EMPLOYMENT TRIBUNALS

Claimant: Mr R Khan

Respondent: Leicester Tissue Company Ltd

Heard: Remotely, by Cloud Video Platform
On: 11 September 2020

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: In person
Respondent: Mr S Merriman (HR Consultant)

JUDGMENT

1. The Claimant did not enter into a contract of employment with the Respondent.

2. His complaint of breach of contract therefore fails and is dismissed.

REASONS

Complaint

1. The Claimant's complaint of unfair dismissal having previously been dismissed because the Tribunal had no jurisdiction to hear it due to his having less than two years' service, the single complaint to be considered at this hearing was one of breach of contract.

Issues

2. This case was essentially concerned with the termination of the Claimant's contract with the Respondent prior to his starting work. The issues for me to determine, as agreed with the parties at the outset, were as follows:

2.1. whether the Claimant entered into a contract of employment with the Respondent – the Claimant says that he was offered and accepted employment as the Respondent's operations director; the Respondent says that whilst the parties entered into a contract, it was not a contract of employment;

2.2. if there was a contract of employment between the parties, the next issue was whether the Tribunal had jurisdiction to hear the complaint, namely whether the claim arose or was outstanding on termination of the Claimant's employment;

2.3. if it was, the third issue was what notice the Claimant was entitled to receive from the Respondent, it not being argued that there were grounds (such as gross misconduct) for termination without notice;

2.4. the final issue was what compensation should be awarded in the event of the Claimant's complaint succeeding, taking into account his obligation to mitigate any losses.

Procedural matters

3. I should say a little about the conduct of the hearing first.

4. It was conducted by Cloud Video Platform and was scheduled for 3 hours, starting at 10.00 am. There was a slight delay in starting, principally because of technical problems on my part, although there were no material technical difficulties thereafter. We had a short break after an hour or so, and then at around 12.15 pm, the Claimant requested a longer break, which I was happy to provide, until 1.00 pm. The evidence and submissions concluded at around 2.00 pm. After deliberation and delivery of judgment, and some brief discussion with the parties thereafter, the hearing concluded at around 3.50 pm. The Claimant requested written reasons.

5. Just before the longer break, the Claimant expressed some concern about the conduct of the hearing. He said he felt attacked because Mr Merriman was questioning him and trying to point out inconsistencies in his evidence, when in his view it should be the Respondent that was giving answers to his questions. He said that he was very tired and had found the morning stressful. That is why I decided that we should have a 45-minute break. The Claimant also said that he was very disappointed with how the hearing had gone, clarifying that he was referring to Mr Merriman who he said was trying to catch him out. He confirmed he had no concerns about the conduct of proceedings on my part. I record that I found nothing in Mr Merriman's questions or manner that gave me the slightest concern or reason to interject. He was polite and professional throughout and his questions were all relevant to the issues and appropriately put. I explained to the Claimant that it was in the nature of a tribunal hearing for one party to put their case to the other and challenge the other's evidence. He confirmed after the break that he was feeling refreshed.

6. I should also mention at this juncture that early on in his evidence the Claimant made an application for an order for disclosure of certain documents by a third-party recruitment consultant, Barnaby Stewart. I will deal with that application in the course of my analysis below. I record here that what the Claimant sought was disclosure of any documents provided by the Respondent to Barnaby Stewart

relating to the recruitment of an operations director, and any correspondence between them between 15 August and 30 September 2019.

7. The application was made on the basis that the Claimant believed such documents would show the role he applied for with the Respondent, the salary attached to it and that the Respondent had changed its mind from originally wanting to employ someone to deciding to engage someone on an independent contractor basis. The Claimant sought to argue that he had made a written application to the Tribunal to this effect. I reviewed the emails he referred to, in which he copied to the Tribunal some email exchanges with the Respondent on 15 July 2020 and some exchanges between him and Barnaby Stewart in June 2020. Nothing in the email trails went close to making an application for disclosure.

Facts

8. Mr Merriman had prepared a bundle of documents, a copy of which had been sent to the Claimant and to the Tribunal. Page references below are references to that bundle. Although there was a clear Order for witness statements to be exchanged, the Claimant had not prepared one. He said that he had been unwell and had no legal support. He said that he was willing to clarify anything necessary and that the facts would speak for themselves. He gave extensive oral evidence under oath accordingly, swearing on his personal copy of the Quran.

