use subcontractors and that this was how the industry is. I was also referred by the claimant to emails for example at page 208 when Wates, a main contractor contact the claimant directly to issue instructions on the work being carried out by the respondent.

73. I was taken to page 214, when Mr Swanepoel, describing herself as contracts manager for the respondent, provides a letter confirming that an individual was employed by the respondent.In this letter he refers to NPS and ATL as the respondent's payroll companies.

74. Mr Greene emphasised how shocked he was to discover that Francois had written such a letter and was very clear that he had no authority to do so, nor did he have authority to misrepresent the position in the documents at page 503. I note that the contract with ATL services is signed on behalf the respondent by Mr Swanepoel.I have already found that Mr Swanepoel had authority to act on behalf the respondent and was able to enter into contracts on its behalf. Mr Greene described both Francois and Paulius as highly skilled professionals and it is clear that he relied upon them to act on the respondent's behalf. He had delegated authority to them to do so.

75. I find that it is inherently unlikely that a contract misdescribing the claimant's relationship would be sent out without the respondent's knowledge and in any event I find that it was sent out with the respondent's authority.

Relevant Law

76. The issue to be determined was the claimant's status , was he either an employee or a worker or neither as defined by s 230(1) and s 230(3) of ERA1996.

Can a relationship be impled with the end user ?

77. I was provided with copies of three authorities,James v London Borough Of Greenwich [2007] IRLR 168 , Smith v Carillion(JM) Limited IRLR 344 and Tilson v Alstom Transport 2011 IRLR 169, which considered the position where there was a contract with an agency and whether a contract of emplyment could be implied with the end user

78. The Court of Appeal confirmed in the first that a tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation. There will be no such necessity where agency arrangements are genuine and accurately represent the relationship between the parties. The Court stated that an employment contract should not be implied simply because the worker has been engaged with one client for a significant period of time. In each case, the question 'must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements'.

79. The court approved the EAT guidance given to assist Tribunals in deciding whether to imply an employment contract with the end user which is as follows:

- *"the key issue is whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end-user*
- *the key feature in agency arrangements is not just the fact that the end-user is not paying the wages, but that it cannot insist on the agency providing the particular worker at all*
- *it will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be inconsistent with the relationship*
- *it will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed*

- *the mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two"*

- *it will be more readily open to a tribunal to imply a contract where the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user.*

80. The second case to which I was referred, Smith v Carillion arose in the context of TUPE and whether the employment of an agency worker would transfer following the transfer of the end users organistion.The Court of Appeal held that even if the agency worker is integrated into the business of the end-user and is subject to the end-user's direction and control, this will not justify the 'necessary' implication of an employment contract.

> " The tribunal had not misdirected itself on the question of whether there had been a contract between the agency worker and the company. The facts before the employment tribunal included his admission that he was an "agency worker". Moreover, he had conceded that there was no express contract between him and the company and that in accordance with the recognised authorities, he would have to show that a contract could be implied on the principle of necessity. In those circumstances it was not surprising that the employment tribunal treated that as its starting point and it could not be criticised for doing so. It was not unusual for an agency worker to be integrated into the business of the end-user. It would often be impossible for the worker to give satisfactory service without being integrated into the business.

81. The Court of Appeal confirmed in Tilson v Alstom Transport 2011 IRLR 169, CA, that whether a contract should be implied is ultimately a matter of law and involves an objective analysis of all the relevant circumstances.The judgment specified

> "The mere fact that there was a significant degree of integration of a worker into an organisation was not at all inconsistent with the existence of an agency relationship in which there was no contract between worker and end user. In most cases, it would be quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business to a degree and that would inevitably involve control over what was done and, to an extent, the manner in which it was done."

82. The parties' understanding that there is no such contract in place explaining the terms of their relationship, and their inability to reach an agreement on the terms such a contract should contain, are 'extremely powerful factors' militating against any such implication.