9. The Respondent produced a very short witness statement prepared by Mr Ayaz Tejani, who is its managing director. Mr Tejani was not present to give evidence. Mr Merriman explain that this was because the Respondent's case rested on the documentary evidence speaking for itself. I explained to the parties that whilst it is entirely a matter for a party how it presents its case, whilst I would take account of Mr Tejani's statement, it would carry much less weight than would normally be the case because he was not present to have his evidence tested.

10. Both parties had opportunity to make closing submissions.

11. On the basis of the above, I make the following findings of fact, which rest either on uncontested evidence or, where there is an evidential conflict, on the balance of probabilities.

12. The Respondent is a manufacturer for various leading retailers. It is based in Leicester. The Claimant's Claim Form said almost nothing about the circumstances he alleges gave rise to his complaint. More detail of his case was recorded by Employment Judge Butler in his record of a Closed Telephone Preliminary Hearing which took place on 2 June 2020. He recorded (pages 2 to 5):

"The Claimant claims he was offered permanent employment at a senior production level by the Respondent after two interviews arranged by a recruitment consultant. He then met the owner of the Respondent who suggested he be engaged as a subcontractor which would be more financially beneficial for him. He initially told me he agreed to this and said he understood it would be a temporary arrangement after which he would become a permanent employee if both parties were happy to do so. He then said he never agreed to the self-employed arrangement as the agreement

sent to him contained a notice provision of only one week which he could not agree to".

13. The Claimant agreed that the record recited above is an accurate summary of what he told Employment Judge Butler.

14. It is agreed that the Respondent engaged recruitment consultants, Barnaby Stewart, following the departure of its operations director. It is also accepted that initially the Respondent was looking to recruit on the basis that the successful candidate would enter into a contract of employment.

15. Barnaby Stewart contacted the Claimant and set up two interviews for him. The Claimant says that Barnaby Stewart did not send him anything in writing about the role, other than the interview details, though it is his belief that the Respondent would have sent them an initial job description for the role. The bundle did not include any correspondence between the Respondent and Barnaby Stewart scoping the Respondent's initial instructions nor Barnaby Stewart's correspondence with the Claimant setting up the interviews. Any documents in the former category were the subject of the Claimant's application for a disclosure order referred to above.

16. The Claimant attended two interviews, the first with Mr. Tejani and Mr Tejani's father around the third week of September 2019, and a second interview with Mr Tejani only. The Claimant says this took place on or around 10 October 2019.

17. The Claimant says that about a week after the second interview, he was telephoned by Mr Tejani and verbally offered a "permanent role", by which the Claimant means employment, as operations director. The Claimant says that he was told by Mr Tejani that his start date could not be confirmed at that point, and would not be capable of confirmation until the end of December 2019, but the Claimant could look for a flat in Leicester. The Claimant says he was promised a salary of £56,000, a contribution towards accommodation costs, and a bonus. He says that nothing was said about a subcontractor arrangement.

18. The Claimant handed in his notice to his then employer on or around 30 November 2019. He was working either for, or at, Coca-Cola, earning a salary of £56,000.

19. The Claimant says that in mid-December 2019, Mr Tejani spoke with him and suggested that he start work in the new year. He says that he informed Barnaby Stewart that unless he got proper documentation, he would not be taking the opportunity any further. The Claimant says that as a result he was told by Mr Tejani that the then HR manager, Krishna Gohill, would sort out the necessary documentation. I pause to observe that this contrasts with what the Claimant said later in his evidence, when he told me that Mr Tejani handled everything personally, and that HR was barely involved.

20. As I have already noted, the Respondent's case is that the parties entered into a self-employed arrangement, under what it calls a sub-contract. The Claimant accepts that this was discussed, he says on the basis that it would produce a cost saving for the Respondent. He initially told me that it was first raised in early January 2020, at a meeting he attended with Mr Tejani and the Respondent's

accountant who was to arrange to set the Claimant up as a consultant. He was specific about this, saying it was around 7 January. The Claimant then told me that this meeting took place in late October 2019. He said that following this meeting which, whenever it was, took place at the Respondent's premises, a list of 24 points was put together setting out the tasks the Claimant would carry out for the Respondent. The Claimant's case was that he took the lead in preparing that list.

21. The list appears in a typed document at page 46. I note in particular the following:

21.1. The document is headed, "Subcontract Agreement". There is no mention of employment, or use of either "employer" or "employee".

21.2. The Respondent is described as the "Contractor" and the Claimant as the "Subcontractor", with the possibility referred to in brackets after his name that he might provide his work through a company, though it is not suggested this particular detail was taken further.

21.3. It states that the Claimant would "(on a non-exclusive basis) provide the Contractor with the following services: //Carry out the role of Production Consultant".

21..4 Under the heading, "Fees", there is a statement that the Claimant would submit a weekly bill to the Respondent and be paid a fee of "£1090.38 per week (based on £56,700 divided by 52 weeks)". I accept the Claimant's evidence that the figure of £56,700 was reached on the basis that it was a slight increase on the Claimant's salary with his then employer.

21.5. Under the heading "Operational matters", there is then the list of 24 points referred to above. These include work relating to health and safety; ensuring equipment was operating appropriately; ensuring optimal output; ensuring stock counts were done; "authorising holidays for the subordinates"; working "closely with HR on ensuring culture and disciplinaries are enforced where necessary"; and preparing reports for the Respondent's board. The Claimant says that the list typifies what an operations director would do.

22. The Claimant agreed with Mr Merriman's proposition that it was clear that what is set out at page 46 did not set out terms of employment. There is a second page to the document, page 47, which for reasons which will shortly become apparent, I now deal with separately by noting the following:

22.1. Under the heading "Termination", page 47 provides, "This agreement may be terminated by either party giving one week's notice in writing".

22.2. Under the heading, "Compliance with laws and regulation", it provides "The Subcontractor will carry out all work in compliance with all laws, policies and operating standards as may from time to time be specified by law or any relevant professional or other statutory body or bodies".

22.3. It then sets out a provision by which the Claimant agrees not to solicit business from the Respondent's customers either during the life of the contract or afterwards.

22.4. Finally, under the heading, “General”, it states, “Nothing in this agreement shall be construed as an undertaking by the Contractor to supply the Subcontractor with a minimum level of work and nothing in this agreement shall be construed as an undertaking by the Subcontractor to be available to work on any particular day or days”.

23. At the foot of page 47, the document is signed by the Respondent against the date 7 October 2019 and just above that there is a space for signature by the Claimant, a signature is entered, and the date is entered as 11 October 2019.

24. The Claimant’s case before me was that this second page, including the provision as to notice, was added at a later date by Mr Tejani without his knowledge, their having agreed the contents of page 46, or at least the list of “Operational matters”. I note that this expressly contradicts what the Claimant told Employment Judge Butler in June, namely that an agreement was sent to him which included a one-week notice period and that this was the reason he could not sign it. The Claimant agreed in answer to my question that this was an inconsistency in his evidence. He nevertheless maintained that he did not sign the document including page 47. He did not, in my view, provide an entirely clear account as to whether the signature on page 47 was his or not; I believe his evidence to be that what appeared on that page was an attempt to copy it.

25. At page 45 there is an e-mail from Ms Gohill to the Claimant dated 7 October 2019. It was copied to Mr Tejani, was headed “Subcontract agreement”, and read, “Dear Rab, //As per your discussion with Ayaz, please find attached a subcontract agreement. //Could you please sign and return a copy”. The Claimant accepts that he received this e-mail (I will come back to what was attached to it), but was unable to explain how this tallies with his evidence that the earliest point at which the Respondent raised the idea of a subcontract was at the end of October 2019, after (he says) Mr Tejani had verbally offered him an employment contract.