83. I also considered Autoclenz Ltd v Belcher and ors 2011 ICR 1157. This is only relevant if it is neccesary to imply a contract with the respondent.If the claimant can establish that he meets this high hurdle, then Autoclenz allows employment tribunals to disregard contrary contractual provisions if they find the true nature of a working relationship is one of worker/employee.

How is a worker or employee relationship determined ?

84. The courts and tribunals have developed a number of tests over the years aimed at helping them to identify a contract of service and to distinguish between employees and the self-employed. The approach in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. was confirmed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, where Lord Clarke called it the 'the classic description of a contract of employment'. In essence, the Ready Mixed formulation of the multiple test can be boiled down to three questions:

    i. did the worker agree to provide his or her own work and skill in return for remuneration?

    ii. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

    iii. were the other provisions of the contract consistent with its being a contract of service?

85. Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements, control,personal performance, and mutuality of obligation and control.

86. A worker is defined under section 230(3) of ERA 1996 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 is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

87. The test of whether an individual is "carrying on a business undertaking" and whether the "employer" is a "customer" of that business is similar to the test of whether a contract is a contract of service or a contract for services. Relevant factors could include: the degree of control exercised by the "employer"; the exclusivity of the arrangement; its typical duration; the method of payment; which party supplied the equipment used; the level of risk undertaken by the worker; and HMRC's view of the status of the individual. Mutuality of obligation is also relevant to the consideration of worker status.

Conclusion

88. Having made the findings of fact set out above I have then considered the relevant law and applied that to those findings. My starting point must be the contract that existed between the respondent and NPS and ATL. To imply any contract between the claimant and the respondent it must be necessary to do so. A contract of service should not be implied where the contractual arrangements in place adequately explain the working relationship.

89. While I accept that Mr Greene is giving an honest account of how he intends the relationship to work and how he believes it is supposed to work, I have found that those responsible for running the day-to-day operation do not act in accordance with the contractual terms. From Mr Greene's evidence it appears that his main motivation in using subcontractors is because that is the only economic basis on which to run the projects. In doing so he is adopting an industry practice.

90. Nonetheless, I have made findings of fact that many aspects of the relationship were contrary to the express contractual arrangements between ATL, NPS or both and the respondent. I have found that there was a requirement for the claimant to provide his services personally. I have found that the respondent ensured that the claimant was directed to ATL to continue to provide his services to the respondent and that the respondent also sourced other individuals who were directed to ATL. The claimant was expected to attend jobs personally and was indeed written into key core contractor contracts. I conclude that the right of substitution was a sham. I also conclude from these facts that there was mutuality of obligation, the respondent would not have been satisfied with anybody else turning up but expected the claimant to do so.

91. I have found that, again contrary to the express terms of the contract,the respondent exercised full control over the claimant, determining when he did the work, where he did the work, how he did the work and the tools he used. Again, contrary to the contractual terms I have found that the claimant was provided with tools and took instructions from the respondent. He incurred no financial risk for faulty work.

92. He was held out by the respondent as an employee and was integrated into their business to that extent. The integration was significant and that he was held out to core contractors as an employee of the business.

93. For these reasons, I conclude that it is necessary to imply a contract with the end-user. The contractual arrangeents in place do not describe the relationship.The clauses in the contract which referred to mutuality of obligation, personal service, the right to substitute, indemnification and control do not reflect the reality the situation. Further, while I accept that integration on its own is not sufficient for it to be necessary to imply a contract between the claimant and the respondent, on these facts the integration is very significant and, in addition to the other factors I have considered, does on this occasion also indicate that it is necessary to imply a contract with the end-user.

94. Having found that it is necessary to imply a contract with the end-user, I must then consider the nature of that implied contractual relationship. Again I have found that this is a contract of personal service, there was mutual obligation, control was exercised over the claimant, he was provided with all the tools necessary to do his work, he was held harmless from any loss his actions caused and he was integrated into the business. For those reasons I conclude that he was in fact an employee.

**Employment Judge McLaren**
**Date: 7 April 2021**