26. At page 44 there is an exchange of emails between Ms Gohill and the Claimant dated 28 October 2019. Miss Gohill wrote, “Dear Rab, //Thank you for promptly signing and returning the subcontract agreement. //We are now in receipt of the signed document and look forward to you starting in February”. The Claimant replied, “Krishna, “Many thanks for the update. I am really looking forward to meeting with all my new colleagues in Feb. //Thanks. //Rab”. There had clearly been an e-mail from the Claimant sending the Respondent a signed document of some description, though that email was not in the bundle. The Respondent says in its Response that a signed document was provided by the Claimant on 11 October 2019. I have no reason to doubt that was the case and indeed the Claimant accepted it. The Claimant initially stated that what he was sent did not include a provision for one week’s notice of termination. He eventually accepted however that both pages 46 and 47 had been sent to him with the e-mail of 7 October from Ms Gohill.

27. As to what he signed, the Claimant told me that the only document he signed was the list of “Operational matters”, which he and Mr Tejani signed at the Respondent’s site. In terms of timing, that is clearly at odds with the email

correspondence. He nevertheless maintained that the document sent to him by Ms Gohill had been tampered with, by which he meant changed compared to what he had agreed and signed with Mr Tejani at the Respondent's premises, in other words part of what is now page 46 and all of page 47 had been doctored by Mr Tejani. He did not e-mail or otherwise contact Ms Gohill or Mr Tejani to raise this point. The Claimant also informed me that, notwithstanding the email exchange of 28 October, even what he did sign was not a formal contract, just a draft.

28. The Claimant also said during his evidence that he discussed with Mr Tejani that he would only become an employee of the Respondent from April 2020, on the basis that he would be a consultant initially. He said that initially he had not seen anything negative in that, but had later decided he would prefer to be employed. As already mentioned, the Claimant initially said that this discussion took place in January 2020, but he then said it was in late October 2019. He says that he told Mr Tejani by text on 15 November 2019 that he wanted a permanent role, by which he meant employment, and that Mr Tejani said that this was fine. I have not seen a copy of that text, which was not in the bundle. In another part of his oral evidence, the Claimant said that when he told Mr Tejani that he wanted an employed role, Mr Tejani pulled the plug on the arrangements between them altogether.

29. It was on or around 16 January 2020 that the Respondent informed the Claimant, via Barnaby Stewart, that it did not wish to proceed to work with the Claimant. The Respondent says in its Response that "the role was not necessary for [its] business at that moment in time".

Law

30. Having the status of employee is clearly a prerequisite to being able to bring a complaint of breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). One must look for these purposes to the Employment Tribunals Act 1996 ("ETA") which gave rise to the Order. Section 3(2) permitted the making of the Order in relation to "*a claim for damages for breach of a contract of employment or other contract connected with employment*". Section 42(1) of the ETA provides:

> *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,*
>
> *"employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment,*
>
> *"employer", in relation to an employee, means a person by whom the employee is (or, where the employment has ceased, was) employed.*

31. In the light of these definitions, reflecting precisely those in the Employment Rights Act 1996 ("ERA"), it is appropriate to look at the case law interpreting the meaning of those definitions under the ERA.

32. The classic formulation of the test to apply when determining employment status is that set out in **Ready Mixed Concrete (South East) Limited v Minister of**

Pensions and National Insurance [1968] 2 QB 497. The first requirement is that the individual agrees to carry out work for the putative employer in return for pay, in other words an obligation of personal service. The second requirement is that the individual agrees, expressly or impliedly, that in performing that work the putative employer will exercise sufficient control over the individual so as to be his "master". The third requirement is that the other features of the contract are consistent with it being a contract of employment.

33. No issue relating to personal service arises in this case. As to control, this was elaborated by the High Court in **Ready Mixed Concrete** as follows:

> "*Control includes the power to decide 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.*
>
> > *[quoting another authority] 'what matters is lawful authority to command so far as there is scope for it and there must always be some room for it, if only in incidental or collateral matters'.*
>
> *To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication*".

34. It is plain, not only from that decision, but also from the way in which many contracts of employment operate, that some autonomy on the part of the individual is not inconsistent with the requirement for control.

35. As to matters which may be inconsistent with a contract of employment, it is not possible or necessarily helpful to provide a full list, but typically an individual's provision of his own equipment might be an indication that the relationship is not one of employment, as is likely to be the fact that he takes some financial risk in the work that he carries out for the putative employer.

36. To the essential requirements set out above, subsequent case law has added the importance of an irreducible minimum of obligation, often described as mutuality of obligations (**Carmichael v National Power Plc [1999] ICR 1226**). This is important both when an individual is working but also during any time in between those periods of work. As the Employment Appeal Tribunal ("EAT") made clear very recently in **Varnish v British Cycling Federation [2020] UKEAT 0022/20/LA V**, the question of mutuality of obligation is first a question about whether there is a contract in the first place. Citing **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181**, the EAT highlighted that the mutuality of obligation that is necessary in an employment contract is the requirement on the part of the putative employee to undertake some minimum or reasonable amount of work and some obligation on the part of the putative employer to pay for it.

37. The various tests are not a checklist to be ticked off. A tribunal must stand back and look at the whole picture. The starting point for constructing that picture is the

written agreement between the parties, if there is one and if it is intended to be an exclusive record of the arrangements between them. As made clear in **Carmichael**, where there is no written contract, or where the contract is not the exclusive record of the arrangements, the agreement between the parties is to be objectively ascertained from oral exchanges at the outset of the relationship and the parties' conduct as time went on. Subsequent case law has established that a tribunal is also entitled to go behind a written agreement if it is established that a term does not in fact represent the true arrangement between the parties, namely that it is a sham (**Autoclenz Ltd v Belcher [2011] IRLR 820**).

38. I need only briefly refer to the Order. Amongst other requirements for a claim to be brought before an employment tribunal for breach of contract, the claim must arise or be outstanding on the termination of the employee's employment. It was established in **Sarker v South Tees Acute Hospitals NHS Trust [1997] IRLR 328** that this requirement is satisfied where an employment contract has been entered into and then terminated, even where the employee has not started work.

39. Finally, I also refer briefly to rule 31 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). This rule provides that "*The Tribunal may order a person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court …*". A tribunal would need to be satisfied that it was both appropriate and necessary to the proper determination of the case before making any such order.

Analysis

40. My first task is to establish what took place given the conflicts of evidence outlined in my findings of fact. I found myself in an unusual position in assessing the evidence in this case. On the one hand, I had no tested witness evidence from the Respondent, in view of the fact that Mr Tejani was not present to be questioned about his statement. As already indicated, I do not criticise the Respondent in that regard, as it is of course entirely its choice as to how it seeks to defend the claim. I nevertheless attach little weight to Mr Tejani's statement, though I note it is essentially consistent with the documentary record as I have described it. On the other hand, I heard extensive oral evidence from the Claimant, but as I have already indicated, his testimony was found wanting in several respects. It was both unclear and inconsistent, and did not tally with the (admittedly limited) documentary record, in at least the following ways, which I list in no particular order:

40.1. The Claimant's initial oral evidence before me, to the effect that the document he was sent by Ms Gohill did not include provision for one week's notice of termination, was inconsistent with what he told Employment Judge Butler and with his later oral evidence on this point.

40.2. Having first said that he only received page 46 from Ms Gohill on 7 October 2019, under appropriate questioning from Mr Merriman he accepted that he received page 47 as well, though he was insistent that the latter in particular had been tampered with by Mr Tejani.

40.3. He initially said that he and Mr Tejani first discussed a subcontract arrangement in January 2020, being quite specific about the date, then later changed that evidence to say that it was in late October 2019.

40.4. His oral evidence that he received a verbal offer of employment after his second interview and that nothing was said at that point about a subcontractor arrangement is both contrary to what told Employment Judge Butler and inconsistent with the fact that he was sent an email as early as 7 October 2019 attaching a "subcontract agreement".

40.5. His evidence that the only document he signed was at the Respondent's site is inconsistent with the email exchanges with Ms Gohill.

40.6. He was unable to offer any explanation as to why he failed to raise with either Mr Tejani or Ms Gohill his conclusion that what was sent to him on 7 October had been tampered with.

40.7. He gave inconsistent evidence as to who at the Respondent was primarily responsible for dealing with him, specifically the extent to which Ms Gohill was involved.

40.8. His evidence as to Mr Tejani's reaction to his indication that he preferred an employment arrangement was also changed. He first said that Mr Tejani said it was fine and then said that it in fact led Mr Tejani to terminate the relationship.

41. The inconsistencies in, and the lack of clarity and conviction regarding, key points of the Claimant's evidence, in particular those summarised above, leads me to conclude, notwithstanding the limited witness evidence from the Respondent, that I cannot accept the Claimant's account of events. I therefore conclude that the key events were as follows:

41.1. The Respondent initially sought to employ an operations director.

41.2. The Claimant was identified by Barnaby Stewart, who put him forward for interview.

41.3. The Claimant was interviewed by Mr Tejani in September 2019, and again on or before 7 October 2019, hence Ms Gohill's e-mail of the same date.

41.4. Notwithstanding the Respondent's initial intentions, Mr Tejani did not verbally offer the Claimant an employment contract either at the second interview or by telephone later – that is wholly inconsistent with the documentary record, limited as it may be.

41.5. Rather, at that early stage of their discussions, a subcontract arrangement which would operate at least until the end of March 2020, was discussed between the parties. I conclude that this was discussed at the second interview, and included the list of operational matters which the Claimant played a significant role in determining.

41.6. On 7 October 2019 Ms Gohill sent the e-mail at page 45, with both pages 46 and 47 attached. It was signed for and on behalf of the Respondent.

41.7. The Claimant returned that document duly signed on 11 October 2019 – page 44 clearly shows that a signed document was returned and the Claimant accepts that he returned something on that date.

41.8. There was delay in determining the date on which the Claimant would first work for the Respondent.

41.9. Apparently because of financial concerns on Mr Tejani's part, in January 2020 the Respondent terminated the arrangement.

42. That analysis is consistent with the first part of what the Claimant told Employment Judge Butler as recorded above. It is also consistent with the email exchanges and with the fact that the only written record of any agreement between the parties is that at pages 46 and 47. It will be evident therefore that I conclude that the agreement between the parties was that set out at pages 46 and 47. The next question is whether that agreement was a contract of employment.

43. As already stated, my focus should be on the terms of the written arrangement, if I am satisfied that it fully and properly represents the relationship between the parties. I am satisfied that it does, on the limited evidence as I have analysed it. In any event, I do not have any evidence as to the actual conduct of the relationship between the parties to assist me, because the Claimant did not carry out any work for the Respondent, and as I have already made clear I regard the Claimant's evidence as to any oral exchanges between the parties, prior to the signing of that agreement, to be unreliable.

44. Further, I see no basis on which I could properly conclude that the arrangement between the parties was a sham, in other words that it did not properly represent what they had agreed. Mr Tejani clearly preferred a self-employed arrangement as a means of saving cost, but that of itself is not improper and indeed the Claimant himself saw no difficulty with it in principle. Whilst the Claimant maintained his case that he did not sign the document now represented by pages 46 and 47 and that several aspects of it were interposed by Mr Tejani, I have rejected his case in that regard for the reasons already given. As I have made clear, I am satisfied that pages 46 and 47 represent what the parties agreed. I have seen nothing to suggest that this document did not properly reflect that agreement and how they intended the relationship between them to operate.

45. What therefore of the terms of the agreement? I will deal with the material terms in turn, applying the key litmus tests I have identified from the case law (with the exception of the need for personal service which is not disputed in this case) and then stand back to take the overall view that is necessary to properly assess its status.

46. I accept, as the Claimant says, that the list of "Operational matters" could be read as a description of the role of an operations director and therefore as a list of employment duties, though broadly speaking it could also be read as a list of tasks that could properly be carried out by a self-employed "production consultant". There are one or two matters that are more suggestive of employment, such as approving annual leave for more junior staff and enforcing disciplinary matters, but they are

only small parts of a very long list. The crucial point is that neither this list, nor any other part of the contract, deals fully with the extent of the control the Respondent would have exercised over the Claimant, if any. As I am enjoined to do by the decision in **Ready Mixed Concrete** therefore, I must seek to assess by implication whether the level of control was sufficient to make the Respondent the Claimant's "master".

47. It seems plain from the nature of the work the Claimant was to do that it was intended he would exercise a high degree of autonomy, though of course, that would have been the case for an employed operations director, as well as for a production consultant and so of itself this does not take the analysis much further forward. As to place of work, I note that there is no suggestion the Claimant would have been able to perform the work elsewhere than at the Respondent's premises in Leicester, at least to a large degree. There could therefore be said to be control by the Respondent of the place where the work was undertaken, though in this particular industrial context that is hardly surprising and again therefore does not particularly assist with the analysis.

48. More helpful in analysing the extent of the Respondent's control is the fact that the Claimant took the lead in establishing the tasks that he would perform. That is an indication that what was to be done, and doubtless to a large extent the way in which it should be done, was set out in the contract on the basis of what he thought was necessary, of course with the Respondent's agreement, but at his instigation. Further, the agreement provided, under the heading "General", that the Claimant was not required to be available to work on any particular day or days. I infer on the basis of this provision that whilst no doubt the parties would have agreed when the Claimant would carry out work, the Respondent had only limited control as to the times when he would do so.

49. I also note the obligation on the Claimant to comply with certain laws and regulations. I do not say that this is necessarily something that could not properly be included in an employment contract, particularly for someone at a senior level. It is nevertheless more the sort of provision one would expect to read in an independent contractor agreement and is a reflection of the high level of personal responsibility being placed on the Claimant.

50. In summary, for the reasons set out at paragraphs 46 to 49, based on the evidence that was placed before me, I am not satisfied that the contract between the parties can be said to have included a sufficient degree of control by the Respondent to render it a contract of employment.

51. That would be sufficient to dispose of the matter, but as I did in my oral reasons it is appropriate for me to go on to consider the other tests that are typically applied to determine employment status. I turn next therefore to consider whether the other features of the contract were consistent with it being one of employment or not. The picture is somewhat mixed:

51.1. I note that essentially the Claimant's weekly fee was worked out on the basis of an annual sum not dissimilar to the salary he had earned in his previous employment. That is potentially reminiscent of an employment arrangement, but I

should immediately add that the contract clearly provided that the weekly fee would only be paid when the Claimant had actually carried out work, based on which he would send a bill to the Respondent against which payment would be made, which is more reflective of self-employment.

51.2. There is then the contract's description of itself and the terminology used. Although of course the label attached to an agreement by the parties is by no means conclusive, I note that it is said to be a relationship between a contractor and a sub-contractor, and makes no mention of "employment" or related terms. I also note that the Claimant himself accepted that the document, even on the basis of his case that he only agreed to the list of "Operational matters", did not contain terms of employment. This is consistent with his evidence of the discussions about taking up employment at a later stage.

51.3. I also note the provision that the Claimant's services were to be provided on a "non-exclusive basis". The Claimant said that he did not know what this meant. I do not accept that. He is clearly a well-informed and intelligent individual who has worked in senior roles for several years. It is clear that the import of this provision was that he could work for other companies at the same time as working for the Respondent.

51.4. Finally, I note the provision relating to non-solicitation of the Respondent's clients. It would not be unusual to find that in the contract of a senior employee where it related solely to a fixed period post-termination. The fact that the term expressly forbade solicitation of clients during the life of the contract is more suggestive of a business hiring someone who might indeed work elsewhere as indicated above, because he was in business on his own account, and might therefore end up working for its clients.

52. On balance, and for the reasons indicated, these features taken as a whole – none are determinative taken by themselves – tend to indicate a relationship other than one of employment.

53. Finally, I turn to the requirement for mutuality of obligation. There would of course have been mutuality of obligation when the Claimant was actually working, though as the case law makes clear, that would have indicated no more than that there was a contract of some description; it would not answer the question of whether there was an employment contract. My task is to assess the written contract, that is whether it constituted an overarching employment contract between the parties, whether the Claimant was working or not.

54. As stated in my summary of the law, what would have been required for there to be an employment contract was an obligation on the Claimant to do a minimum or reasonable amount of work and an obligation on the Respondent to pay for that work. The key contractual provision was as follows: "Nothing in this agreement shall be construed as an undertaking by the Contractor to supply the Subcontractor with a minimum level of work and nothing in this agreement shall be construed as an undertaking by the Subcontractor to be available to work on any particular day or days".

55. This is an express statement that there was no obligation on the Claimant to do a minimum amount of work, albeit put in terms of there being no obligation on the Respondent to provide any such minimum. Whilst the Claimant would not accept this was what the parties had agreed, I have concluded otherwise, and find furthermore that this is an arrangement that is certainly in principle consistent both with Mr Tejani's concern about costs and his actions in putting off the date on which the Claimant would first carry out some work. This too is fatal to the Claimant's case. It means that at the very least that there was no overarching employment relationship.

56. Assessed overall therefore, and taking the contract between the parties at face value as I have determined is the only proper course of action in this case, I conclude that it was not a contract of employment. The contract evinces insufficient control of the Claimant by the Respondent, and the absence of the required mutuality of obligation. Those parts of the contract that taken in isolation might be more indicative of an employment relationship are nowhere near enough to disturb that conclusion.

57. As I have indicated, the Claimant applied for an order for disclosure of documents in the possession of Barnaby Stewart in order to shed further light on the question of the nature of his relationship with the Respondent. I deal with that at this point as I did in my oral reasons, as I felt it necessary to get a much greater understanding of the case first, by hearing the Claimant's witness evidence and considering the documents already in the bundle, before determining his application.

58. In fairness to the Claimant, he was able to narrow his disclosure request to a well- defined period of time. I also accept his point that he is not legally qualified and has not been legally represented in these proceedings. He is nevertheless clearly an intelligent man and it is significant therefore that at no point did he ask the employment tribunal for help in obtaining these documents which he regards as so important. As I have indicated, he suggested to me that he had asked the Tribunal to make appropriate orders, but he clearly had not. I am mindful therefore that his application was made after the start of the final hearing of the case, when there is no reason why it could not have been made earlier. That was certainly a factor weighing against ordering disclosure, whether by one of the litigants or a third party.

59. The main reason I was not prepared to grant the application however was because in my judgment the factual matters which the Claimant says the documents would help to demonstrate were more than clear already.

60. First, it is accepted by the Respondent that it initially wanted an employment arrangement with the successful candidate; if that is what the documents which may or may not be held by Barnaby Stewart show, then they would plainly have nothing to add to what was already in front of me. Secondly, what happened next, as Mr Merriman pointed out, is a matter between the Respondent and the Claimant and not Barnaby Stewart. Moreover, the Claimant said that the documents he hoped to obtain by way of an order would show the role and salary as originally intended, and whether the Respondent then changed its mind about wanting to recruit an

employee. All of those matters were already clear from the evidence I had considered; they were essentially undisputed.

61. The application was therefore refused on the basis that granting it would add nothing to the evidence already before me, as limited as it was; to make an order in those circumstances would have been to permit the Claimant to embark on nothing more than a fishing expedition, i.e. requiring disclosure of Barnaby Stewart in the vague hope that it might throw up something of interest. I was not prepared to make an order on that basis.

62. Given that on the evidence as I have analysed it the Claimant did not enter into a contract of employment with the Respondent, he is not able to establish his entitlement to bring a complaint under the Order and therefore his complaint must fail. For completeness, I note that had he been able to establish that he did have a contract of employment, then on the basis of **Sarker**, the fact that he had not started work under the contract would not have been a barrier to his claim proceeding.

63. Finally, although I did not deal with this in my oral reasons, I should make clear that even if the Claimant had established that the contract between the parties was one of employment, I would have had no hesitation in finding that it was terminable by either party on one week's notice. That is what the agreement between the parties provided, consistent with Mr Tejani's hesitation about financial commitment, and there was absolutely no evidence to the contrary.

64. Accordingly, had I been required to assess compensation for breach of contract, I would have been entitled to assume that the Respondent would have performed the contract in the way most beneficial to it, namely that it would have given the minimum notice required. Section 88 of the ERA provides for an employee in their statutory minimum notice period to be paid in full if they are ready and willing to work but they are not provided with any work by their employer. On that basis, the Claimant would have been entitled to compensation equal to the net pay he would have received if working in that week, and that is all. He referred to financial loss relating to his taking on a flat in Leicester, but even if there had been a breach of an employment contract by failure to give one week's notice, that breach would not have given rise to any accommodation costs the Claimant incurred in making arrangements to take up the role.

65. For all of the above reasons, the Claimant's complaint is dismissed.

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Employment Judge Faulkner

Date: 28 September 2020

JUDGMENT SENT TO THE PARTIES ON

29 September 2020

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FOR THE TRIBUNAL OFFICE

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